No. 23-15087

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COALITION ON HOMELESSNESS; TORO CASTAÑO; SARAH CRONK; JOSHUA DONOHOE; MOLIQUE FRANK; DAVID MARTINEZ; TERESA SANDOVAL; and NATHANIEL VAUGHN,

Plaintiffs-Appellees

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants-Appellants

On Appeal from the United States District Court
for the Northern District of California
No. 4:22-cv-05502-DMR
Hon. Donna M. Ryu

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF BY THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF DEFENDANTS AND APPELLANTS THE CITY AND COUNTY OF SAN FRANCISCO AND REVERSAL

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

Pursuant to Federal Rule of Appellate Procedure 29(a)(3), The League of California Cities, The California State Association of Counties, and The International Municipal Lawyers Association move for leave to file the accompanying *Amici Curiae* brief in support of the Appellants and Defendants in this proceeding, the City and County of San Francisco ("Appellants," "Defendants," "San Francisco," or "the City"), and reversal of the lower court order that is the subject of this appeal.

1. Statements of Interest of *Amici Curiae*

Amicus The League of California Cities ("Cal Cities") is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(e), *Amici* certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparation or submission of the brief, and no persons other than *Amici* contributed money that was intended to fund preparation or submission of the brief.

identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Amicus The California State Association of Counties ("CSAC") is a non-profit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program administered by the County Association of California and overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and determined that this case is a matter affecting all counties.

Amicus The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Its membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. 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 as well as state and federal appellate courts.

2. Consent to File *Amici Curiae* Brief

Appellants have consented to the filing of this brief. *Amici Curiae* contacted Appellees' counsel and asked for consent to file this brief, and in response Appellees' counsel indicated that they take no position on submission of the brief.

3. The *Amici Curiae* Brief Raises Issues Relevant to the Disposition of This Appeal

This appeal presents a matter of significant concern for *Amici.* The District Court erred in enjoining Appellants from enforcing state and local prohibitions on sitting, sleeping, lying, or camping on public property until the City can ensure shelter for every resident experiencing homelessness. If the decision is left to stand, its impact will be dire. It will impose enormous fiscal and logistical constraints on local agencies and make it incredibly difficult if not impossible for cities to regulate and otherwise ensure the safety and accessibility of their sidewalks and streets. Moreover, Appellants have consented to the filing of this brief, and Appellees do not oppose its filing.

Based on their concern about the foregoing impacts and interest in preserving the ability of local governments to address the needs of all their citizens, *Amici* hereby submit this brief in support of the City, and respectfully request that the Court grant them leave to file it.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Federal Rules of Appellate Procedure 29(a)(4)(A), 26.1

Amici Curiae The League of California Cities, The California State Association of Counties, and The International Municipal Lawyers Association are non-profit corporations or organizations. *Amici* have no parent corporations, and no publicly held corporation owns 10% or more of any of *Amici's* stock.

I. INTRODUCTION

Homelessness is a public health crisis that local agencies throughout the country are grappling to address. The plight of the homeless is deeply tragic and demands immediate attention. Local agencies within California—where more than half the nation's homeless population resides[2]—have strived to develop creative and effective solutions for resolving this longstanding societal problem. Like many cities, San Francisco has allocated immense resources toward securing shelter and a host of health and occupational services for its homeless inhabitants. In 2021, the City earmarked over a billion dollars toward combatting homelessness,[3] and has an entire department focused solely on providing shelter and housing to persons experiencing homelessness.

While striving to provide shelter and services for the homeless, San Francisco and other cities have simultaneously sought to address the exigent public health and safety risks that street encampments pose to all citizens. Local governments have a vested interest in ensuring that their sidewalks remain safe and

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[2] *See* Sara Korte and Jeremy B. White, *Rising Homelessness Is Tearing California Cities Apart* (Politico Sept. 21, 2022), https://www.politico.com/news/2022/09/21/california-authorities-uproot-homeless-people-00057868.

[3] *See* Trisha Thadani, *S.F. Has an Unprecedented $1.1 Billion to Spend on Homelessness. The Pressure Is on to Make a Difference* (S.F. Chronicle June 16, 2021), http://www.sfchronicle.com/bayarea/article/S-F-has-an-unprecedented-1-1-billion-to-spend-16318448.php.

accessible. San Francisco's multifaceted approach to closing encampments and collecting and storing unattended personal items is procedurally fair and judicious, and consistent with the practice of many other jurisdictions. Most importantly, the policy complies with federal law. This is undisputed, as both the District Court and Plaintiffs have conceded that San Francisco's homelessness response system and bag-and-tag policy are constitutional. ER-39; ER-48.

Nevertheless, based largely on uncorroborated anecdotes about isolated incidents and non-contemporary abstract data, the District Court issued an unreasonably vague and breathtakingly broad order. It granted Plaintiffs' motion for a preliminary injunction ("PI Motion") and enjoined San Francisco from enforcing state and local laws that prohibit sleeping, lying, or camping on public property against all "involuntarily homeless individuals," and barred the City from violating its own bag-and-tag policy. ER-49-50. The order was in error, and *Amici* urge this Court to reverse it.

Notably, Plaintiffs have failed to demonstrate that any alleged constitutional injuries they sustained are directly attributable to an official governmental policy or custom, as required under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978). Instead, the District Court impermissibly subjected the City to vicarious liability for alleged threats made by police officers to Plaintiffs, none of which have been independently verified, and absent any

showing that the threats were made pursuant to a policy or official procedure. The District Court also exceeded its jurisdiction by issuing a class-wide injunction—enjoining the City from enforcing anti-camping and anti-sleeping laws against all involuntarily homeless persons—even though Plaintiffs have not sought certification of a putative class under Federal Rule of Civil Procedure 23.

Furthermore, the District Court's erroneous reading of this Court's "narrow" holding in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) holds local governments to an extraordinary and unachievable bar. Its order suggests that a municipality may take no steps to enforce any anti-sleeping or anti-camping laws until it can guarantee shelter to every single homeless resident. This misapplication of *Martin*, if left to stand, will make it inordinately difficult for San Francisco to remove structural impediments from the City's streets and sidewalks even where they pose immediate threats to public health or safety. Other cities will invariably face similar lawsuits for broad-based injunctive relief even when their encampment and removal and storage policies are constitutional. Under the District Court's unjustifiably broad order, potential plaintiffs could prevent cities from enforcing otherwise constitutional laws by simply presenting some evidence of isolated, scattered instances of alleged violations of otherwise constitutional laws and policies. The result will have a detrimental effect both on homeless persons who will be deprived of temporary housing and access to other needed

services, and on the rest of the public who will be deprived of safe, clean, and unobstructed streets. For these reasons and those discussed below, the Court should vacate the preliminary injunction.

II. ARGUMENT

A. The District Court Failed to Apply the Correct Legal Standard for Determining the City's Liability.

A local government may not be held liable under 42 U.S.C. § 1983—the statutory vehicle through which a plaintiff may sue a municipal entity for constitutional violations—for "an injury inflicted solely by its employees or agents." *Monell,* 436 U.S. at 694; *see also Sanchez v. City of Fresno*, 914 F.Supp.2d 1079, 1094-95 (E.D. Cal. 2012) (*Monell* "provides that a municipality cannot be liable under § 1983 on a *respondeat superior* theory (i.e., simply because it employs someone who deprives another of constitutional rights)"). Rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694. To establish a governmental entity's liability under *Monell*, a plaintiff must prove the following: "(1) that [the plaintiff] possessed a constitutional right of which [s]he was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional right; and (4) that the policy is the moving force

behind the constitutional violation." *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (internal quotation marks and citation omitted; alterations in original).

Local governments may be sued "for constitutional deprivations pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." *Monell*, 436 U.S. at 690-91. But consistent with the commonly understood meaning of that term, random acts or isolated events "are insufficient to establish custom." *Thompson v. City of Los Angeles,* 885 F.2d 1439, 1443-44 (9th Cir. 1989). For liability to arise for an unconstitutional custom, a plaintiff must make one of three showings: (1) that the violation was committed pursuant to a "longstanding practice or custom which constitutes the standard operating procedure of the local government entity"; (2) that the decision-making official who committed the constitutional tort "was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision"; or (3) that "an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate" to commit the violation. *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 984–85 (9th Cir. 2002) (internal quotation marks and citations omitted); *see also Navarro v. Block*, 72 F.3d 712, 714 (9th Cir.1995) (municipality liable for unconstitutional conduct of employees in absence of

official policy only if plaintiff proves "the existence of a custom or informal policy with evidence of repeated constitutional violations for which the errant municipal violators were not discharged or reprimanded").

Importantly, the limitations imposed by *Monell* apply not just to monetary claims but also claims for injunctive and declaratory relief, like those brought by Plaintiffs. See *Los Angeles County v. Humphries*, 562 U.S. 29, 30 (2010) ("The question presented is whether the 'policy or custom' requirement also applies when plaintiffs seek prospective relief, such as an injunction or a declaratory judgment. We conclude that it does so apply."). This heightened standard likewise applies at the preliminary injunction stage. *See Martinez v. City of Santa Rosa*, 482 F.Supp.3d 941, 943 (C.D. Cal. 2020) ("Therefore, to obtain a preliminary injunction against the City at the outset of the case, the plaintiffs must also demonstrate a likelihood of success on their contention that the officers were acting pursuant to an official municipal policy."); *Lozman v. City of Riviera Beach, Fla.*, 138 S.Ct. 1945, 1951 (2018) ("It is well established that in a § 1983 case a city or other local governmental entity cannot be subject to liability *at all* unless the harm was caused in the implementation of 'official municipal policy.'" (emphasis added)).

In their Complaint, Plaintiffs asserted both federal and state constitutional claims, but predicated their PI Motion on their claims under the Eighth Amendment (for cruel and unusual punishment) and Fourth Amendment (for unreasonable search and seizure) of the United States Constitution. ER-1560. Naturally, they have sought relief for these claims pursuant to § 1983, as that statute is the exclusive instrument through which a private cause of action for constitutional violations may be pursued. ER-2617; ER-2620; *see Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) ("Plaintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983."). *Monell* thus controls here. 436 U.S. at 694. But Plaintiff's PI Motion does not recite or substantively address *Monell's* requirements.[4] The City argued in its opposition to the PI Motion that the limited evidence presented by Plaintiffs was insufficient to establish *Monell* liability. ER-1030. But the

[4] Plaintiffs provided a slightly more substantive but still cursory argument under *Monell* in their reply brief, which still failed to set forth *Monell*'s requirements for establishing a policy or custom. ER-966. Although this showing was still insufficient, because Plaintiffs raised the argument for the first in their reply, and the District Court neither addressed nor adopted it in its ruling, it should be deemed waived. *Cedano–Viera v. Ashcroft*, 324 F.3d 1062, 1066 n. 5 (9th Cir. 2003) ("[W]e decline to consider new issues raised for the first time in a reply brief."); *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) ("Issues raised for the first time in the reply brief are waived."); *Ass'n of Irritated Residents v. C & R Vanderham Dairy*, 435 F.Supp.2d 1078, 1089 (E.D. Cal. 2006) ("It is inappropriate to consider arguments raised for the first time in a reply brief.").

District Court's order fails to cite *Monell* or its progeny, and like Plaintiff's PI Motion provides no analysis or even peripheral commentary on whether Plaintiffs have demonstrated a reasonable likelihood of satisfying *Monell's* prerequisites such that a preliminary injunction against the City is proper. Plaintiffs have not shown that the San Francisco Police Department ("SFPD") officers who allegedly threatened to arrest them for failing to comply with "move along" orders and seized and destroyed their personal belongings acted pursuant to a policy or custom. Quite the contrary, Plaintiffs concede that the City's official policy—memorialized in SPFD's Bulletin 19-080 ("Enforcement Bulletin")—requires police officers to secure appropriate shelter for a homeless person before citing or arresting them under Penal Code section 647(e) (California's unlawful lodging statute). ER-39. Further, Plaintiffs and the District Court acknowledged that San Francisco's encampment and bag-and-tag policies are constitutional. ER-39; ER-48; ER-50.

Martinez, a 2020 district court case, is instructive. There, residents of the City of Santa Rosa brought a proposed class action on behalf of themselves and other Black Lives Matter ("BLM") protesters against the city and its police department and sought a preliminary injunction to prevent the police from violating the protesters' constitutional rights to free speech and assembly. *Martinez*, 482 F.Supp.3d at 942. The court observed that as an initial matter, the

plaintiffs had to show that the officers' conduct at BLM demonstrations had violated the protesters' First or Fourth Amendment rights, but "that [was not] all." *Id.* Because the plaintiffs had sued a governmental entity, they had to do more "than simply demonstrate constitutional violations." Under *Monell*, they also had to prove "that the employees were acting pursuant to a policy or custom of the municipality." This requirement did not "merely apply to efforts by plaintiffs to recover damages from a municipality." *Id.* It also applied "to any effort to seek an injunction against the municipality." *Id.* at 942-43. The plaintiffs thus had to demonstrate a likelihood that the officers' decision to fire tear gas and projectiles and otherwise retaliate against the protesters was made pursuant to a policy or custom. *Id.* at 943.

In finding that the plaintiffs had failed to show a likelihood of prevailing against the city, the court observed that lower courts in other recent cases involving police misconduct had, curiously, issued restraining orders and preliminary injunctions without addressing the criteria for municipal liability under *Monell*:

> In response to police conduct during the Black Lives Matter protests, several district courts have entered temporary restraining orders or preliminary injunctions against local police departments without discussing this municipal liability issue. Perhaps in those cases both sides agreed that the conduct of the officers was pursuant to a municipal policy or custom. Perhaps the plaintiffs argued the point, and the defendants failed to contest it. Perhaps it was obvious that the decisions made represented official policy. Or perhaps the rushed nature of the proceedings led to error in not holding the plaintiffs to their burden on that issue. Regardless, the plaintiffs in this case have not even attempted to show a likelihood of success on

> municipal liability, and the meager evidence in the record barely speaks to this issue.

Id. a 943 (internal citations omitted). The same is true here. Plaintiffs have not presented any material legal argument as to why the City is likely liable under *Monell*, by establishing for instance that it is San Francisco's "standard operating procedure" to direct police officers to cite or arrest homeless individuals under section 647 or related laws without first determining whether those individuals have access to shelter. *Ulrich,* 979 F.2d at 1346. Nor have they shown that an official with final policymaking authority ratified these practices.[5] To the extent any Plaintiffs have ever been threatened with arrest or deprived of their belongings, Plaintiffs have not demonstrated that these acts were "of sufficient duration, frequency and consistency" that "the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Specifically, they have not established how often the City's employees violate San Francisco's encampment and bag-and-tag policies when they conduct the encampment resolutions—e.g., whether they have violated these policies more than 50% of the time or with greater or lesser frequency, such it can be determined whether the practice constitutes a policy or custom. Because Plaintiffs failed to

[5] In fact, the evidence presented by the City strongly suggests that City officials with final policymaking authority would not and did not ratify any of the violations alleged by Plaintiffs here. ER-1069-70; ER-1077.

raise these arguments in their PI Motion, they have waived them. *Warre v. Comm'r of Soc. Sec. Admin*., 439 F.3d 1001, 1007 (9th Cir. 2006); *Cedano–Viera*, 324 F.3d at 1066 n. 5.

A district court's order is "reversible for legal error if the court did not employ the appropriate legal standards which govern the issuance of a preliminary injunction, or if, in applying the appropriate standards, the court misapprehended the law with respect to the underlying issues." *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 724-25 (9th Cir. 1983). Because the District Court did not apply the *Monell* standard for determining the viability of Plaintiff's federal constitutional claims, its order warrants reversal.

B. The District Court Improperly Issued a Class-Wide Injunction.

Plaintiffs have only filed suit in their own stead and have not sought certification of a proposed class under Federal Rule of Civil Procedure 23. But the District Court did not simply enjoin San Francisco from enforcing laws that prohibit sleeping, sitting, lying, or camping in public against Plaintiffs. Rather, with the broadest of brushes, it enjoined the City from enforcing these laws against *all* involuntarily homeless individuals,[6] without so much as certifying or defining the applicable class. This too was error.

[6] The District Court did not define the term "involuntarily homeless individuals" in its order. This Circuit has said that persons are involuntarily homeless "if they do not have access to adequate temporary shelter, whether because they have the

As a general rule, injunctive relief "should be narrowly tailored to remedy the specific harms shown by plaintiffs, rather than to enjoin all possible breaches of the law." *Zepeda*, 753 F.2d at 728 n. 1. An injunction "should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). This is "particularly true when, as here, a preliminary injunction is involved," as a preliminary injunction "can only be employed for the limited purpose of maintaining the status quo." *Zepeda*, 753 F.2d at 728 n.1.

Furthermore, a "federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may *not attempt to determine the rights of persons not before the court*." *Id.* at 727 (emphasis added). Under Federal Rule of Civil Procedure 65(d), the district court must "tailor the injunction to affect only those persons over which it has power."

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means to pay for it or because it is realistically available to them for free." *Johnson v. City of Grants Pass*, 50 F.4th 787, 792 n.2 (9th Cir. 2022) (citing *Martin*, 920 F.3d at 617; internal quotations omitted). But the District Court cited a declaration from Plaintiffs contending that the City sometimes forces homeless individuals to choose between keeping their property and accessing shelter, and that some individuals decline shelter beds because they do not wish to leave their property behind. The order does not address whether a person who declines a shelter bed out of concern for their property is "involuntarily homeless" for purposes of the injunction. In this regard, the order does not comply with Federal Rule of Civil Procedure 65(d)(C), which requires that every order granting an injunction "describe in reasonable detail—and by referring to the complaint or other document—the act or acts restrained or required."

Id. And "[w]ithout a properly certified class, a court cannot grant relief on a class-wide basis." *Id.* at 728 n.1; *see also National Center for Immigrants Rights, Inc. v. I.N.S.*, 743 F.2d 1365, 1371 (9th Cir. 1984) ("The INS asserts that in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs. We agree."); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974) ("Relief cannot be granted to a class before an order has been entered determining that class treatment is proper.").

In *Zepeda*, seven plaintiffs of Mexican descent filed a class action against the Immigration and Naturalization Service (INS). 753 F.2d at 722. The district court denied the plaintiffs' class certification petition, and the plaintiffs subsequently moved for a preliminary injunction. In support of their motion, the plaintiffs submitted deposition testimony and affidavits stating that INS agents had entered and searched residences and nonpublic areas of businesses without consent or a warrant and had "detained and questioned Hispanic persons without reasonable suspicion that they were aliens." *Ibid.* Based on this evidence, the District Court issued a preliminary injunction restraining the INS from, among other acts, approaching homes for the purpose of questioning, searching, or arresting persons absent reasonable suspicion that these individuals were unlawfully present in the United States. *Id.* at p. 723.

On appeal, while this Circuit recognized that the trial court's finding that the plaintiffs had demonstrated a likelihood of prevailing on their Fourth Amendment claims was "not clearly erroneous," it vacated the preliminary injunction because, among other grounds, its scope was too broad. *Id.* at 727. It declared that the injunction had to "be limited only to the individual plaintiffs unless the district court certifie[d] a class of plaintiffs." *Id.*

Here, as discussed, Plaintiffs have not made the requisite showing under *Monell* to support a preliminary injunction even applicable only to them, but even assuming they had, as in *Zepeda* the District Court's injunction is impermissibly broad. Plaintiffs have not sought class certification, which would have required a showing that they adequately represent the interests of all involuntarily homeless persons citywide. As such, the District Court's order enjoining San Francisco from enforcing anti-camping and anti-sleeping laws or violating its bag-and-tag policy as to all involuntarily homeless persons citywide constitutes an abuse of discretion.

Plaintiff's contentions about the City's bag-and-tag policy illustrate the problematic nature of class-wide injunctive relief. The District Court found that the City had produced a total of 195 bag-and-tag records for a six-month period in 2021, even though San Francisco displaced "at least 1,282 experiencing unsheltered homelessness" during that same period. ER-44. Based on this disparity, and Plaintiffs' declarations recounting the purported seizure and

destruction of their unabandoned personal property, the Court concluded that the City systematically seizes and destroys the unabandoned personal property of other homeless individuals (all of whom are non-parties to this case). But Plaintiffs provide no evidence specifically demonstrating this. It is equally conceivable that (1) the City did not collect the unabandoned personal property of many if not most of those 1,282 persons, and thus generated no bag-and-tag records; (2) the City destroyed the items in question because they were unsafe or hazardous to store; or (3) because those individual in fact received notice from the City, they took their belongings with them when they vacated the encampment, thereby proving the adequacy of the notice. *See Shipp v. Schaaf,* 379 F.Supp.3d 1033, 1038 (N.D. Cal. 2019) (motion for preliminary injunction to prevent closure of encampment denied where plaintiffs' declarations averred that the city sometimes removed and destroyed encampment members' property, but failed to contradict city's representations that it consistently complied with policy to store discarded items so long as it was safe to do so). Even taking as true Plaintiffs' assertions that the City has on previous occasions seized their personal belongings without providing notice and an opportunity to retrieve those items, that alone does not establish the existence of a class of people within the City who have experienced similar or identical treatment. Because no showing has been made that Plaintiffs adequately

represent the interests of a particular class of individuals, a class-wide injunction was improper.

C. Plaintiffs Have Not Satisfied Their Evidentiary Burden.

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original). A plaintiff seeking a preliminary injunction must establish that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th Cir. 2017).

Again, Plaintiffs failed to cite the proper legal standard for pursuing injunctive relief against the City under *Monell* and by extension have not made the requisite factual showing that their alleged constitutional violations stemmed from a policy or custom. Therefore, they have not established a likelihood of prevailing on their Fourth and Eighth Amendment claims. That aside, the District Court made multiple assumptions and inferences that are simply unsupported by the evidence.

For example, the District Court asserted that Plaintiffs submitted "significant evidence that written notice of encampment closure is rarely provided." Not so.

The individual Plaintiffs and staff members employed by Plaintiff Coalition on Homelessness, submitted declarations averring that they have rarely or infrequently seen written notice of an anticipated sweep posted at an encampment site. ER-15. But this does not prove that no notice was posted; it only proves that these declarants did not observe the notice when they were present at the encampment. *See Thomas v. Autauga County Bd. of Educ*., 2014 WL 1491199 at *11 (M.D. Ala. Apr. 15, 2014) ("Not seeing something does not prove that the thing does not exist. It only proves that one 'never saw' the thing."). Absent from the record was testimony or other evidence that San Francisco's Homeless Outreach Team ("SFHOT")—which is tasked with posting notifications over the weekend of any encampment resolution that is scheduled to take place the following week—as a standard practice does not post written notice before initiating an encampment sweep. Plaintiffs' "anecdotal" evidence[7] was directly belied by declarations from multiple City employees that SFHOT posts written notices of scheduled closures on tents, utility poles, and walls in and around targeted encampments on the weekend preceding the closure operation, and that they also attempt to verbally inform the encampment's occupants of the anticipated closure. ER-1097. Defendants also introduced photographs of written notices

[7] At the hearing on the PI Motion, the District Court itself characterized Plaintiffs' evidence as "anecdotal." ER-383.

posted at encampment sites. ER-1100-95. Against this evidence, Plaintiffs have not provided sufficient proof to satisfy their burden. *See Mazurek*, 520 U.S. at 972 ("And what is at issue here is not even a defendant's motion for summary judgment, but a plaintiff's motion for preliminary injunctive relief, *as to which the requirement for substantial proof is much higher*" (emphasis added)).

Furthermore, Plaintiffs have not demonstrated that it is the City's custom, practice, or policy to require homeless individuals to vacate an encampment without first ensuring that they have access to shelter. Rather, they have conceded that the City's policy mandates that SFHOT workers and other municipal employees not displace any homeless person without first ensuring that they have access to shelter, and that this policy is constitutional. Plaintiffs also have not alleged that they have ever been arrested or prosecuted for violating state or local anti-camping or anti-sleeping laws. And the anonymized data that Plaintiff's submitted (to which the District Court ascribed inordinate weight) concerning the overall disparity between San Francisco's homeless population and available shelter beds does not constitute proof that Plaintiffs' constitutional rights—not to mention those of other homeless individuals not named here as parties—were violated. Plaintiffs do not and cannot show any nexus between this data and police action directed specifically against Plaintiffs pursuant to a policy or custom. Accordingly, Plaintiffs have not established that they will likely suffer irreparable

harm without an injunction. *See Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (plaintiff must "do more than allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief"); *Enyart v. Nat. Conference of Bar Exam'rs*, 630 F.3d 1153, 1165 (9th Cir. 2011) ("Mere possibility of harm is not enough.").

As to the latter two elements required for preliminary injunctive relief, Plaintiffs have not demonstrated that the equities tip in their favor or that an injunction is in the public interest. In finding that the disparity between San Francisco's homeless population and the number of available beds constitutes prima facia evidence of an Eighth Amendment violation, the District Court's order in effect precludes the closure of any encampment unless Defendants always know the exact number of homeless individuals living in the City and can guarantee nightly shelter to all of them—irrespective of whether they are the subject of an encampment sweep. The financial and logistical burden this will impose on San Francisco far exceeds that contemplated or permitted by *Martin* (as discussed at greater length below).

Lastly, where a claimant seeks prospective injunctive relief to prevent future harm, the claimant must demonstrate "that he is realistically threatened by a repetition of [the violation]." *Melendres v. Arpaio*, 695 F.3d 990, 997 (9th Cir.

2012) (internal quotation marks and citation omitted; alternation in original). A plaintiff may do this in one of two ways, by showing that: (1) "the defendant had, at the time of the injury, a written policy, and that the injury stems from that policy"; or (2) "the harm is part of a pattern of officially sanctioned behavior" violative of the plaintiffs' federal rights. *Id.* at 998.

Here, again, the District Court recognized that Defendants' policies are constitutional. Furthermore, Plaintiffs have offered no evidence that the alleged seizure and destruction of their property or "move along" orders given by police officers constituted "officially sanctioned behavior," particularly since such practices contravene the City's Enforcement Bulletin and bag-and-tag policy. Accordingly, Plaintiffs are not entitled to prospective injunctive relief.

D. The District Court Misconstrued and Exceeded This Circuit's "Narrow" Holding in *Martin.*

In *Martin*, the Ninth Circuit held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." 920 F.3d at 616. But the court stressed that its holding was "a narrow one" that did not require any municipality to "provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place." *Id.* at 617. Its prescription excluded "individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it

is realistically available to them for free, but who choose not to use it." *Id.* at 617 n. 8 (emphasis in original). The court refrained from suggesting that "a jurisdiction with insufficient shelter" could "*never* criminalize the act of sleeping outside," and that an ordinance barring the obstruction of public rights-of-way or the erection of certain structures, or one prohibiting individuals from sitting, lying or sleeping in public at certain times or in certain locations "might well be constitutional." *Id.* (emphasis in original).

The opinion makes clear that a city need not—even assuming it has the resources and space to do so—guarantee shelter to every homeless resident before enforcing laws that prohibit lying or sleeping in public. If someone who violates those laws has access to shelter but forgoes it, a local agency may cite or even prosecute them.

The District Court dispensed with these strictures entirely. Rather than predicating its inquiry on whether the City had previously arrested or prosecuted Plaintiffs for lying or sleeping in public when they lacked access to shelter, it treated the overall disparity between San Francisco's homeless population and available beds as controlling. This generalized approach flouts *Martin's* explicitly limited holding. Had this Circuit intended to proscribe enforcement of anti-camping and anti-sleeping laws against all homeless persons in jurisdictions with

insufficient beds, it would have done so rather than curtailing *Martin's* reach to foreclose any such reading.

As noted, *Martin* also recognized the permissibility of "time, manner, and place" restrictions. *Martin*, 920 F.3d at 617 n.8. One provision of the San Francisco Police Code that the District Court enjoined the City from enforcing, section 169(c), only permits enforcement of that section's anti-camping prohibitions during daytime hours. *Martin*, 920 F.3d at 617 n. 8. And yet, the District Court categorically barred the City from enforcing this section. Additionally, the record demonstrates that to the extent the City directs individuals to vacate an encampment, the directive is limited to that specific site; it does not preclude individuals from lying or sleeping on public property elsewhere in the City.

The District Court also cited the Ninth Circuit's recent decision in *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022), in support of its finding that Plaintiffs had established a likelihood of prevailing on their Eighth Amendment claim. *Johnson* is distinguishable on multiple grounds, but the facts in that case illustrate the overbreadth of the District Court's injunction here.

In *Johnson*, three homeless individuals filed a putative class action against the City of Grant Pass, challenging the constitutionality of its anti-camping and anti-sleeping ordinances. *Id.* at p. 792. Those ordinances precluded homeless

persons from using blankets or pillows for protection from the elements and authorized the city police to bar an individual from all city parks for 30 days if, within one year, the individual was issued two or more citations for violating park regulations. *Id.* at 793-94. In partially granting the plaintiffs' motion for summary judgment, the district court found that the city's enforcement of the ordinances violated the Eighth Amendment, but it enjoined the city's enforcement only in part. *Id.* at 797. Specifically, it did not enjoin enforcement of the anti-sleeping ordinance, and it barred enforcement of the anti-camping ordinances at night but not during the day so long as 24 hours' notice was given. *Id.* Its summary judgment order also made clear that the City "could still limit camping or sleeping at certain times and in certain places," ban "the use of tents in public parks," limit "the amount of bedding type materials allowed per individual," and "pursue other options to prevent the erection of encampments that cause public health and safety concerns." *Id.* at 797.

Contrary to the instant case, in *Johnson* the city presented no evidence that as a matter of policy it enforced the anti-camping and anti-sleeping ordinances against homeless individuals only after offering them shelter; rather, its principal argument was that *Martin* did not proscribe the issuance of civil citations for the use of rudimentary bedding supplies in public parks. *Id.* at 807-08. The Ninth Circuit rejected this attempt to evade *Martin* and upheld the district court's finding

that the city's ongoing enforcement of the ordinances violated the Eighth Amendment. *Id.* But it also held that the ordinances' prohibitions on the use of stoves or fires were not necessarily impermissible. *Id.* at 812. It directed the trial court to "craft a narrower injunction recognizing Plaintiffs' limited right to protection against the elements, as well as limitations when a shelter bed is available." *Id.*

The District Court's injunction against San Francisco is far broader than that in *Johnson*. As noted, although the trial court in *Johnson* had already limited the reach of its injunction in several important ways, on remand the Ninth Circuit instructed the trial court to further narrow its scope. Additionally, the *Johnson* court issued its considerably narrower injunction following summary judgment—after the parties had ample opportunity to conduct discovery. *Id.* at p. 796. Here, the proceedings were exceedingly rushed. Plaintiffs filed their PI Motion on the same day they filed their Complaint, and the District Court issued its preliminary injunction less than three months later. Defendants have had no meaningful opportunity to depose any of Plaintiffs' declarants or conduct any other discovery.

For these reasons too, the District Court's order was improper.

E. The District Court's Order Sets a Harmful Precedent.

Amici appreciate the District Court's frustration with the lack of adequate housing and the dire conditions facing the homeless. Homelessness is one of the

gravest crises confronting this nation. With more than 170,000 people living in tents and cars and sleeping on sidewalks and under highway overpasses, California is in many ways the epicenter of this crisis.[8] More can and certainly needs to be done. But the preliminary injunction issued in this case is not the answer.

As discussed, the District Court's order rests on a misinterpretation of *Martin* and is erroneous on other counts. But the practical consequences it will spawn for San Francisco—and local governments across the state if other courts adopt its flawed reasoning—will be staggering. For this reason, too, the decision merits heavy scrutiny. The District Court's one-size-fits-all formula overlooks the various regional approaches local agencies throughout California have taken to address homelessness. Many jurisdictions are collaborating with one another to develop programs and solutions unique to their areas.[9] Some cities—like Sacramento—have designated specific camping sites with space for tents to

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[8] Alicia Victoria Lozano, *California City Bans People From Living in Tents Amid Homeless Crisis* (NBC News Feb. 18, 2023), https://www.nbcnews.com/news/us-news/california-city-bans-people-living-tents-homeless-crisis-rcna70852.

[9] For example, in April 2021 a coalition of state and local elected officials, service providers, and business and other community leaders across nine Bay Area cities partnered together to form the Regional Action Plan. The Plan emphasizes a multifaceted approach that does not simply rely on emergency shelter, but devotes resources to homelessness prevention, interim or emergency housing, permanent supportive housing, and housing subsidies. All Home, *Regional Action Plan to Reduce Homelessness by 75% in Three Years* (April 21, 2021), https://www.allhomeca.org/2021/04/12/regional-action-plan-to-reduce-homelessness-by-75-in-three-years/ (last visited Feb. 28, 2023).

accommodate people experiencing homelessness.[10] Such a practice is wholly consistent with the "time, manner, and place" restrictions endorsed by both *Martin* and *Johnson*, but the District Court's order makes no allowance for this accommodation.

The District Court's order precludes the City from balancing the needs of the homeless with those of other residents. If other municipalities are held to the same draconian standard imposed on Appellants, they will find it exceedingly difficult to safeguard public rights-of-way and address the compelling health and safety concerns posed by encampments. In many neighborhoods, tents and bulky items frequently block access to public sidewalks. To pass through, pedestrians—particularly those using wheelchairs—must often enter the streets, where they run the risk of being struck by a vehicle. The accumulation of trash and other unsanitary conditions that exist at many encampment sites can give rise to communicable diseases like hepatitis and tuberculosis.[11] Local governments must

[10] Vicente Vera, *'Safe Ground' Site Set for Miller Park in Sacramento to Hold Up to 60 Tents*, (ABC10 News February 2, 2022), https://www.abc10.com/article/news/local/sacramento/safe-ground-site-set-for-miller-park-in-sacramento-to-hold-up-to-60-tents/103-2af358ce-cadd-4d1b-a4d3-3bdf455279bd.

[11] Anna Gorman, *Medieval Diseases Are Infecting California's Homeless* (The Atlantic Mar. 8, 2019), theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/.

be allowed to take reasonable, constitutionally permissible steps to protect their citizens—both homeless and housed—from these risks.

III. CONCLUSION

For the foregoing reasons, the Court should vacate the preliminary injunction.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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