

**Nos. 21-55395, 21-55404, 21-55408**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**LA ALLIANCE FOR HUMAN RIGHTS, ET AL.,**  
*Plaintiffs–Appellees,*

v.

**CITY OF LOS ANGELES, ET AL.,**  
*Defendants–Appellants.*

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Appeals from the United States District Court for the  
Central District of California, No. 2:20-cv-2291-DOC-KES

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**BRIEF OF THE INTERNATIONAL MUNICIPAL  
LAWYERS ASSOCIATION, THE CALIFORNIA STATE  
ASSOCIATION OF COUNTIES, THE LEAGUE OF  
OREGON CITIES, THE ASSOCIATION OF  
WASHINGTON CITIES, THE WASHINGTON STATE  
ASSOCIATION OF MUNICIPAL ATTORNEYS, AND  
THE ASSOCIATION OF IDAHO CITIES AS  
*AMICI CURIAE* IN SUPPORT OF APPELLANTS**

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June 10, 2021

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## DISCLOSURE STATEMENT

No *amici* is a subsidiary of any parent company. No publicly held corporation owns 10% or more of any *amici*'s stock.

June 10, 2021

/s/ Caleb C. Wolanek  
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## IDENTITY OF *AMICI CURIAE*

The *amici* filing this brief are associations of local governments and public officials.<sup>1</sup> *Amici*'s members are thus on the front lines of the efforts to end homelessness. Given their experiences, *amici* in no way minimize the plight of people experiencing homelessness. To the contrary, *amici* know that homelessness requires robust responses from a wide array of institutions. Yet *amici* also know the District Court's preliminary injunction injects the federal judiciary into delicate and complex debates about local public policy, overriding politically accountable officials. In doing so, the preliminary injunction violates both federalism and the separation of powers, hamstringing the already-difficult task of allocating scarce public resources, and gives authority over local public policy to a branch of the federal government ill-suited to the task. *Amici* are filing this brief to urge this Court to give proper and necessary deference to local governments and public officials.

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties to these consolidated appeals consented to the filing of this brief.

The associations joining this brief are the following:

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local-government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and state supreme and appellate courts.

The California State Association of Counties (CSAC) is a nonprofit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, which comprises county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League of Oregon Cities (LOC) is organized as a consolidated department of the State of Oregon's 241 incorporated cities. Founded in 1925, the LOC was formed to be, among other things, the collective voice of Oregon's cities before legislatures and courts, advocating for the preservation of home rule. Its mission is to be the effective and collective voice of Oregon's cities and their authoritative and best source of information and training.

The Association of Washington Cities (AWC) is a nonprofit organization, founded in 1933, that represents the State of Washington's cities and towns. Though membership is voluntary, AWC maintains 100% participation from Washington's 281 cities and towns.

The Washington State Association of Municipal Attorneys is a nonprofit organization of municipal attorneys who represent cities and towns in the State of Washington. Its members advise and defend their clients in all areas of municipal and constitutional law.

The Association of Idaho Cities (AIC) was founded in 1947 and is a nonpartisan, nonprofit corporation that serves the State of Idaho's 199 cities. AIC's voting membership consists of members of Idaho's city governments.

## SUMMARY OF THE ARGUMENT

The preliminary injunction on appeal seeks to change, at a systemic level, how the City and County of Los Angeles address homelessness. The experiences of *amici*'s members confirm that such “institutional-reform” or “structural” injunctions implicate both federalism and separation-of-powers concerns. Their experiences also confirm the Supreme Court’s insight that concerns about invading core municipal functions “are heightened when ... a federal court decree has the effect of dictating ... local budget priorities.” *Horne v. Flores*, 557 U.S. 433, 448 (2009).

Those federalism and separation-of-powers concerns are especially present here. The District Court’s preliminary injunction weighs competing public-policy goals, attacks the wisdom of political decisions, and exerts control over budgetary policies and priorities. Those are tasks for the local governments that *amici* represent—not tasks for federal judges. So under well-established law, the preliminary injunction cannot stand.

*Amici*’s opposition to the District Court’s injunction is not academic, though. Violations of federalism and the separation of powers have real-world consequences. *Amici*’s members must make complex, difficult, and debatable choices about allocating scarce resources, and injunctions like



the one on appeal only make that task harder. Such injunctions transfer policymaking authority away from politically accountable local leaders and give it to a part of the federal government not entrusted with (or equipped for) that task.

There is, however, a better way forward: By adhering to traditional limits on equity jurisprudence, courts can say what the law is while still respecting federalism and the separation of powers.

## ARGUMENT

### **I. The District Court’s preliminary injunction violates both federalism and the separation of powers**

The District Court’s preliminary injunction violates federalism and the separation of powers in several ways. Consider just three examples. First, the District Court tries to direct how the City and County of Los Angeles will spend *\$1 billion* of taxpayer money. 1-ER-14, 1-ER-139. Second, the court orders the City and County to offer and provide housing to all people living in Skid Row. 1-ER-141. Third, and more generally, the District Court substitutes its own judgment for the City and County’s “decision to prioritize long-term housing at the expense of committing funds to interim shelters.” 1-ER-79.

Those conclusions are policy judgments. The District Court practically admitted as much. For example, the District Court said it was “looking for a political solution.” 2-ER-159. It faulted the City and County for, in its view, lacking “political courage” and “political will.” 1-ER-73, 1-ER-83, 1-ER-111. The District Court conceded that “pursuing housing at the expense of shelter” and “ramping down” a new shelter program are “political choices.” 1-ER-106. It admitted that it tried to “balance” short-term shelter programs against long-term housing initiatives. 2-ER-155, 2-ER-

163, 2-ER-199. It repeatedly turned aspirational statements of local politicians into binding legal obligations. *See, e.g.*, 1-ER-128, 1-ER139. And it criticized the City for not exercising discretion to issue a declaration that might let the Mayor of Los Angeles “bypass the bureaucracy.” 1-ER-70.

Those political decisions were not for the District Court to make. As this Court recently explained, decisions that involve “the exercise of discretion,” “trade-offs,” and similar “value judgments” are “ill-suited for an Article III court.” *Juliana v. United States*, 947 F.3d 1159, 1172 n.8 (9th Cir. 2020), *reh’g denied*, 986 F.3d 1295 (9th Cir. 2021); *see also Brown v. Plata*, 563 U.S. 493, 555–57 (2011) (Scalia, J., dissenting) (explaining that structural injunctions require policymaking). This Court also explained that when the status quo is inadequate, “democracy is the appropriate process for change.” *Juliana*, 947 F.3d at 1173 (quoting *M.S. v. Brown*, 902 F.3d 1076, 1087 (9th Cir. 2018)). Put another way, it is “not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.” *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Legislators and executives determine whether a public policy is wise or effective, and

judges have no license to pursue policy goals that local governments, “in their discretion, have declined to advance.” *Id.* at 388 (Thomas, J., concurring).

Federalism and separation-of-powers violations are especially evident here because the City’s and County’s budgets are on the line. The Supreme Court has recognized that “budgetary policy judgments ... are properly entrusted” to “state and local officials.” *Horne*, 557 U.S. at 455. And this Court recently agreed that legislators, not judges, hold “the power of the purse.” *Perez v. Barr*, 957 F.3d 958, 966 (9th Cir. 2020); *see also* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Yet the District Court tries to control approximately 14% of the Mayor of Los Angeles’ proposed budget for fiscal year 2021–2022. *See* 2-ER-396.

The District Court’s disregard for federalism and the separation of powers dooms its preliminary injunction. Injunctions are, after all, “drastic and extraordinary” remedies, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), and courts must “pay particular regard for the public consequences” of granting them, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). The Supreme Court has

therefore stressed that “federal courts must recognize ‘the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.’” *City of L.A. v. Lyons*, 461 U.S. 95, 112 (1983) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)) (cleaned up); see *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (similar); *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (*Jenkins III*) (Thomas, J., concurring) (explaining that “federalism and the separation of powers” are “clear restraints on the use of the equity power”).<sup>2</sup> Likewise, the Supreme Court has held that, in deciding whether to impose an injunction, federal courts “must take into account the interests of ... local authorities in managing their own affairs.” *Milliken v. Bradley*, 433 U.S. 267, 280–81 (1977).

Such required respect for local government is “one of the most important considerations governing the exercise of equitable power.” *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990). Yet the District Court failed to

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<sup>2</sup> See also, e.g., *Midgett v. Tri-Cnty. Metro. Transp. Dist. of Or.*, 254 F.3d 846, 851 (9th Cir. 2001) (“[A] federal court must exercise restraint when a plaintiff seeks to enjoin any non-federal government agency, be it local or state.”); *In re Gee*, 941 F.3d 153, 167 (5th Cir. 2019) (per curiam) (“Courts are properly reluctant to grant [structural] relief because of the federalism burdens it imposes.”).

respect the City and County’s constitutionally protected power to shape public policy and manage their own affairs. So the District Court abused its discretion.

That the City and County are subunits of state government, and not branches of the federal government, does not help Plaintiffs. Instead, because the federal-court injunction on appeal *both* usurps state-government functions *and* transfers legislative and executive powers into the judiciary, it is a federalism-and-separation-of-powers double-whammy.

That Plaintiffs filed claims relating to what is no doubt a pressing social problem that the government no doubt needs to address does not save the District Court’s injunction. That is because federalism and the separation of powers are themselves foundational constitutional principles. *See, e.g., Bond v. United States*, 564 U.S. 211, 220–22 (2011) (highlighting the centrality of federalism to our Constitution); *City & Cnty. of S.F. v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018) (“The Separation of Powers was an integral part of the Founders’ design.”).

There is, of course, a “temptation” for courts to resolve persistent problems. *Lewis*, 518 U.S. at 388 (Thomas, J., concurring). That temptation might be particularly powerful when there seems to be a “failure to

muster political will” by one of the political branches. 1-ER-73; *see* 1-ER-111. Even so, “[f]ailure of political will does not justify unconstitutional remedies.” *Juliana*, 947 F.3d at 1175 (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018)).<sup>3</sup>

This does not mean rights will go unvindicated; it just means “[o]ur system of government leaves many crucial decisions to the political processes.” *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974).<sup>4</sup> And the political process is already addressing homelessness. The City and County have explained how they dedicate millions of dollars to homelessness programs each year. *See, e.g.*, 5-ER-932–33, 7-

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<sup>3</sup> The school-desegregation cases that the District Court relied on are distinguishable. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), over a decade-and-a-half had passed after the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). Yet governments continued to defy court orders when providing government services. Here, by contrast, the District Court announced a new rule and simultaneously entered a preliminary injunction. *See* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 683, 688, 695–96 (1982) (urging that courts should not move too quickly in imposing structural injunctions).

<sup>4</sup> *See also* Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 680 (1978) (“Fully redressing violations of constitutional rights may often require the efforts of more than one branch of government, particularly if ‘redress’ is defined broadly enough.”).

ER-1600. Even Plaintiffs agree that the efforts of City and County officials “are impressive and commendable.” 12-ER-2800. Further, Congress recently appropriated billions of dollars for homeless assistance—plus tens of billions more for rental assistance.<sup>5</sup> Just last year, the House of Representatives passed a bill, introduced by a Member of Congress representing part of Los Angeles, that would have appropriated \$100 billion for emergency rental assistance.<sup>6</sup> Relevant legislation is also pending in

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<sup>5</sup> *E.g.*, American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54 (\$21.55 billion for emergency rental assistance); *id.* § 3202(a), 135 Stat. at 58 (\$5 billion for emergency housing vouchers); *id.* § 3205(a), 135 Stat. at 61 (\$5 billion for homeless assistance and supportive services); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. L, tit. II, 134 Stat. 1182, 1867, 1884 (2020) (\$39.2 billion for rental assistance); *id.*, 134 Stat. at 1882 (\$3 billion for homeless assistance grants); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, div. B, 134 Stat. 281, 608 (2020) (\$4 billion for homeless assistance).

<sup>6</sup> Emergency Housing Protections and Relief Act of 2020, H.R. 7301, 116th Cong. § 101(a) (as passed by House on June 29, 2020) (introduced by Rep. Maxine Waters).



the California legislature.<sup>7</sup> And a few weeks ago, Governor Newsom proposed the largest increase in funding for housing for the homeless in state history.<sup>8</sup>

Thus, while the District Court believes the City and County should do more, the task of relieving homelessness “rests squarely on the shoulders of ... elected officials.” *Murray v. City of Phila.*, 481 F. Supp. 3d 461, 466 (E.D. Pa. 2020). By injecting its own judgment into local policy debates, the District Court violated both federalism and the separation of powers.

## **II. The District Court’s injunction will only frustrate ongoing efforts to address homelessness and other complex social issues**

*Amici*’s members know from experience that it is wise to respect federalism and the separation of powers. *Amici* and their members confront a constellation of complex issues, and those problems rarely have proven, clear-cut solutions. As a result, *amici*’s members must listen to

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<sup>7</sup> See A.B. 71, 2021–2022 Reg. Sess. (Cal. 2021); A.B. 816, 2021–2022 Reg. Sess. (Cal. 2021).

<sup>8</sup> See *California Roars Back: Governor Newsom Announces Historic \$12 Billion Package to Confront the Homelessness Crisis*, OFFICE OF GOV. GAVIN NEWSOM (May 11, 2021), <https://tinyurl.com/49xvmcse>.

constituents, collaborate with experts and other governments, make value judgments, assess what is feasible, and develop interlocking strategies. And because *amici*'s members have limited personnel and money, they must set policy priorities and choose between competing goods. Federalism and the separation of powers defer that difficult task to municipalities, ensuring *amici*'s members have the broad discretion required to make decisions that reflect local policies, values, and circumstances. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (explaining that “[s]tate policymakers, no less than their federal counterparts, retain broad discretion”).

The District Court’s preliminary injunction ignores this reality, stripping municipalities of much-needed flexibility and forcing local leaders to reallocate their time and money to the court’s plan—all “at the expense of other citizens, other government programs, and other institutions not represented in court.” *Jenkins III*, 515 U.S. at 131 (Thomas, J., concurring). And because judges are not equipped to set public policy, the result will be to frustrate ongoing efforts to best address homelessness and other challenging social issues.

**A. *Amici*'s members must weigh competing policy priorities when crafting responses to homelessness**

Homelessness is not a simple problem. It has no simple solution. People can be homeless for many overlapping reasons, and experts disagree about which policies are best for which people. A policy that is effective in San Diego may not work in Spokane. The issues are intricate and require *amici*'s members to make value judgments. *See Murray*, 481 F. Supp. 3d at 466 (identifying just a few issues elected officials face when responding to homelessness). *Amici*'s members must have flexibility and discretion to navigate these disputes and to tailor responses to their unique situations.

One choice that confronts *amici*'s members is how to prioritize between temporary (or emergency) shelters and long-term housing. Temporary shelters can be helpful, and communities often make those shelters available. *See* 9-ER-2204 (reporting that in 2020, more than 36,000 people in Los Angeles County “received shelter in interim or emergency shelters”). Yet many experts argue that society must focus on long-term housing instead of temporary shelters, explaining that “long shelter stays are extremely expensive, and likely to be harmful to individuals and to chil-

dren in particular.”<sup>9</sup> And as one scholar wrote, “no emergency-shelter intervention solves the underlying problem of homelessness like stable, permanent housing does.”<sup>10</sup> Local experience supports that view. For instance, after focusing resources on housing rather than shelter, the City of Houston, Texas, reduced homelessness by 54%.<sup>11</sup>

When *amici*’s members do offer shelter, they confront new questions. For example, what rules should a shelter have? Should it condition shelter on abstaining from drug use or participating in substance-use treatment? Are pets allowed? How many people should sleep in the same room? May (or must) families stay together? How often should a municipality offer to shelter the same person? How long can a “temporary” stay last? Answering those and other questions requires value judgments, and the answers affect how municipalities spend resources. Providing longer

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<sup>9</sup> Katherine M. O’Regan et al., *How to Address Homelessness: Reflections from Research*, 693 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 322, 328 (2021); see, e.g., *id.* (suggesting “a significant shift of resources away from shelters” and into housing); LINDA GIBBS ET AL., HOW TEN GLOBAL CITIES TAKE ON HOMELESSNESS: INNOVATIONS THAT WORK 102 (2021) (“There is a global push in the homeless field toward permanent housing solutions and for supportive housing over temporary or transitional options.”).

<sup>10</sup> Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 602 (2021).

<sup>11</sup> GIBBS ET AL., *supra*, at 82.

shelter stays to more people requires more money, more staff, and more administrative oversight. That diverts resources away from long-term solutions.

Dilemmas also abound when it comes to long-term housing. Many agree that communities need more affordable housing.<sup>12</sup> Still, *amici*'s members must weigh whether to buy, build, or rent government housing against whether to provide rental assistance for privately owned housing. To complicate things even more, different sub-groups within the homeless population may benefit from different types of long-term housing programs. As homelessness is often an economic problem, some experts argue that rental assistance is the best way to help lift families out of homelessness.<sup>13</sup> In line with that view, the City of Chicago has increased funding for homelessness prevention to “focus on housing subsidies and

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<sup>12</sup> See, e.g., ASS'N OF WASH. CITIES, STATE OF THE CITIES 22 (2020) (reporting that 77% of Washington cities “list a lack of low income and affordable housing as a problem”), <https://tinyurl.com/y4d6bkdr>.

<sup>13</sup> See MARYBETH SHINN & JILL KHADDURI, IN THE MIDST OF PLENTY: HOMELESSNESS AND WHAT TO DO ABOUT IT 90 (2020); O'Regan et al., *supra*, at 325; Tim Aubry et al., *Housing Trajectories, Risk Factors, and Resources among Individuals Who Are Homeless or Precariously Housed*, 693 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 102, 119 (2021).

services for addressing youth homelessness.”<sup>14</sup> And when the federal COVID-19 eviction moratorium ends, homelessness may spike if communities do not increase access to affordable housing,<sup>15</sup> fund programs to help defend tenants facing eviction,<sup>16</sup> or take other steps to keep people off the streets.

At the same time, though, high-needs individuals might benefit more from supportive housing combined with social services (such as substance-use or mental-health treatment).<sup>17</sup> Such an approach to high-needs individuals can be less expensive than temporarily sheltering chronically homeless people,<sup>18</sup> and experts argue it is underfunded.<sup>19</sup> Yet

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<sup>14</sup> *Mayor Lightfoot Announces 36 Percent Increase in City Funding for Homelessness Prevention*, CITY OF CHI. (Oct. 22, 2019), <https://tinyurl.com/hmkux95h>; see also *Mayor Lightfoot and the Department of Family & Support Services Announce \$35 Million to Rapidly House Chicagoans Experiencing Homelessness*, CITY OF CHI. (Sept. 21, 2020), <https://tinyurl.com/kzz77dtf>.

<sup>15</sup> See Kirk Siegler, *Communities Worry About What Will Happen When Eviction Ban Is Lifted*, NPR (May 25, 2021), <https://tinyurl.com/4nzbrnpc>.

<sup>16</sup> See Emily Alpert Reyes, *L.A. to spend \$10 million on eviction defense, \$50 million on new programs for poor*, L.A. TIMES (Sept. 1, 2020), <https://tinyurl.com/yt6w8h9c>; Evan Symon, *California Eviction Defense Program for Vulnerable Renters Bill Passes in Committee*, CAL. GLOBE (Apr. 6, 2021), <https://tinyurl.com/374hrvus>.

<sup>17</sup> See SHINN & KHADDURI, *supra*, at 80, 90.

<sup>18</sup> See Rankin, *supra*, at 576 n.111.

<sup>19</sup> See SHINN & KHADDURI, *supra*, at 90.

a municipality that might provide permanent housing to someone with a history of substance use must decide whether to make treatment a condition of housing. That value judgment can affect how the municipality allocates taxpayer money between various types of long-term housing.

Because homelessness has many underlying causes—such as unemployment, substance use, mental illness, and intimate partner violence—housing is also not the only possible (or necessary) response to homelessness. In fact, 61% of people who are homeless already have shelter,<sup>20</sup> and experts argue that “[a]n effective response to homelessness requires an array of ... services” that respond to the multitude of challenges homeless people face.<sup>21</sup> Shelter is not a cure-all, and *amici*’s members must decide how to prioritize responses to those underlying issues.

Municipalities might approach homelessness by spending more on healthcare. For example, a county might decide to fund longer hospital

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<sup>20</sup> U.S. DEP’T OF HOUS. & URBAN DEV., THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 1, 6 (Jan. 2021), <https://tinyurl.com/4urumd3n>.

<sup>21</sup> U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, STRENGTHENING PARTNERSHIPS BETWEEN LAW ENFORCEMENT AND HOMELESSNESS SERVICE SYSTEMS 11 (June 2019), <https://tinyurl.com/zr38xv3d>.

stays or expand mental-health services.<sup>22</sup> Those strategies may help keep people from becoming homeless in the first place. Yet healthcare is also expensive. So even though healthcare professionals can address underlying issues that temporary shelters cannot, expanded access to healthcare might lead to fewer shelter beds.

A municipality might also try to reduce homelessness by helping its citizens get jobs.<sup>23</sup> It might improve public transportation, making it easier to get to a job across town. Or the municipality might provide more job training. Or it might give tax breaks to stimulate job growth. Or, for parents unable to work because of a lack of affordable childcare, the municipality might subsidize childcare. Yet for every dollar spent on job-related services, there is less money to spend on other programs.

Municipalities must also decide whether and how to support people transitioning out of prison. According to one study, formerly incarcerated people “are almost 10 times more likely to be homeless than the general

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<sup>22</sup> See U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, EXPANDING THE TOOLBOX: THE WHOLE-OF-GOVERNMENT RESPONSE TO HOMELESSNESS 14 (Oct. 2020) (arguing that “[m]ental health services need to be significantly expanded”), <https://tinyurl.com/4ph7845p>.

<sup>23</sup> See EXPANDING THE TOOLBOX, *supra*, at 13 (arguing that “[h]omelessness can be reduced by expanding opportunities for jobs and job training”).



public.”<sup>24</sup> Programs promoting reintegration into society might help reduce homelessness, and some experts suggest those programs should be available for longer after someone leaves prison.<sup>25</sup> Expanding reintegration programs is expensive, though, and determining the amount of assistance requires value judgments about the role of the criminal-justice system.

As this discussion shows, responding to homelessness requires *amici*’s members to weigh competing policies. Experts often disagree, so *amici*’s members must exercise discretion in a way that is tailored to local needs and values. Policymakers must also consider an array of possible programs, not just temporary shelters.<sup>26</sup> And as *amici* know all too well,

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<sup>24</sup> Lucious Couloute, *Nowhere to Go: Homelessness among formerly incarcerated people*, PRISON POL’Y INITIATIVE (Aug. 2018), <https://tinyurl.com/3h6yszbz>.

<sup>25</sup> See Brianna Remster, *Homelessness among Formerly Incarcerated Men: Patterns and Predictors*, 693 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 141, 155 (2021).

<sup>26</sup> Local leaders must also determine whether and how to coordinate programs. One community found success when a single office coordinated access to services and when “representatives of the VA, the fire department, the health and mental health systems, and social service agencies” met monthly to discuss individual homeless people “by name.” Dan Heath, *Reducing Homelessness with Upstream Thinking*, PUB. MGMT. 42–43 (Aug. 2020), <https://tinyurl.com/3rp8kjt>. But such an approach requires resources.

local governments already struggle to handle costs associated with homelessness,<sup>27</sup> and local policymakers must prioritize some initiatives over others. Those budgetary decisions are already tough. Yet if, like the District Court, federal courts require municipalities to provide temporary shelter to all homeless people, it will be that much harder to fund programs that pursue long-term solutions. *See Horne*, 557 U.S. at 448 (“When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs.”).

**B. *Amici*’s members must address critical issues aside from homelessness**

Just as *amici*’s members must make hard choices about how to address homelessness, they must also make value judgments about the extent of any government response. That is because municipalities must also prioritize a multitude of other critical needs competing for scarce resources. While courts often lose sight of those who lose resources as a

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<sup>27</sup> *E.g.*, STATE OF THE CITIES, *supra*, at 22 (reporting that three-fourths of Washington cities “are struggling to handle the costs and impacts of the homelessness crisis in their communities”).

result of judicial decrees,<sup>28</sup> *amici*’s members know that every dollar spent on homelessness comes at the expense of other valuable programs.

As this Court has recognized, municipalities have a compelling interest in providing quality public education. *See Hunter ex rel. Brandt v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1063–64 (9th Cir. 1999). In fact, “education is perhaps the most important function of ... local governments.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“Providing public schools ranks at the very apex of the function of a State.”). Quality education is not cheap; it can put an incredible strain on local budgets. Roughly 45% of funding for K–12 education already comes from local governments,<sup>29</sup> and in 2017, 40% of local-government spending was on education.<sup>30</sup> Even so, public schools are often underfunded.<sup>31</sup> Local governments thus have a strong interest in allocating more resources for education.

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<sup>28</sup> See Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1305.

<sup>29</sup> CONG. RES. SERV., R45827, STATE AND LOCAL FINANCING OF PUBLIC SCHOOLS 2 (2019). Of course, not all municipalities fund K–12 education, but many do.

<sup>30</sup> *Elementary and Secondary Education Expenditures*, URBAN INST. (last visited June 10, 2021), <https://tinyurl.com/676npr3y>.

<sup>31</sup> See generally *Underpaid Teachers and Crumbling Schools: Hearing before the H. Comm. on Educ. & Labor*, 116th Cong. (2019).

*Amici*'s members might also choose to spend resources fighting what many believe is an existential threat: climate change. *See Juliana*, 947 F.3d at 1166 (summarizing “expert evidence” that “[a]bsent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies”). Cities and counties nationwide are reducing carbon emissions by purchasing clean energy, installing solar panels, building bike lanes, installing electric vehicle charging stations, buying electric cars, and more.<sup>32</sup> Climate change response is not cheap, either. For example, the City of Olympia, Washington, estimated that the cost of protecting its citizens from rising sea levels may be up to \$350 million.<sup>33</sup>

Local correctional facilities—which are chronically underfunded and overcrowded—also demand resources.<sup>34</sup> There are, of course, humanitarian reasons to allocate more resources to jails. In addition, if local

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<sup>32</sup> *See, e.g., Sustainability: What We're Doing*, SALT LAKE CITY (last visited June 10, 2021), <https://tinyurl.com/ks3esfv5>; Hillary Rosner, *How State and Local Governments Are Leading the Way on Climate Policy*, AUDUBON MAG. (Fall 2019), <https://tinyurl.com/2ft7tdtm>.

<sup>33</sup> CITY OF OLYMPIA, OLYMPIA SEA LEVEL RISE RESPONSE PLAN 107 (Mar. 2019), <https://tinyurl.com/k97v5sb9>

<sup>34</sup> *See, e.g.,* BUREAU OF JUSTICE STATS., DEP'T OF JUSTICE, NCJ 255608, JAIL INMATES IN 2019, at 8 (Mar. 2021) (reporting that at midyear 2019, 15% of jails were operating above their rated capacity), <https://tinyurl.com/ks3esfv5>.

governments do not commit enough resources to correctional facilities, they might be liable under the Eighth Amendment. *See Moderwell v. Cuyahoga Cnty.*, 997 F.3d 653, 2021 WL 1897949, at \*9 (6th Cir. 2021).

Infrastructure funding is also a critical concern for *amici*'s members. Counties, cities, and other local governments own more than 3.1 million miles of roadway—or around 75% of all public roads.<sup>35</sup> But due to past budget constraints, there is currently “a \$786 billion backlog of road and bridge capital needs.”<sup>36</sup> So it makes sense that many municipalities want to invest more resources on infrastructure repairs—lest bridges collapse.

In addition, municipalities that do not adequately maintain streets and sidewalks might be liable under the Americans with Disabilities Act. *See, e.g., Am. Council of Blind of N.Y., Inc. v. City of N.Y.*, 495 F. Supp. 3d 211, 257 (S.D.N.Y. 2020) (finding New York City liable under the

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com/mhvxx8v4; *cf. Peralta v. Dillard*, 744 F.3d 1076, 1090 (9th Cir. 2014) (Christen, J., dissenting in part and concurring in part) (“To anyone familiar with the conditions of California’s prisons, it will come as no surprise that prison officials there have inadequate resources.”).

<sup>35</sup> *See* FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., HIGHWAY STATISTICS 2019, at Table HM-10 (Sept. 30, 2020), <https://tinyurl.com/ryuwtjba>.

<sup>36</sup> AM. SOC’Y OF CIVIL ENG’RS, 2021 REPORT CARD FOR AMERICA’S INFRASTRUCTURE 111 (2021), <https://tinyurl.com/c959c92e>.

ADA). Again, though, construction is expensive. Something as simple as installing curb ramps can cost even a small town millions of dollars.<sup>37</sup>

The list of other local funding priorities—such as training police officers, offering substance-use treatment, promoting public health, building parks, funding retirement plans, and encouraging job growth—goes on and on. But governments do not have the resources to fully solve every problem. State law often restricts local governments’ ability to tax, and even if municipalities could raise taxes on their own, there are practical and political limits on raising revenue.<sup>38</sup> State laws and municipal charters also require local governments to balance their budgets.<sup>39</sup> As a result, *amici*’s members must choose between competing goods when allocating scarce resources.

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<sup>37</sup> See Robert Pore, *Costs for maintaining sidewalks and ADA compliance loom heavily over G.I. streets*, THE GRAND ISLAND INDEP. (updated Jun. 24, 2019) (quoting a city official: “The current count is that we have more than 5,000 ramps to do, and the cost per ramp is between \$1,500 to \$1,600”), <https://tinyurl.com/udw5tfxf>.

<sup>38</sup> Erin Scharff, *Preemption and Fiscal Authority*, 45 FORDHAM URB. L.J. 1270, 1273 (2018); see Ariel Jurow Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. 1884, 1947–62 (2020) (collecting state constitutional and statutory provisions restricting the ability to raise property taxes).

<sup>39</sup> See, e.g., CAL. GOV’T CODE § 29009; OR. REV. STAT. § 294.388(1); WASH. REV. CODE § 35.33.075; *Budget & Research Department*, CITY OF

**C. The federal judiciary is ill-suited to resolving policy disputes and allocating scarce resources**

Because decisions about public policy and resource allocation “plainly require consideration of ‘competing social, political, and economic forces,’” those decisions “must be made by the People’s ‘elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.’” *Juliana*, 947 F.3d at 1172 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 128–29 (1992)). That is not an arbitrary rule. To the contrary, there are at least five sensible reasons to avoid “government by injunction.” *Schlesinger*, 418 U.S. at 222.

*First*, letting federal judges set public policy would produce uneven, sporadic, and potentially contradictory results. Different judges have different priorities: One jurist might be particularly concerned about homelessness, while other judges in the same courthouse could think that climate change, public education, low taxes, or something else is more important. Because injunctions are discretionary, it can be hard to predict when a court will enter an injunction. And if there were multiple requests

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PHOENIX (last visited June 10, 2021) (“[The] Phoenix City Charter requires a balanced budget each year.”), <https://tinyurl.com/waeuvc82>.

for structural injunctions against the same municipality, two judges (neither accountable to the people) could enter competing (or contradictory) injunctions against the same government. *Amici*'s members, by contrast, can craft long-term, comprehensive, internally consistent plans.

*Second*, federal courts usually must rely on the parties to frame the case for a decision. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). This includes relying on the parties to prove the facts needed for a decision. *Id.* Yet in cases about complex social issues, it is likely that key stakeholders are left out of the litigation.<sup>40</sup> And if the parties miss key issues or facts, the court has little ability to fill that gap. *See Jenkins III*, 515 U.S. at 132 (Thomas, J., concurring) ("Federal courts simply cannot gather sufficient information to render an effective decree"). Thus, a federal court considering a structural injunction can easily make an uninformed policy judgment. *See Brown v. Plata*, 563 U.S. at 558 (Scalia, J., dissenting) (arguing that structural injunctions "invite judges to indulge

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<sup>40</sup> See Horowitz, *supra*, at 1293.



*incompetent* policy preferences”). Unlike the judiciary, though, representative branches of government often conduct fact-finding missions and routinely solicit the views of key stakeholders.<sup>41</sup>

*Third*, multi-faceted problems like homelessness often require flexible responses.<sup>42</sup> As communities learn from setbacks and successes, and as the problems themselves evolve, local governments must adjust and try new things. Doing so in a collaborative environment is, to borrow a phrase from the District Court, “so much better than the adversarial process.” 2-ER-243. Court orders, by contrast, can lead to stifling, “inflexible mandates.”<sup>43</sup>

*Fourth*, the federal judiciary lacks the resources to successfully implement and supervise sweeping changes. The federal judiciary is a lean branch of government, without much bureaucracy. It has little ability to

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<sup>41</sup> Here, the District Court also devised new constitutional theories Plaintiffs did not advance and granted relief Plaintiffs did not request. *Compare* 8-ER-1733–1735 (Plaintiffs’ constitutional theories) *and* 8-ER-1697–1699 (Plaintiffs’ requested injunction) *with* 1-ER-108–119 (District Court’s constitutional analysis) *and* 1-ER-138–142 (District Court’s preliminary injunction). This confirms the District Court was not performing a passive role.

<sup>42</sup> *See* GIBBS ET AL., *supra*, at 212 (“No one can view ending homelessness as a time-limited exercise. The commitment must be permanent.”).

<sup>43</sup> GIBBS ET AL., *supra*, at 27.

supervise and coordinate efforts of other government agencies. And though public support is critical to the long-term success of major reforms,<sup>44</sup> judges “cannot seek public or political support for their remedies.” *Jenkins III*, 515 U.S. at 132 (Thomas, J., concurring). *Amici*’s members are different. They have vast experience managing social institutions, and they can try to persuade the public to support initiatives.

*Fifth*, when judges set political priorities, they jeopardize the judiciary’s reputation. Confidence in the courts “may well erode” if unelected, life-tenured judges (who may even live in another municipality) exercise “general oversight of the elected branches.” *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring); *see also Carney v. Adams*, 141 S. Ct. 493, 499 (2020) (“[W]e should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.” (quoting *Richardson*, 418 U.S. at 188 (Powell, J., concurring))).

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<sup>44</sup> See GIBBS ET AL., *supra*, at 139 (“Winning the public hearts and minds is critical to the success of systems-level reform.”)

For these and other reasons, the District Court’s preliminary injunction does more than just hinder already-fraught decisions about allocating scarce taxpayer resources. It also shifts local policymaking authority to the branch of the federal government least able to handle the task.

### **III. To protect the ability of local governments to set local policy priorities, traditional limits on equity jurisprudence should apply**

Based on the general principles of federalism and the separation of powers alone, the District Court’s preliminary injunction cannot stand. There is, however, a straightforward way to avoid many debates about federalism and the separation of powers: Federal courts should not enter injunctions that compel a representative branch of local government to do more than a single simple act. That constraint is rooted in traditional principles of equity jurisprudence, and courts should follow it today.

Under Supreme Court precedent, federal courts cannot enter injunctions that were not available in English courts of equity at the time of the Founding. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond*

*Fund, Inc.*, 527 U.S. 308, 318–19, 332 (1999).<sup>45</sup> In other words, the “traditional principles of equity jurisdiction” still apply today. *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 993 (9th Cir. 2006) (quoting *Grupo Mexicano*, 527 U.S. at 319).

At the time of the Founding, it was well-understood that courts of equity were constrained, governed by “principles ... reduced to a regular system” and limited to “*extraordinary cases*.” THE FEDERALIST NO. 83, *supra*, at 505 & n.\* (Alexander Hamilton); see 3 WILLIAM BLACKSTONE, COMMENTARIES \*440 (explaining that equitable relief was administered by “a regular science”). Courts of equity had flexibility, but not omnipotence. See *Grupo Mexicano*, 527 U.S. at 322. Otherwise, the powers of equity courts “would have become too arbitrary to have been endured.” 3 BLACKSTONE, *supra*, at \*440; see 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 19, at 16 (Isaac F. Redfield ed., 9th ed. 1866) (similar).

One specific limit that developed was that an injunction ordering a person to do something (that is, a “mandatory injunction”) would require

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<sup>45</sup> See also *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832) (Story, J.) (noting “the settled doctrine” that “remedies in equity are to be administered ... according to the practice of courts of equity in [England]”); *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 222–23 (1818) (looking to English “principles of common law and equity”).

the person to perform only “a single simple act.” *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 841 (1994) (Scalia, J., concurring) (quoting HENRY L. MCCLINTOCK, *PRINCIPLES OF EQUITY* § 15, at 32 (2d ed. 1948)). There was, in fact, “a ‘historical prejudice ... against rendering decrees which called for more than a single affirmative act.’” *Id.* (quoting MCCLINTOCK, *supra*, § 61, at 160).<sup>46</sup> Given that tradition, “it should come as no surprise that there is no early record of the exercise of broad remedial powers.” *Jenkins III*, 515 U.S. at 130 (Thomas, J., concurring). Early federal courts did not issue “structural injunctions” like the one on appeal. *Id.*; see *Brown v. Plata*, 563 U.S. at 554 (Scalia, J., dissenting) (noting that “structural injunctions are radically different from the injunctions traditionally issued by courts of equity”).

In cases involving political branches of local government, this Court should adhere to the traditional rule that mandatory injunctions should

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<sup>46</sup> See also John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1159 (1996) (“*The Federalist* No. 78 further indicates that the judicial power was not understood to comprehend ... the power to compel individuals to follow certain affirmative rules and regulations.”); Roscoe Pound, *The Progress of the Law, 1918–1919 Equity*, 33 HARV. L. REV. 420, 434 (1920) (identifying a historical “prejudice against affirmative decrees in any case where more than a single simple act was sought”).

not compel more than a single simple act. That limit would not affect a federal court's authority to enter declaratory judgments or to *prohibit* future acts. *Cf. Stone v. City & Cnty. of S.F.*, 968 F.2d 850, 860 (9th Cir. 1992) (noting that federalism and the separation of powers do not prohibit *all* injunctions against local governments). But adhering to the traditional limits would avoid a type of injunction that is already “particularly disfavored,” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (citation omitted), that requires endless judicial oversight, that frustrates local policymakers' ability to make necessary value judgments and allocate scarce resources, and that strips policymaking power from politically accountable local leaders and gives it to unelected federal judges. In short, limiting injunctions against municipalities would avoid violating the foundational principles of federalism and the separation of powers.

## CONCLUSION

For the reasons above, the District Court abused its discretion when it entered its preliminary injunction. That preliminary injunction should be VACATED.

Respectfully Submitted,

*/s/ Caleb C. Wolanek*

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**9th Cir. Case Number(s)** Nos. 21-55395, 21-55404, and 21-55408

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