No. 21-55404

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LA ALLIANCE FOR HUMAN RIGHTS,
An unincorporated association; et al.,
Plaintiffs-Appellees,

LATINO COALITION OF LOS ANGELES; JOSUE TIGUILA
Intervenor-Plaintiffs-Appellees,

v.

CITY OF LOS ANGELES, a municipal entity
Defendant-Appellant,

and

COUNTY OF LOS ANGELES, a municipal entity
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 IN SUPPORT OF EMERGENCY MOTION TO STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. Introduction

The Preliminary Injunction Order entered by the district court ("Order") should be stayed while this Court addresses the Order's many fundamental deficiencies: it violates basic principles of separation of powers and federalism; it is based on novel legal theories for which there is no support in common or statutory law; and it relies on articles and reports not part of the record, and which in any event fail to validate the district court's extraordinary Order. (Dkt. 277.)

Rather than address the City's arguments, Plaintiffs' Opposition does little more than refer back to the Order. Plaintiffs provide essentially no response to the City's contentions that the Order is invalid because it violates the separation of powers and federalism doctrines inherent in Article III and is unsupportable under the law and record in this case. Plaintiffs summarily dispute the City's claim of irreparable injury, and never address why the judicial seizure of basic municipal functions, including an outright ban on transfers of City property and the forced escrow of $1 billion dollars does not constitute irreparable harm.

The issues Plaintiffs do raise—the supposed existence of evidentiary hearings that never actually occurred, the alleged opportunity to address legal theories they concede were created for the first time by the court, and a request to remand the matter to the district court—all are unsupported by the facts or the law.

All parties agree that homelessness is a serious and complex problem to which the City has devoted significant assets, time, and energy. Nothing justifies an Order that co-opts the discretionary decision-making of duly elected municipal officials during the appeal.

For all the reasons discussed in the Motion and here, this Court should stay the Order pending addressing the appeal on the merits.

II. The District Court's Recent Actions Demonstrate the Need for a Stay Pending Appellate Review.

To avoid appellate review, Plaintiffs argue that the district court significantly modified the Order in response to Defendants' motions to stay pending appeal. In fact, the district court did not materially alter the Order; rather, it denied the requests for stay except for two modest extensions of time which applied to only two of sixteen provisions of the Order—and those were only to delay for 60 days the City's deadline to escrow $1 billion, to delay for 37 days a complete ban on transfers of City property. The district court conditioned the stay on completion of additional obligations, titled "Provisions of the Stay." (Dkt. 286 at 11.) At best, the district court provided a short delay on only two elements of the Order, which does not alleviate the irreparable injury facing the City if a stay is not granted.

Plaintiffs further assert that the district court's upcoming May 27 hearing justifies abandoning appellate review when, in fact, it demonstrates the need for a

stay. The City appealed the Order on April 23, divesting the district court of jurisdiction over it. (Dkt.281.) See *Townley v. Miller*, 693 F.3d 1041, 1042 (9th Cir. 2012) (Filing a notice of appeal of a preliminary injunction "divested the district court of jurisdiction over the preliminary injunction."); and *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc*., 204 F.3d 867, 880 (9th Cir. 2000) ("A district court lacks jurisdiction to modify an injunction once it has been appealed except to maintain the status quo among the parties.")

Nevertheless, the district court's April 25 order denying Defendants' requests for a stay raises the real concern that it may hold further proceedings relating to the Order even though it has lost jurisdiction to this Court due to this appeal. (See Dkt. 286, 11-15.) The only way to preserve the status quo pending appeal and preserve appellate jurisdiction is for this Court to stay the Order.

Plaintiffs' citation to *Bistodeau v. United States*, 2020 U.S. App. LEXIS 39384 (9th Cir. Idaho, Dec. 15, 2020) should be easily disregarded. The case involved a challenge to a final order in a criminal matter, but the trial court allowed the appellant to proceed with a post-conviction challenge which reopened the conviction, leaving no appealable judgment. *Bistodeau v. United States*, 2020 U.S. Dist. LEXIS 101076, 1-2* (D. Idaho May 8, 2020). In stark contrast to this and the other cases cited by Plaintiffs on this point, the district court here has expressly stated its intention to enforce the entire existing Order. Dkt. 286 at 11.

Moreover, the district court has demonstrated that Defendants' arguments and evidence are of little interest to it. The district court preemptively announced that no reply to the Motion for Preliminary Injunction would be needed by Plaintiffs. Then, the Court issued its 110-page Order within hours of its receipt of Defendants' oppositions. Dkt. 269, 277. Only after the Court has already made its factual findings and conclusions of law is it allowing Defendants to comment on them. Dkt. 286 at 15. This, of course, is exactly backwards: The court is supposed to receive evidence and legal argument first, then issue its order.

III. Plaintiffs Have Failed to Justify Why the Sweeping Preliminary Injunction Should not be Stayed Pending Appeal.

A. The City Is Likely to Prevail on the Merits.

Plaintiffs do not respond to the City's Motion. Plaintiffs offer no defense to the many sweeping and novel legal theories which drive the Order, except to cite to *Brown v. Board of Education*, 347 U.S. 483 (1954) and *United States v. Fordice*, 505 U.S. 717 (1992), cases in which it was litigated and established in the record that specific state action—the exclusion of racial minorities from public schools—resulted in a direct injury to individuals' constitutional rights justifying the remedies imposed. In those cases the connection between the specific state actions and the resulting impacts were direct and immediate, unlike the multifaceted and complex issue of homelessness.

Similarly, Plaintiffs parrot the Order's use of the "State-Created Danger" doctrine, but do not address the City's point that this exception only applies when the state actor affirmatively created a specific and immediate danger to a specific person that would not have existed but for the state action—not to the chronic, society-wide problem of homelessness. E.g., *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063 (9th Cir. 2006) (citing "an actual, particularized danger"). The potential impact on homelessness of numerous City, County, State, and Federal actions through a variety of separate policies over a period of decades simply cannot be characterized as "an actual, particularized danger" to a particular person justifying the state-created danger exception under the Fourteenth Amendment. Moreover, no one has suggested that there would be no homelessness but for the actions of the City or that the state-created danger doctrine applies to a failure to fully address problems that exist without City action.

B. Plaintiffs' Dismissal of the City's Irreparable Harm Is Misguided.

Plaintiffs assert that providing shelter to all the unhoused people in Skid Row would not impose a significant financial burden as to create irreparable harm. They offer no basis for that contention, which is demonstrably false, especially on the schedule imposed by the Order. And the financial and logistical burdens the Order would impose are not limited to providing shelter or housing to everyone in Skid Row. For example, such harm comes from having to escrow $1 billion

dollars—roughly one-seventh of the Mayor's proposed budget for the next fiscal year—regardless of the consequences both to homeless housing and services and to other programs that require funding in the meantime. Other irreparable harms include the imposed judicial control over all City property, the imposed cost and burden of multiple audits and reports, the ordering of mandatory committee hearings (apparently directed to ratify the district court's own conclusions regarding homelessness), and the pervasive violations of federalism and separation of powers by judicial intrusion into municipal functions. See Dkt. 277 at 106-110. Plaintiffs' implication that the district court's May 27 hearing indicates a willingness to reduce the City's burden is mere speculation, as the district court has already denied Defendants' requests for a stay and confirmed its intention to pursue the Order. Dkt, 286 at 11. Plaintiffs have effectively conceded the irreparable harm to the City.

C. The Balance of Hardships and Public Interest Continue to Favor a Stay Pending Appeal.

Plaintiffs do not dispute that preserving the status quo requires a stay pending appeal. In addition, while no one disputes that conditions on Skid Row need substantial improvement, Plaintiffs themselves acknowledge that significant resources, which have successfully housed thousands of people, are being devoted to homelessness without the Order. See e.g., Dkt 1 at 8-10 and 34-36. These and

other City efforts to address homelessness will continue while the Order is stayed pending appeal.

IV. Plaintiffs Mischaracterize the Underpinnings of the Order.

A. The District Court Failed to Conduct Evidentiary Hearings.

Plaintiffs assert that the district court held "evidentiary hearings" that support the massive preliminary injunction, but then fail to cite a single example of any such hearings. As listed in the Motion, and undisputed by Plaintiffs, the district court held a series of status conferences regarding Defendants' progress in addressing homelessness, but none could be considered "evidentiary." (Motion at 3, n.1.) The district court makes the same baseless assertion, although it admits these were status conferences. Dkt. 205 at 1 (1//31/21 Order) ("the Court has conducted several status conferences and other less formal discussions").

While Plaintiffs cite to February 4, 2021 as an example of an "evidentiary hearing," they make no showing that any evidence was actually admitted. In fact, the district court announced that hearing was an opportunity for the parties—who were invited but not compelled to attend—to "provide progress and status reports" on addressing the homeless crisis. Dkt. 205 at 2. This is a far cry from taking evidence on the alleged causes, scope, and proposed remedies to solve homelessness that Plaintiffs assert. See also Dkt. 206 (2/3/21 Order). Even at the February 4 hearing, the district court stated: "I've asked in this hearing and invited

you to show cause why the Court should not *begin* the consideration of deploying any and all equitable remedies to address the crisis of homelessness gripping Los Angeles." (Dkt 218, p. 6; emphasis added.)

While Plaintiffs attempt to inject the February 4 hearing with great importance, the district court only cited to it twice in the Order: to quote the comments of Pete White, executive director and founder of the Los Angeles Community Action Network (LA CAN), and Monique Nowell, spokesperson for the Downtown Women's Action Coalition, that homelessness is a result of structural and institutional racism, which neither commentator specifically ascribed to the City. (Dkt 277, p. n. 81 and p. 18 n. 115.)

This absence of supporting evidence in the record is demonstrated by both the Order and Plaintiffs' Opposition. Despite an imposing 110 pages, with 497 footnotes, the district court cites only 14 items in the record—more than half of which are pleadings filed by the parties—and then mostly for procedural events. In sum, *there is no evidence in the record to support the Order*. Instead, the Order, and Plaintiffs' Opposition, cite to articles and papers completely outside the record.

To defend the district court's reliance on provocative and unauthenticated sources, Plaintiffs assert—without discussion or support—the ability to take judicial notice. This fails for at least two reasons: (1) the district court never took judicial notice of anything; and (2) the federal rules only authorize judicial notice

for facts that are "generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," i.e. matters which cannot reasonably be disputed. FRE, Rule 201(b); and see *Khoja v. Orexigen Therapeutics, Inc*., 899 F.3d 988, 999 (9th Cir. 2018).

Thus, none of the "facts" relied on were ever entered into evidence or judicially noticed, and any attempt to do so would have violated the federal rules of evidence since studies that explore complex social histories and multifaceted social problems—like the several interacting causes of homelessness—cannot "be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." E.g., *Gerritsen v. Warner Bros. Entm't Inc*., 112 F. Supp. 3d 1011, 1025-26 and 1029-30 (C.D. Cal. 2015) (the accuracy of articles and blog entries are generally inappropriate for judicial notice).

B. There Was No Notice of the Scope and Basis for the Order.

Plaintiffs mistakenly assert that Defendants had prior notice of and a chance to address the legal theories and remedies in the Order. In fact, on January 31, 2021, the district court issued an order to show cause "why the Court should not deploy any and all equitable remedies to address the crisis of homelessness" (Dkt. 205 at 1) that provided no notice of what "equitable remedies" the district court was considering and no mention of the novel and untested legal theories later debuted. Such disclosures were similarly absent from the voluntary February 4

hearing. See Dkt. 277. Following the NAACP amicus brief filed on April 11, which broadly addressed the disparate impacts of homelessness but failed to identify any particular constitutional violation by the City, the district court ordered on April 13 that all parties address that brief in their oppositions to the preliminary injunction, which they did. Dkt. 264, 266, 270 at 33-35. Thus, while the parties had some discussion and briefing regarding the court's equitable powers in the abstract, they never engaged on the legal theories and purported evidence deployed by the district court, let alone the remedies in the Order.

To further distract, Plaintiffs repeatedly assert that the factual assertions and legal theories debuted in the Order were unchallenged by Defendants, ignoring Defendants' point in both their oppositions to the preliminary injunction and the motions for stay that neither the record in this case nor existing constitutional law justify the judicial takeover of basic municipal functions imposed by the Order.

V. Conclusion

For all of the reasons set for the in the Motion and above, this Court should stay the Order pending appellate review.

Dated: May 6, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 (d)(2) because it contains 2,335 words and the page limitation of Circuit Rule 27-1(1)(d) because it does not exceed 10 pages. This motion complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

Dated: May 6, 2021

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