IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CITY OF ALBUQUERQUE,

Petitioner,

v.

THE HONORABLE JOSHUA A. ALLISON,
District Judge for the Second Judicial District,

Respondent,

No. _____

and

LADELLA WILLIAMS, SCOTT YELTON,
SONJA GARCIA, ALONSO MAGALLANES,
CHRISTINA GARCIA, RICKEY MAUK,
SHERI GIBSON, and LANCE WILSON,

Real Parties in Interest.

EMERGENCY VERIFIED PETITION FOR WRIT OF SUPERINTENDING CONTROL AND REQUEST FOR STAY

Second Judicial District Court, County of Bernalillo
Case No. D-202-CV-2022-07652

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Under Article VI, Sections 3 and 20 of the New Mexico Constitution and Rule 12-504 NMRA, Petitioner the City of Albuquerque (the "City") petitions this Court to exercise its power of superintending control to stay a preliminary injunction prohibiting the City from enforcing a large cross-section of its laws against unhoused individuals. That order also effectively requires the City to render most of its outdoor public spaces available for use as permanent encampments for unhoused individuals. The City also asks this Court to resolve two legal issues : (1) whether the district court erred in concluding that the Eighth Amendment prevents a state or local government from imposing reasonable restrictions on the use of public spaces by homeless persons; and (2) whether the district court erred in issuing a preliminary injunction that effectively prevents the City from protecting public health and safety when Plaintiffs' evidence did not establish that they would suffer irreparable harm in the absence of an injunction.

I. Factual and Procedural Background

In recent years, Albuquerque, like many cities in the United States, has seen an explosion of its homeless population. In response, the City has made concerted efforts to implement policy-based solutions to address homelessness, including constructing additional temporary shelter beds, increasing available options for temporary housing, and conducting outreach to offer social services. The City has elected not to use criminal enforcement as a means of solving homelessness. In

fact, the City's policy is not to cite or arrest any individual merely for experiencing homelessness or engaging in conduct inextricably related to homelessness. In short, the City has attempted to address homelessness with a carrot, not a stick.

Even so, encampments in the City continue to increase. These encampments consist of large groups of homeless persons and their belongings. They often occupy public spaces such as parks. And they present significant health, safety, and environmental issues that endanger both the homeless themselves and the residents in surrounding communities.

Case in point is the large encampment that developed during the COVID-19 pandemic in Coronado Park, north of downtown. The record shows that the health, safety, and environmental issues at Coronado Park were legion. Take a few examples. Between December 1, 2021, and August 17, 2022, the Albuquerque Solid Waste Department collected over 108 tons of refuse from Coronado Park, including human waste, needles, and drug paraphernalia. PA 242.[1] Several deceased individuals were located in the park. *Id.* 243. Leading up to June 2022, APD confiscated from Coronado Park one shotgun, 3 handguns, 4,500 fentanyl pills, over 5 pounds of methamphetamines, 24 grams of heroin, 29 grams of cocaine, several rocks of crack cocaine, and $10,000 in cash. *Id.* 211. Two Solid

[1] Pursuant to Rule 12-504(B)(2), all citations of the district court record are to the Petitioner's Appendix ("PA") submitted herewith which is serially paginated and cited as "PA [page]."

Waste Department employees were assaulted by individuals living at the encampment. *Id.* 243. In the first six months of 2022 alone, APD "received 418 calls for service directly at Coronado Park." *Id.* 211. Other issues included stolen electricity from local businesses, and destroyed trees, irrigation systems, and fencing. *Id.* 212. [2]

On August 17, 2022, after extensive advance notice, the City cleared the encampment at Coronado Park and closed the park to the public. *Id.* 243. When doing so, it conducted extensive outreach to those living at the encampment to offer housing solutions and social services. *Id.* 247-48. As a result, many residents of Coronado Park received temporary housing solutions and related assistance. *Id.*

After the Coronado Park cleanout, on December 19, 2022, a group of Albuquerque residents alleging to be involuntarily unhoused filed a class-action complaint. *Id.* 021. Plaintiffs relied heavily on two recent Ninth Circuit cases addressing the scope of permissible criminal enforcement against homeless persons, *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), and *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023). Plaintiffs alleged that the City's efforts to clear homeless encampments effectively criminalizes an individual's mere status in violation of Article II, Section 13 of the New Mexico Constitution.

[2] Though perhaps the largest and most prominent example, the situation at Coronado Park is hardly unique. In 2022 alone, the City responded to 3,611 calls related to encampments or illegal dumping. PA 241.

Id. 057. Plaintiffs also alleged that the City has a practice of seizing and destroying unhoused individuals' belongings without due process in violation of Article II, Sections 10 and 18 of the New Mexico Constitution. *Id.* Plaintiffs seek declaratory and injunctive relief. *Id.* 059.

On March 31, 2023, Plaintiffs filed an emergency motion for preliminary injunction. Through this motion, Plaintiffs sought to bar the City from continuing the challenged practices pending a resolution on the merits. *Id.* 067. The City opposed Plaintiffs' motion, providing clear evidence that it does not cite or arrest individuals merely for experiencing homelessness, and that it has robust procedures to ensure that homeless individuals are not deprived of their belongings. Following full briefing, on September 8, 2023, the district court heard argument on the motion.[3]

On September 21, 2023, the district court issued an order (the "MOO") granting Plaintiffs' motion in part. *Id.* 001. In its MOO, without citing any evidence, the district court found that "[t]he City has enforced, and has threatened to enforce, various ordinances and statutes criminalizing homeless persons' mere presence on outdoor public property and the presence of their belongings on outdoor public property when there are inadequate indoor spaces for homeless

[3] Over the City's objection, the district court refused to hold an evidentiary hearing, which the City believed necessary to fully develop the facts.

people living Albuquerque to be." *Id*. 004. The court concluded that the Eighth Amendment prohibits the City from "punish[ing] the mere presence of homeless people and their belongings in outdoor public spaces when there are inadequate indoor spaces for them to be." *Id.* 006.

The court also found that "[t]he City has seized and destroyed the property of homeless people, including property that homeless people need to live … without a valid search warrant, without adequate pre-deprivation notice, or without an adequate opportunity to be heard prior to or after the seizure and before the destruction of the property." *Id.* 004.

Based on these and other findings and conclusions, the district court enjoined the City "from enforcing, or threatening to enforce … any statutes and ordinances against involuntarily unhoused people that prohibit a person's presence in, or the presence of a person's belongings on, outdoor public property." *Id.* 001-02. The court allowed the City to enforce statutes and ordinances that would prohibit a homeless person from obstructing sidewalks or other public rights of way—but only in cases involving an "immediate threat to the safety of any person." *Id.* 002. The court provided no guidance on what counts as an "immediate threat." The injunction also permitted enforcing ordinances prohibiting a homeless person from "occupying any property of any public school." *Id.* The court offered no rationale for its distinction between public-school property and other public

property. The MOO also preliminarily enjoined the City from seizing unabandoned property of a homeless person without extensive pre-seizure procedures. *Id.* Yet here again, the court did not provide the City any direction on how to determine if property is "unabandoned."

The district court temporarily stayed implementation of the preliminary injunction until 12:01 am on November 1, 2023. *Id.* 020.

II. Summary of Argument

The injunction strips the City of the prerogative to enforce its laws and perform the basic functions for which city government exists. It represents a judicial mandate that the City surrender the vast majority of its outdoor public spaces to occupation by encampments of unhoused individuals, and leaves the City to manage and mitigate the health, safety, and environmental impacts of these encampments. As to Coronado Park, the City addressed that situation by clearing the park while simultaneously offering housing solutions and related assistance to encampment occupants. But the preliminary injunction prohibits the City from clearing new encampments that form on public property. Under the injunction, the City would be left only to dedicate an outsized proportion of its resources to managing the resulting health, safety, and environmental issues. In so doing, the preliminary injunction impairs the City's ability to implement policy-based solutions to address the epidemic of homelessness.

The injunction not only creates these severe adverse consequences but also lacks support in both the facts and the law. Contrary to the district court's conclusion, the Eighth Amendment to the United States Constitution does not afford unhoused individuals the right to permanently appropriate particular public spaces for themselves and their belongings. Nor does it prohibit state and local governments from protecting the health and well-being of all citizens by clearing encampments that represent safety, health, and environmental threats.

The district court also erred in concluding that Plaintiffs will suffer irreparable harm in the absence of a preliminary injunction because the City is not criminalizing homelessness. The City does not arrest, cite, or threaten with arrest or citation, any unhoused individual merely because they are present on public property.

The injunction also prohibits the City from seizing or destroying any property belonging to an unhoused individual deemed unabandoned absent extensive procedures. Even though the City has made, and continues to make, improvements to ensure that unhoused individuals' unabandoned belongings are not discarded, the property injunction is unworkable in practice. Beyond requiring individual City employees to make inherently subjective determinations of whether particular property is unabandoned, the property injunction presents the City with the nearly impossible task of locating the property's owner and providing 72-

hours' notice prior to the seizure of such property. Rather than risk contempt, the likely result is that the City will simply stop removing any property from its public spaces. That situation is simply untenable.

As a result, under Article VI, Section 3 of the New Mexico Constitution, the City petitions this Court to issue a Writ of Superintending Control staying implementation of the preliminary injunction and ultimately vacating that injunction as contrary to law. As explained below, a Writ of Superintending Control is both necessary and appropriate because the Petition presents an issue of great public importance, and the preliminary injunction imposes an exceptional hardship on the City: an inability to perform essential governmental functions.

III. Argument

A. Standards Applicable to Petition for Writ of Superintending Control

The New Mexico Constitution provides that "[t]he Supreme Court … shall have a superintending control over all inferior courts." N.M. Const. Art. VI, § 3. The power of superintending control allows this Court "to control the course of litigation in inferior courts and 'to correct any specie of error.'" *Grisham v. Romero*, 2021-NMSC-009, ¶ 15, 482 P.3d 545 (quoting *Kerr v. Parsons*, 2016-NMSC-028, ¶ 16, 378 P.3d 1). While employing this authority sparingly, this Court has recognized that exercising superintending control is appropriate when "necessary to prevent irreparable mischief, great, extraordinary, or exceptional

hardship" *Dist. Court of the Second Judicial Dist. v. McKenna*, 1994-NMSC-102, ¶ 4, 881 P.2d 1387, "where the public interest implications of the question posed are significant," and "where it is deemed to be in the public interest to settle the question involved at the earliest moment." *Romero*, 2021-NMSC-009, ¶ 16. Because the preliminary injunction here prohibits the City from enforcing many of its laws, and imposes on the City the burdens associated with managing permanent encampments of unhoused individuals on virtually any of its outdoor public spaces, review by this Court is both appropriate and necessary.

B. Standards Applicable to Issuance of a Preliminary Injunction

"A preliminary injunction is an extraordinary remedy; it is the exception rather than the rule. As such, it may only be awarded upon a clear showing that the [movant] is entitled to such relief." *Springer v. Seventh Judicial Dist. Court*, 2023 U.S. Dist. LEXIS 168703, at *12-13 (D.N.M. Sep. 21, 2023) (cleaned up). Under New Mexico law, a plaintiff seeking a preliminary injunction must establish that

> (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits.

Labalbo v. Hymes, 1993-NMCA-010, ¶ 11, 850 P.2d 1017. Preliminary injunctions that seek to alter the status quo by prohibiting a government from enforcing its laws are particularly disfavored and require a heightened showing on the

likelihood-of-success and balance-of-harms factors. *See Free the Nipple v. City of Ft. Collins*, 916 F.3d 792, 797 (10th Cir 2019).

C. The District Court's Preliminary Injunction Against Criminal Enforcement Rests on an Erroneous Interpretation of the Eighth Amendment.

The injunction against criminal enforcement rests on the conclusion that clearing an encampment that has formed on public property, or otherwise directing an unhoused person to relocate from particular public property, "violates the Eighth Amendment's prohibition against cruel and unusual punishment." PA 007.[4]

The district court's reasoning relies heavily on *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). In *Martin*, the court held that the Eighth Amendment's prohibition on cruel and unusual punishment "places substantive limits on what the government may criminalize." *Martin*, 920 F.3d at 615. *Martin* went on to apply this holding to enforcement of a municipal camping ban, explaining that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying on public property for homeless individuals who cannot obtain shelter." *Id.* at 616.

But *Martin*'s interpretation of the Eighth Amendment as prohibiting enforcement of statutes or ordinances that criminalize sleeping in public spaces or

[4] The district court relied exclusively on the Eighth Amendment, and did not reach whether Article 2, section 13 of the New Mexico Constitution would provide additional protections beyond the Eighth Amendment. PA 007-08.

similar activities has been met with significant criticism, much of it from other judges on the same court. In particular, dissenting from the denial of rehearing *en banc* in *Johnson*, a later case addressing the constitutionality of a municipal camping ban, 13 judges of the Ninth Circuit agreed that "the Cruel and Unusual Punishments Clause itself provides no substantive limit on what conduct may be punished. Instead, it only prohibits 'punishments' (*i.e.*, pain or suffering inflicted for a crime or offense) that are cruel (*i.e.*, marked by savagery and barbarity) and unusual (*i.e.,* not in common use)." *Johnson*, 74 F.4th at 928 (O'Scannlain, J., dissenting from denial of rehearing *en banc*).

New Mexico's courts have similarly interpreted the Eighth Amendment as applicable only after a defendant has been adjudged guilty of a criminal offense. *See State v. Smallwood*, 1980-NMCA-037, ¶ 10, 608 P.2d 537 ("[T]he state does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.") (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 (1977)); *State v. Blankenship*, 1968-NMCA-026, ¶ 11, 441 P.2d 218, 219 ("Defendant's claim is not a claim of cruelty in his punishment. The claim does not raise an issue under the Eighth Amendment."). These cases undermine the district court's legal conclusion that the Eighth Amendment prohibits criminal enforcement of the

City's ordinances against involuntarily unhoused individuals.[5] On this basis alone, the Court should vacate the injunction. Alternatively, the City asks that the Court grant the writ, stay the injunction, and allow briefing on this vital issue.

D. *The Preliminary Injunction Goes Well Beyond Anything Dictated by* Martin *and Invents a Constitutional Right to Reside in a Particular Public Space.*

Even if this Court were to accept *Martin*'s core holding, the injunction goes well beyond what *Martin* requires and represents an unprecedented expansion of the Eighth Amendment. *Martin* expressly recognized its holding as a "narrow one"—an assessment echoed by *Johnson*. *See Martin*, 920 F.3d at 617; *see also Johnson*, 72 F.4th at 896 (describing decision as "narrow"). *Martin* and *Johnson* both make clear that the Eighth Amendment does not prohibit a municipality from imposing any restrictions on the activities of involuntarily unhoused individuals. *Id.* ("[W]e in no way dictate to the City that it must … allow anyone who wishes to sit, lie, or sleep on the streets … at any time and at any place.") (second alteration in original) (quoting *Jones v. City of Los Angeles*, 444 F.3d at 1118, 1138 (9th Cir.

[5] The City of Grants Pass has petitioned the United States Supreme Court for a Writ of Certiorari seeking review of the Ninth Circuit's decision and presenting the question: "Does the enforcement of generally applicable laws regulating camping on public property constitute "cruel and unusual punishment" prohibited by the Eighth Amendment?" *See* https://www.supremecourt.gov/DocketPDF/23/23-175/275911/20230823153037814_Grants%20Pass%20v.%20Johnson_cert%20petition_corrected.pdf The City believes it likely that the Supreme Court will grant certiorari on this question. The City urges the Court to review the petition and the amici briefs submitted by states and municipalities across the country.

2006)); *see also Johnson*, 72 F.4th at 913 ("As in *Martin*, we hold simply that it is unconstitutional to [punish] sleeping *somewhere* in public if one has nowhere else to do so.") (alteration and emphasis in original). *Martin* recognized that "[e]ven where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible." *Martin*, 920 F.3d at 617, n.8. *Johnson* likewise declined to prohibit a municipality from criminalizing activities beyond those necessary to human survival. *Johnson*, 72 F.4th at 895 ("The record has not established the fire, stove, and structure prohibitions deprive homeless persons of sleep or 'the most rudimentary precautions' against the elements.").

Martin and *Johnson* both affirm that as long as the mere presence of homeless individuals is not criminalized in *all* public spaces, municipalities retain wide latitude to impose reasonable restrictions on the places homeless people may be present, the length of time they may remain there, and the range of activities in which they may engage. *See, e.g., Fitzpatrick v. Little*, 2023 U.S. Dist. LEXIS 4223, at *34 (D. Idaho Jan. 9, 2023) ("the Campers ask the Court to essentially hold that the State must allow homeless individuals to camp *everywhere* instead of what *Martin* commands, namely, that the State cannot prevent individuals from sleeping *anywhere*."); *Blaike v. El-Tawansy*, 2022 U.S. Dist. LEXIS 153470, at *6-7 (N.D. Cal. Aug. 25, 2022) ("*Martin*…does not, however, prohibit cities from

barring sleeping in a particular place."). Of particular relevance here, courts recognize that *Martin* does not preclude a municipality from clearing a homeless encampment. *See, e.g.*, *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075, 1081-82 (W.D. Wash. 2019) ("*Martin* does not limit the City's ability to evict homeless individuals from particular public places—including River Camp."); *Miralle v. City of Oakland*, 2018 U.S. Dist. LEXIS 201778, at *6 (N.D. Cal. Nov. 28, 2018) ("*Martin* does not establish a constitutional right to occupy public property indefinitely at Plaintiffs' option.").

By contrast, the preliminary injunction recognizes no such limitations and essentially interprets the Eighth Amendment to vest homeless individuals with a plenary right to occupy any particular public space, with unlimited belongings, for an indefinite period of time. Other than the narrow exceptions for causing an immediate threat within a public right of way, the preliminary injunction prohibits the City from removing homeless individuals from any public property, including property owned by other public entities, or establishing appropriate time limits on the use of public property. This is illustrated by the MOO's conclusion that requiring a homeless person to "relocate from one outdoor public space to another" results in irreparable harm. PA 004. These restrictions preclude the City from taking any steps to prevent the establishment of permanent encampments of unhoused individuals on virtually any outdoor public property, including parks,

playgrounds, outdoor museums, outdoor memorials or curtilage of public buildings, or clearing such encampments once established.

Whatever protections the Eighth Amendment may afford, it does not prohibit the City from imposing generally applicable restrictions on the use of public lands, or enforcing those restrictions against unhoused individuals, and it certainly does not condemn the City to the wholesale surrender of its public spaces for use as homeless encampments. Even assuming the Eighth Amendment gives homeless people the right to be *somewhere*, it does not afford them the right to turn public spaces into permanent encampments. By failing to acknowledge or impose any such limitations, the preliminary injunction goes beyond well beyond what any other court has done, and effectively invents a constitutional right to live, undisturbed, on the public property of one's choosing and to erect a shelter on such property. The Eighth Amendment guarantees no such luxury, and the district court erred in ruling otherwise.

E. By Failing to Specify Which Ordinances the City is Prohibited From Enforcing, the Injunction Is Fatally Vague.

The preliminary injunction not only rests on an erroneous legal premise but also is impermissibly vague. It fails to reflect specific statutes or ordinances that the City is enjoined from enforcing. *See Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1411 (11th Cir. 1998) ("[A] court must craft its orders so that those who seek to obey may know precisely what the court intends to

forbid."). Unlike *Martin* and *Johnson*, which involved challenges to the enforcement of specifically enumerated ordinances, the injunction identifies no particular ordinances that the City is enjoined from enforcing. Instead, the injunction broadly prohibits the City from enforcing "any statutes and ordinances … that prohibit a person's presence in, or the presence of a person's belongings on, outdoor public property…." PA 001-02.

The injunction thus leaves the City, under threat of contempt, to guess both the particular ordinances it is prohibited from enforcing, and enforceability against a particular individual.[6] Such a vague injunction would represent a hardship for the City because efforts at compliance are likely to chill otherwise permissible and beneficial law-enforcement activities to the detriment of public safety. *See Benham v. City of Charlotte*, 2008 U.S. Dist. LEXIS 7552, at *17 (W.D.N.C. Jan. 17, 2008) (noting argument "that the issuance of an injunction would chill legitimate law enforcement for fear of being taken to court by the plaintiffs for violating the

[6] The preliminary injunction also suffers from overbreadth in the scope of individuals it covers. *Martin* held that criminalizing certain behavior by homeless people violated the Eighth Amendment because they have no choice but to exist without indoor shelter. As the court explained: "an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them." *Martin*, 920 F.3d at 604. *Martin* expressly noted that its "holding does not cover individuals who do have access to adequate temporary shelter … but who choose not to use it." *Id.* at 617, n.8. By contrast, the preliminary injunction is not limited to individuals who cannot obtain shelter but instead prohibits enforcement against any individual who "for subjectively legitimate reasons…ha[s] no fixed residence." PA 001. The preliminary injunction would thus preclude enforcement against not only individuals who lack access to shelter, but also individuals who are currently housed, albeit in a temporary situation.

injunction"). Moreover, a vague injunction promises to burden the courts by forcing a judge to play the role of monitor to oversee compliance and resolve ongoing disputes about compliance. *See Logan v. Pub. Emples. Ret. Ass'n*, 163 F. Supp. 3d 1007, 1028 (D.N.M. 2016) ("vague injunctions … are a recipe for bogging the court down into the role of monitor."). The injunction's vagueness is an independent ground for setting it aside.

F. The Preliminary Injunction Was Improper Because Plaintiffs Failed to Establish Future Irreparable Harm.

Beyond its erroneous interpretation of the Eighth Amendment, the district court erred in issuing the injunction because Plaintiffs failed to make the showings required under *Labalbo*. First, Plaintiffs failed to show that they are likely to suffer irreparable harm without a preliminary injunction. *See Schrier v. Univ. of Colorado*, 427 F.3d 1253, 1267 (10th Cir. 2005) ("The purpose of a preliminary injunction is not to remedy past harm but to protect plaintiffs from irreparable injury that will surely result without their issuance.").

1. The City Does Not Prosecute Mere Homelessness.

As to criminal enforcement, the district court erred in concluding that without a preliminary injunction, unhoused individuals would likely suffer irreparable harm by being cited or arrested merely for their status as homeless or for conduct inextricably associated with homelessness. While relying on instances in which they have been cited or arrested for other violations of law (*see* PA 42),

Plaintiffs have failed to cite a single instance in which any individual has been cited or arrested simply for being homeless.[7] By contrast, the City has demonstrated that its standard operating procedure is not to pursue any type of criminal enforcement against unhoused individuals for their mere presence on public property. Albuquerque Police Department ("APD") Standard Operating Procedure 1-4 specifically states that APD officers do not initiate contact with an individual solely because the individual appears to be experiencing homelessness, and individuals who appear to be experiencing homelessness are free to frequent public places without being questioned or searched. PA 238. In light of this undisputed enforcement posture, the district court erred in concluding that that Plaintiffs are likely to suffer injury via arrest or citation without an injunction.

Perhaps more importantly, any injury suffered from criminal enforcement would not be irreparable. On this point, the district court concluded that "arrests for these violations regularly result in missed court appearances and the resulting issuance of bench warrants for the homeless person's arrest for failure to appear." *Id.* 004. But being subject to enforcement of generally appliable laws cannot be considered an irreparable harm. *See Winn v. Cook*, 945 F.3d 1253, 1259 (10th Cir. 2019) ("[T]he cost, anxiety, and inconvenience of having to defend against a single

[7] During the recent clearing of encampments at Coronado Park and First Street & Indian School, APD did not cite a single person for their presence at the encampment. *See* PA 234.

criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term.") (quoting *Younger v. Harris*, 401 U.S. 37, 47 (1971).

Finding irreparable harm, the district court also concluded that "a homeless person who is forced to relocate from one outdoor public space to another oftentimes loses personal belongings that are vital to that person's health and safety as a result of that forced relocation." PA 004. But as described in greater detail below, when clearing encampments, the City goes to great lengths to ensure that individuals have ample opportunity to collect and preserve their belongings. The district court's conclusion that periodically requiring homeless people to relocate, rather than allowing them to reside permanently on a specific piece of public property, represents irreparable harm, was error.

2. The District Court Erred in Concluding that Absent a Preliminary Injunction, Unhoused Individuals Would be Unconstitutionally Deprived of Their Property.

As to the injunction's treatment of personal property, the district court concluded that "[t]he City has seized and destroyed the property of homeless people … without a valid search warrant, without adequate pre-deprivation notice, or without an adequate opportunity to be heard prior to or after the seizure and before the destruction of the property." *Id*. This conclusion, however, does not

establish that any unhoused individual is likely to suffer future irreparable harm without a preliminary injunction.

In response to Plaintiffs' motion, the City adduced evidence that when clearing a Priority 1 encampment (those presenting immediate threats to public health), the City will give individuals present an opportunity to move their belongings and will not dispose of an individual's property when the owner of the property is present. *Id.* 241. If no individuals are present, City personnel will attempt to locate the owners of any property, including by waiting for occupants of the encampment to return, canvassing the area, and/or visiting nearby encampments in an effort to identify an owner of the property. *Id.* When clearing Priority 2 or 3 encampments (those not presenting immediate public-health concerns), the City generally provides at least 72 hours' notice before the clearing. *Id.* 242. Upon arrival at the encampment, City personnel provide individuals additional time to gather their belongings before disposing of any remaining property. *Id*. The City is presently expanding its efforts to locate owners before disposing of their property. *Id.* 244.

Beyond notice and an opportunity to remove property, when clearing the encampments at Coronado Park, the City offered storage for some personal

property for a period of up to 90 days.[8] *Id.* 248. Similarly, for the March 29, 2023 clearing of a large encampment at First Street & Indian School (for which the City provided 120 hours' advance notice), the City provided written notice that storage was available and sent a team to collect any items that individuals wished to store. *Id.*

With these safeguards, it is hard to imagine a scenario in which the City is likely to dispose of property that can objectively be understood as unabandoned. The district court was wrong to conclude that in the absence of a preliminary injunction, unhoused individuals are likely to suffer irreparable harm through unlawful seizure and disposal of unabandoned property.

G. The District Court Erred in Finding that the Balance of the Equities Favors a Preliminary Injunction.

To obtain a preliminary injunction, Plaintiffs must show both that the threatened injury outweighs any damage the injunction might cause the defendant and that issuance of the injunction will not be adverse to the public's interest. Here, the district court undervalued both the City's interests and the public interest.

First, the City has an exceptionally strong interest in the uniform enforcement of its criminal laws. *Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006) (collecting cases and noting that "the government has a strong

[8] At Coronado Park, eight individuals accepted the City's offer of storage for some belongings. After 90 days, none of this property had been retrieved. PA 243.

interest generally in the enforcement of its criminal laws"). This interest extends to enforcing criminal laws in a manner intended to prevent the development of an environment that fosters the commission of more serious crimes. As described above, before it was cleared in August 2023, the encampment at Coronado Park had become a hotbed of violent criminal activity and various other social ills. The City has a legitimate interest in employing its criminal laws to intercept the growth of encampments that, as experience has shown, are likely to result in an outsize amount of criminal activity beyond mere trespass and other undesirable side effects.[9]

The City has an equally significant interest in protecting its public spaces, such as parks, for their intended uses by all residents. *See, e.g., Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 289 (1984) (noting "the Government's substantial interest in maintaining the parks in the heart of the Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence. To permit camping would be totally inimical to these purposes.").

[9] For a fuller description of the dangers presented by encampments see Brief of California Governor Gavin Newsom as Amicus Curiae Supporting Petitioner, *City of Grants Pass v. Johnson*, available at https://www.supremecourt.gov/DocketPDF/23/23-175/280288/20230922163648635_Amicus%20Brief%20for%20Governor%20Newsom%20-%20Grants%20Pass_Final.pdf

The injunction renders the City powerless to protect that interest. Under the injunction, if an encampment of homeless individuals descends on a public park, as occurred with Coronado Park, the City will be powerless to disburse that encampment. The City cannot require the encampment occupants to relocate (even temporarily) for landscape maintenance, or to allow others to use the park for an event, or simple recreation. What is more, the City will be unable to impose any limitations on the amount or type of belongings the occupants of such an encampment are allowed to possess. *See, e.g.,* PA 242 (noting that one individual at Coronado Park maintained 15 shopping carts of belongings).

The City also has a strong interest in an efficient allocation of its limited municipal resources. If allowed to develop without limitation, encampments like those at Coronado Park and First Street & Indian School will require the City to dedicate an outsized portion of its law enforcement, sanitation, and social services resources to managing the corresponding issues that encampments present, as evidenced by the City's bi-weekly cleanouts of Coronado Park. The injunction likewise promises to put immense strain on the City's solid-waste resources. The preliminary injunction requires the City to store, and not destroy, any property it seizes in an encampment cleanout. This will require the City to not only allocate warehouse space for the safekeeping of such property, but also to hire additional staff to collect such property and maintain related records.

Finally, and perhaps most importantly, the City has a strong interest in its ability to develop and implement its own policy-based solutions to the crisis of homelessness. The preliminary injunction strips the City of many of these tools in favor of a judicially mandated protocol. By way of example, the cleanout of the encampments at Coronado Park and First & Indian School afforded the City the opportunity to engage with many occupants of those encampments and steer them toward many of the social services that the City provides, either directly or through contractors. Divested of ability to conduct outreach in connection with the cleanout of an encampment, the City will be substantially impaired in its efforts to implement policy-based solutions.

The City is not alone in its concern that judicially imposed restrictions hamper efforts to address homelessness. Municipal leaders across the country have expressed concerns that injunctions like this one have impaired their ability to implement policy-based solutions to homelessness. As the City and County of San Francisco explained in their Brief as Amicus Curiae in *Grants Pass*

> Because the district court has enjoined it from enforcing several state and local laws in reliance on the panel opinion below, the City [of San Francisco] has been unable to implement the considered policy decisions of its Mayor and local legislature; unable to enforce the will of San Francisco voters; unable to allow conscientious City employees to do their jobs; and unable to protect its public spaces.

> The result is that San Francisco's homelessness crisis has only seemed to worsen.[10]

And as the dissent in *Johnson* explained, the Eighth Amendment "does not empower [the judiciary] to displace state and local decisionmakers with our own enlightened view of how to address a public crisis over which we can claim neither expertise nor authority." *Johnson*, 72 F.4th at 928 (Collins, J., dissenting from denial of rehearing en banc).

Against these strong City interests, Plaintiffs assert a right to be free from violation of their constitutional rights. But this asserted interest is largely a strawman. As noted, the City's current practice is not to enforce criminal statutes against individuals merely for being homeless, and the City takes significant steps to ensure that belongings of homeless individuals are not seized or destroyed. The balance of the equities and the public interest thus weigh strongly against a preliminary injunction.

CONCLUSION

The injunction compels the City to resign virtually all of its outdoor public spaces for use as encampments, of the type seen at Coronado Park, for homeless individuals and their belongings and renders the City powerless to do anything

[10] Brief for Amici Curiae City and County of San Francisco and Mayor Breed in Support of Petitioner, *City of Grants Pass v. Johnson*, available at https://www.supremecourt.gov/DocketPDF/23/23-175/280445/20230925181510233_Brief.pdf

other than triage the resulting ills. The preliminary injunction is unsupported by the facts or applicable law and represents an extraordinary judicial preemption of the City's prerogative to enforce its laws, and bring to bear its own policy-based solution to the homeless crisis. This Court should stay implementation of the preliminary injunction and grant a Writ of Superintending Control vacating that injunction.

Dated: October 6, 2023

Respectfully submitted,

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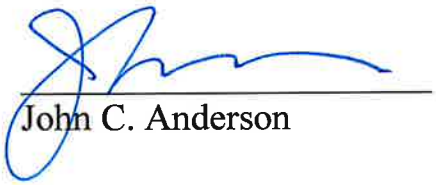
CERTIFICATE OF COMPLIANCE

I certify that this brief complies with type-volume, font size, and word limitations of the New Mexico Rules of Appellate Procedure, specifically Rule 12-504(G)(3) NMRA. The body of this brief employs 14-point Times New Roman font and contains 5,992 words, counted using Microsoft Office 365.

John C. Anderson

VERIFICATION

I, John C. Anderson, counsel for Petitioner, being duly sworn, upon my oath, state that I have read this Verified Petition for Writ of Superintending Control and Request for Stay, and that the factual statements it contains are true and correct to the best of my knowledge, information, and belief.



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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2023, a true and correct copy of the foregoing Emergency Verified Petition for Writ of Superintending Control and Request for Stay was served by email and U.S. Mail to Respondent and Real Parties in Interest:

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