IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CITY OF ALBUQUERQUE,

Petitioner,

v. **No. S-1-SC-40136**

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

Respondent,

and

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

Real Parties in Interest.

Second Judicial District Court, Bernalillo County
Case No. D-202-CV-2022-07652
The Honorable Joshua A. Allison, District Judge

BRIEF OF SAM BREGMAN, SECOND JUDICIAL DISTRICT ATTORNEY, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

STATEMENT REGARDING TRANSCRIPT CITATIONS

No transcript citations are included in this brief.

TABLE OF AUTHORITIES

New Mexico Decisions

Federal Decisions

Constitutional Provisions

Statutes

Rules

Other Sources

INTRODUCTION

Amicus Sam Bregman, in his official capacity as District Attorney of the Second Judicial District, Bernalillo County, comes before this Court as one among countless individuals who share the deeply-held sentiment that more must be done to address the complex challenges associated with homelessness. Amicus emphasizes, however, that disregarding the Rule of Law is not a solution.

Several aspects of the preliminary injunction at issue in this case do just that. For one, it: (a) erroneously twists Eighth Amendment protections against cruel and unusual punishment into a ban on the enforcement of generally applicable laws that set reasonable restrictions on the use of public lands, (b) bans such enforcement only against a subset of the population, and (c) absurdly decrees that one's mere subjective belief that one is a member of that immune subset of the population suffices to make that individual immune from enforcement.

Additionally, the district court erred in its application of the standards for issuance of a preliminary injunction. Further, the end result is a striking usurpation of constitutional and policymaking authority by the district court.

The injunction cannot stand. Amicus therefore submits this brief in support of Plaintiff City of Albuquerque's Petition for Writ of Superintending Control.[1]

[1] Rule 12-320 NMRA disclosure: Counsel for Amicus, John Kloss, Deputy District Attorney, authored this brief, did not make a monetary contribution intended to fund preparation of this brief, and is aware of no other party or individual doing so.

SUMMARY OF PROCEEDINGS

To avoid unnecessary repetition, Amicus offers this brief based on the background and summary of proceedings that City capably set forth in its 10-6-23 Petition under Rule 12-504 NMRA. **[PET 1-7]**

ARGUMENT

I. The preliminary injunction reflects several types of legal error.

A. Standard of Review for Preliminary Injunctions[2]

An appellate court reviews a trial court's decision regarding whether to grant injunctive relief for abuse of discretion. *Labalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314. A trial court may abuse its discretion by applying the incorrect standard for a preliminary injunction or incorrect substantive law, resting issuance of the injunction on clearly erroneous findings of fact, or applying the standards in a manner that results in an abuse of discretion. *Id.* ¶ 11. A trial court also abuses its discretion when it acts in an "obviously erroneous, arbitrary, or unwarranted manner," *State v. Johnson*, 2010-NMSC-016, ¶ 31, 148 N.M. 50, as well as when a ruling is "clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618.

[2] As to the standards for granting City's 10-6-23 Emergency Verified Petition for Writ of Superintending Control and Request for Stay, Amicus defers to the analysis capably set forth at pages 9-11 of City's Petition.

B. The injunction's prohibition on criminal enforcement rests on an erroneous interpretation and application of *Martin* and the Eighth Amendment.

The district court based its decision to grant the preliminary injunction in part on a conclusion that Eighth Amendment protections against cruel and unusual punishment extend beyond punishment to protect against enforcement, and even the prospect of enforcement, of generally applicable criminal laws that regulate the use of public property – but only as to a subset of the population that subjectively self-identifies as involuntarily unhoused. **[MOO 1-3, 6-8, 18-19]**[3] For its analysis, the court relied largely on *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). **[MOO 1-3, 6-8, 18-19]** However, the district court's interpretation and application of *Martin* and the Eighth Amendment are flawed in several respects.

First, *Martin* merely stands for the narrow proposition that "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property." 920 F.3d at 617. In other words, if the government cannot offer an unhoused person indoor shelter, it cannot enforce an all-places or all-times criminal prohibition on sleeping outdoors. *See, e.g.*, Brief for California Governor Gavin Newsom as Amicus Curiae Supporting Petitioner at 4, *City of Grants Pass v. Johnson* (U.S., No. 23-175)

[3] Throughout this brief, citations and other references to "MOO" signify the district court's 9-21-23 "Memorandum Opinion and Order Granting in Part Plaintiff's Motion for a Preliminary Injunction" that is at issue in these proceedings.

(*response, due Nov 6, 2023, requested* Oct. 5, 2023). *Martin* does not stand for the proposition that either the Eighth Amendment or any other authority provides a basis for prohibiting state or local governments from any effort to regulate the time, place, and manner in which an individual (whether unhoused or not) may sleep (or do anything else) on public lands. *See* 920 F.3d at 617 n.8 ("Nor do we suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in a particular location might well be constitutionally permissible.").

Amicus pauses here momentarily to highlight for this Court that a more comprehensive understanding of the complex issues presented in this case, as well as of the massive scale of the problems that have resulted from *Martin* and its misapplication, may be obtained by review of the submissions to the United States Supreme Court's docket in *City of Grants Pass v. Johnson*, (U.S., No. 23-175). Twenty-four entities filed Amicus Curiae briefs – all in support of the petition. Amici in that action include, among others, the California State Association of Counties, the Goldwater Institute, the Speaker of the Arizona House of Representatives Ben Toma, California Governor Gavin Newsom, the City and County of San Francisco and Mayor Breed, the L.A. Alliance for Human Rights, the City of Phoenix, the City of Los Angeles, the International Municipal Lawyers'

Association, and the Criminal Justice Legal Foundation. Notably, many of those *Amici* point to fundamental flaws in *Martin*'s Eighth Amendment analysis, and several highlight that *Martin* is an outlier decision that reflects the view of a small minority of federal circuits and state courts of last resort. *See, e.g.*, *City of Grants Pass v. Johnson* (U.S., No. 23-175), Brief for California Governor Gavin Newsom, at 3-7; Brief for City and County of San Francisco and Mayor Breed, at 12-20.

In any event, notwithstanding the Ninth Circuit Court of Appeals' flawed interpretation of the Eighth Amendment in *Martin*, controlling precedent from the United States Supreme Court instructs that the Eighth Amendment's protections apply only after a defendant has been adjudged guilty of a criminal offense. *Ingraham v. Wright*, 430 U.S. 651, 671 (1977). New Mexico precedent recognizes the same limit on the scope of Eighth Amendment protections. *See, e.g., State v. Smallwood*, 1980-NMCA-037, ¶ 10, 94 N.M. 225 ("The 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."); *and see especially id.* ¶¶ 8-15 (explaining that federal Eighth Amendment jurisprudence supported reversal of district court's ruling that comparable cruel and unusual punishment protections under New Mexico Constitution provided a substantive defense to a crime).

There is, however, one exception to that limit to Eighth Amendment protections, but it does not save the analysis of the district court in this case. As explained by the United States Supreme Court, under that exception the Eighth Amendment forbids punishing a status such as narcotics addiction, though its protections do not reach so far as to protect *acts* beyond that mere status, such as *acts* involving narcotics. *Robinson v. California*, 370 U.S. 660, 664-68 (1962).

A subsequent opinion of the Court, *Powell v. Texas*, 392 U.S. 514 (1968), underscores that the *Robinson* exception is limited to status and that the Eighth Amendment does not preclude the imposition of criminal penalties "if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing." *Id.* at 531-37. Accordingly, the result in Powell was the rejection of a claim that Eighth Amendment protections against cruel and unusual punishment would not allow a conviction for being drunk in public. *Id.* at 531-37.

Robinson and Powell, as well as New Mexico precedent, make clear that the Eighth Amendment limits punishment for status, but does not reach so far as to protect against punishment for conduct that is, or arguably is, attributable to status. *See also, e.g.*, *State v. McCoy*, 1993-NMCA-064, ¶ 35, 116 N.M. 491, *rev'd on other grounds by State v. Hodge*, 1994-NMSC-087, 118 N.M. 410. It therefore follows that although the Eighth Amendment may protect against the criminalization of the *status* of being involuntarily unhoused, it does not protect

against the criminalization of acts in which one may engage as a result of being involuntarily unhoused. Consequently, the Eighth Amendment does not immunize an involuntarily unhoused individual from the reach of neutrally enforced criminal statutes that place reasonable restrictions on what an individual may do, or when an individual may be, on lands allocated for public use.

The district court in this case, relying largely on *Martin*, concluded otherwise. As a result, the district court erred by incorrectly applying *Martin* and substantive Eighth Amendment law. *Labalbo*, 1993-NMCA-010, ¶ 11.

C. The district court's conclusion that the requirements for the issuance of a preliminary injunction were satisfied is clearly erroneous.

As noted in City's Petition, **[PET 10-11]**, a preliminary injunction is an extraordinary remedy, it is the exception rather than the rule, and it may only be awarded upon a clear showing that the movant is entitled to such relief. *Springer v. Seventh Jud. Dist. Ct.*, 2023 U.S. Dist. LEXIS 168703, *12-13 (D.N.M. Sep. 21, 2023) (citations omitted). A plaintiff seeking a preliminary injunction must show 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, 1993-NMCA-010, ¶ 11. Preliminary injunctions that seek to alter the status quo by prohibiting government from enforcing its laws are particularly

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

1. *The district court erred in determining that Plaintiffs in the underlying action will suffer irreparable injury.*

As to the requirement that a plaintiff seeking a preliminary injunction must show, among other things, irreparable injury unless the injunction is granted, the district court's determination that this condition was satisfied, **[MOO 4 (¶¶ F-H), 16 (¶ 45)]**, is problematic for several reasons. First, the court's explanation for its conclusion that the irreparable harm requirement was met does not logically follow from the factual findings to which the court refers as part of that explanation.

The district court stated in the MOO that "[a]s set out in the factual findings, above, the actions of the City in seizing, and in many cases destroying, the property of homeless people causes them irreparable harm. They need their belongings to attempt to provide the most basic human need: shelter." **[*Id.* at 16 (¶ 45)]** The referenced factual findings, which appear earlier in the MOO, do include statements that "City's seizure and destruction of the property of homeless people *often* causes irreparable harm *to the homeless people whose property is unlawfully seized and unlawfully destroyed*," and that "a homeless person who is forced to relocate from one outdoor public space to another oftentimes loses personal belongings that are vital to a person's health and safety as a result." **[*Id.* at 4 (¶¶ F-**

H)] (emphasis added). And the MOO does include pages of discussion about individual property rights, due process, constitutional protections against unreasonable seizures, and even some conclusions that City in some instances has unlawfully seized and/or destroyed the property of some homeless individuals. **[*Id.* at 4-16]**

But even assuming for present purposes that all of that is true, the MOO leaves unclear specifically how City's neutral enforcement of generally applicable statutes and ordinances that place reasonable regulations on the time and manner of the use of public space *actually* has resulted or will result in unlawful seizures of property, and/or *actually* has caused or will cause irreparable harm to any of the underlying plaintiffs, any putative underlying plaintiff class member, or any homeless person, generally.

Adding to that problem, among the findings on which the district court based its irreparable harm conclusion is a finding – expressly cited by the court as an example of irreparable harm in this case – that "arrests for these violations regularly result in missed court appearances and the resulting issuance of bench warrants for the homeless person's failure to appear." **[*Id.* at 4 (¶ F)]** However, at the risk of overstating the obvious, an individual's failure to appear at court, and the bench warrant that a court may lawfully issue as a result, are not the stuff of which irreparable harm is made.

Perhaps more importantly, the district court's analysis fails to recognize numerous features of the criminal justice system that foreclose the conclusion that enforcement of the statutes or ordinances at issue causes Plaintiffs in the underlying action future irreparable harm or deprives them of due process of law. Indeed, our criminal justice system affords many processes by which individuals against whom charges are brought under a statute or ordinance can properly challenge the constitutionality or lawfulness of their prosecution and/or conviction, invoke a determination that they have no criminal liability for the alleged offense, and dispute the lawfulness of a search or seizure as well as obtain an order from the court for the return of seized property. Such options abound.

For example, defendants can avail themselves of such remedies pretrial. *See, e.g.*, Rule 5-120(D)(1) NMRA (allowing for motions to dismiss in district court); Rule 7-304(D) NMRA (same in Metropolitan Court); Rule 5-601(C) NMRA (providing that "[a]ny matter that is capable of determination without trial of the general issue, including defenses and objections, may be raised before trial by motion" in the district court); Rule 7-304(A) (same in Metropolitan Court); *State v. Foulenfont*, 1995-NMCA-028, ¶ 6, 119 N.M. 788 (instructing that prior to trial a defendant can get the court to decide purely legal matters and dismiss when appropriate); Rule 5-212(A-B) NMRA (providing that in the district court "[a] person aggrieved by a search and seizure may move for the return of the property

and to suppress its use as evidence" within a certain time frame prior to trial and, for good cause shown, even after that time frame); Rule 7-304(F) (same in Metropolitan Court).[4] They can also invoke such remedies post-conviction and prior to completion of sentence. *See, e.g.*, N.M. Const. art. VI, § 2 (a party aggrieved by a judgment has the absolute right to appeal); Rule 5-702 NMRA (referring to right of defendant to appeal judgment of district court); Rule 7-702 NMRA (same as to Metropolitan Court judgements); Rule 5-802 NMRA (setting forth procedure for challenging conviction via habeas corpus proceedings).

And critically, in light of the district court's central ruling that one's status of being involuntarily unhoused should result in exemption from criminal liability under use-of-outdoor-public-space laws due to necessity, potential defendants in prosecutions under the laws implicated in this case have, under well-established principles of criminal law, a particularly relevant remedy that can and, if invoked at all, *must* be invoked at trial – the defense of necessity. UJI-5130 NMRA sets

[4] Individuals have additional protection from the unlawful taking and disposal of property by law enforcement under the separate statutory requirement that "[a] peace officer shall immediately inventory and record any personal property that comes into his possession and is taken under authority of law or is left in his possession or in the possession of the state, county or municipality." NMSA 1978, Section 29-1-13 (1983). In this context, "peace officer" means "any full-time employee of a police or sheriff's department that is part of or administered by the state or any political subdivision of the state and which employee is responsible for the prevention and detection of crime and the enforcement of the penal . . . laws of the state." *Id.*

forth the uniform jury instruction for the defense of duress, which is a defense that may be invoked in non-homicide crimes. As explained in the Committee Commentary to UJI-5130, duress is an overarching concept that encompasses necessity, and such defenses spare a person from punishment "if he acted under threats or conditions that a person of ordinary firmness would have been unable to resist or if he reasonably believed that criminal action was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense." (Internal quotation marks and citation omitted).

As with the defense of duress, in criminal proceedings a defendant who wishes the fact finder to consider the defense of necessity must make a prima facie showing that he or she is entitled to that defense. *See State v Castrillo*, 1991-NMSC-096, ¶¶ 4, 6, n.2, 112 N.M. 766 (explaining that both duress and necessity are justification defenses, necessity requires pressure from physical or natural causes and, to warrant submission of such defenses to the jury, a defendant must make a prima facie showing of entitlement to such a defense); *see also* Albuquerque, N.M., Rev. Ordinances[5] § 12-1-5 ("In all prosecutions under the code in which the defense is based on an exception or exemption, the burden shall be on the defendant to present sufficient evidence to raise a reasonable doubt as to

[5] All references/citations in this brief to the City of Albuquerque's ordinances are to those in effect at the time this brief is filed.

such defense, and then the burden shall shift to the prosecution to prove the absence of the exception or exemption just as any other element of the offense."). Consequently, the district court erred for the additional reason that its ruling requires extra-judicial, pre-enforcement determination of whether a violator's qualification for the defense of necessity prohibits enforcement, even though settled principles of criminal law make clear that such questions must be resolved at trial by the fact finder, and only after a defendant makes a prima facie showing that he or she is entitled to assert such a defense. *See also Smallwood*, 1980-NMCA-037, ¶ 10 ("The 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."); *and see especially id.* ¶¶ 8-15 (explaining that federal Eighth Amendment jurisprudence supported reversal of district court's ruling that comparable cruel and unusual punishment protections under New Mexico Constitution provided a substantive defense to a crime).

The district court's MOO reflects no consideration, mention, or even awareness of how established criminal law practice addresses these topics, much less any mention of how any plaintiff in the underlying action found or would find any such remedies that the justice system offers insufficient or even attempted to utilize them. This, however, comes as no surprise given that, prior to issuing the

MOO, the district court, over City's objection, refused to hold an evidentiary hearing. **[PET 5, n.3]**

In short, it was clearly erroneous for the district court to base its preliminary injunction on a conclusion that City's neutral enforcement – or even threatened enforcement – of generally applicable restrictions that regulate the time and manner of the use of public space establishes "irreparable harm."

2. *The district court erred in concluding that issuance of the injunction will not be adverse to the public's interest.*

The district court also erred in concluding that issuance of the preliminary injunction will not be adverse to the public's interest. The preliminary injunction prohibits City from, among other things, enforcing – except in a very limited subset of potential enforcement scenarios – "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." **[MOO 1-2, 17-19]** As a prefatory matter, the preliminary injunction fails for impracticability as it does not specify a single statute or ordinance as to which it prohibits enforcement. *See, e.g.*, *Insure N.M., LLC v. McGonigle*, 2000-NMCA-018, ¶ 6, 128 N.M. 611 (stating that in determining whether to grant injunctive relief, a trial court must consider a number of factors and "balance the equities and hardships," and that among these factors is "the practicability of granting and enforcing the order").

But assuming for present purposes that it is permissible for the injunction to require that those potentially affected by it resort to guesswork to avoid its prohibitions, a brief look at one law that *may* logically be implicated by the injunction, NMSA 1978, Section 30-14-1(C) (1995),[6] helps to illustrate some significant adverse effects on the public interest from the injunction that the district court failed to recognize. That statute states that one way to commit criminal trespass is by "knowingly entering or remaining upon lands owned, operated or controlled by the state or any of its political subdivisions knowing that consent to enter or remain is denied or withdrawn by the custodian thereof." *Id.*

From the plain language of the preliminary injunction as well as Section 30-14-1(C), it follows that the injunction eviscerates the ability of the City of Albuquerque to enforce the trespass statute at *any* time and under any circumstances against *any* involuntarily unhoused individual who has entered *any* public outdoor land owned, operated or controlled by the state or any of its subdivisions and then has refused to leave even if he or she knows that the custodian of that property has denied or withdrawn consent for the individual to enter or remain on that land. This would absurdly include virtually limitless

[6] The 12-19-22 Class Action Complaint in the underlying action sets forth, at page 13, at least eight statutes and ordinances that underlying Plaintiffs understandably believed should fall within the scope of the preliminary injunction's prohibitions. But, alas, the MOO does not identify those laws, or any other laws, as laws that are subject to the enforcement prohibition imposed by the injunction.

scenarios in which City would be unable to remove an individual from a public space, even when City seeks to do so for health or safety reasons, and even in circumstances where public space is allocated for a purpose inconsistent with that individual's refusal to leave. *See generally* Albuquerque, N.M., Rev. Ordinances 10-1-1-1 (defining "park" as "[a]ny area of land so designated and maintained by the city as a place of beauty or recreation or both"); *id.* (defining special event as "[a]ny privately or publicly sponsored advertised activity at a city park or other facility operated by the Parks and Recreation Department, to which the general public is invited for the purpose of recreation, culture or entertainment, and at which food or beverages may be available"); *id.* at 10-1-1-7 ("Recreational Activities" – "Picnic Areas and Use") ("No person in a park shall prevent any person from using any park, or any of its facilities, or interfere with any use already engaged in that is in compliance with §§ 10-1-1-1 et seq. and the rules applicable to such use."); *id.* at 10-1-1-10 (outlining park operating policy, including designated hours parks are open for public use, and providing that "[n]o person shall remain in, occupy, or use any park in the city which is closed to public use unless that person has been authorized to be present by the Mayor or unless that person is present to enforce this ordinance or other laws or ordinances or to irrigate park lands or service and maintain facilities"). Examples of just a few public spaces at which it appears the preliminary injunction would prohibit

enforcement of reasonable regulations regarding the time and manner of use of the public space include the Zoo, Aquatic Park, and Botanical Garden (§§ 10-2-1-1 through 10-2-4-4); any outdoor areas within public swim facilities (§§ 10-3-1-1 through 10-3-5-99); any outdoor spaces at museums, science, and art centers (§§ 10-4-1-1 through 10-4-1-9); any outdoor facilities at the Anderson/Abruzzo Albuquerque International Balloon Museum (§§ 10-4-5-1 through 10-4-5-4); and "drainage channels, arroyos, and irrigation channels" – in which City, for safety and other reasons, prohibits unauthorized presence (§ 12-2-30).

In light of these problems (which, again, are only a handful of examples), the explanation the district court offered in the MOO makes clear that the district court did not give sufficient consideration to the scope of the damage the injunction would cause and how adverse the injunction would be to the public's interest. For these additional reasons, the district court erred in granting the preliminary injunction. *Labalbo*, 1993-NMCA-010, ¶ 11 (requiring for the issuance of an injunction a showing that the injunction is not adverse to the public interest); *Johnson*, 2010-NMSC-016, ¶ 31 (a trial court abuses its discretion when it acts in an "obviously erroneous, arbitrary, or unwarranted manner"); *Sims*, 1996-NMSC-078, ¶ 65 (abuse of discretion occurs when a ruling is "clearly contrary to the logical conclusions demanded by the facts and circumstances of the case").

3. The district court erred in concluding that the threatened injury outweighs any damage the injunction might cause.

As previously noted, the requirements for the issuance of a preliminary injunction include a requirement that the threatened injury outweighs any damage the injunction may cause the defendant. *Labalbo*, 1993-NMCA-010, ¶ 11. Under circumstances such as those in this case, a heightened showing regarding the balance-of-harms factors is required. *Free the Nipple*, 916 F.3d at 797.

In the MOO, the district court devoted only ten lines to explaining the harm-balancing portion of its analysis. **[MOO 17 (¶¶ 47-48)]** The first five of those lines merely recite the legal standard. **[*Id.*]** The remaining five state:

> In balancing these harms – those of the members of the putative class of homeless people as compared to those of the public, in general – and solely for the purpose of fashioning a suitable preliminary injunction, the Court concludes that the presence of homeless people in outdoor public spaces cannot place themselves or others at risk of immediate harm, even if there are inadequate indoor places for homeless people to be.

[*Id.*] That explanation in itself lacks coherence and, in any event, it fails to reflect any principled analysis of the balance-of-harms question. For that reason alone, the district court erred in issuing the preliminary injunction. *Labalbo*, 1993-NMCA-010, ¶ 11; *Free the Nipple*, 916 F.3d at 797. But there is a myriad of other defects in the district court's harm-balancing analysis that Amicus must call to this Court's attention.

First, the district court's analysis reflects a massive and improper judicial intrusion on the authority of the executive and legislative branches of government. Article III, Section 1 of the New Mexico Constitution states:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

"This provision articulates one of the cornerstones of democratic government: that the accumulation of too much power within one branch poses a threat to liberty." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 20, 125 N.M. 343. An unconstitutional infringement occurs when the action by one branch prevents another from accomplishing its constitutionally assigned function. *State ex rel. New Mexico Judicial Standards Com'n v. Espinosa*, 2003-NMSC-017, ¶ 12, 134 N.M. 59 (quotation marks and citations omitted). In several ways, the MOO's enforcement prohibition takes a wrecking ball to the venerable separation of powers principles that form the cornerstones of our government.

The MOO's enforcement prohibition improperly impedes the law enforcement functions of members of the executive branch such as the District Attorney and other law enforcement officers. For example, this Court has explained: "[A] district attorney has broad discretion in determining what charges to bring and what people to prosecute in the best interest of the people of the State

of New Mexico. Accordingly, courts must be wary not to infringe unnecessarily on the broad charging authority of district attorneys." *State v. Surratt*, 2016-NMSC-004, ¶ 14 (internal quotation marks and citations omitted); *see also United States v. Robertson*, 45 F.3d 1423, 1437 (10th Cir. 1995) (explaining that case law "clearly establishes that separation of powers mandates the judiciary remain independent of executive affairs and vice versa" and that charging decisions "are primarily a matter of discretion for the prosecution, the representatives of the executive branch of government, who are not mere servants of the judiciary" (quotation marks and citation omitted)). Relatedly,

> [i]t is . . . the duty of every sheriff, deputy sheriff, constable and every other peace officer to investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware, and it is also declared the duty of every such officer to diligently file a complaint or information, if the circumstances are such as to indicate to a reasonably prudent person that such action should be taken.

NMSA 1978, Section 29-1-1 (1979). Similarly, the MOO's enforcement prohibition improperly impedes the function of the legislative branch. *See Morris v Brandenburg*, 2016-NMSC-027, ¶ 45 (stating that the Legislature can, under its police power, "provide reasonable regulations for the use and enjoyment of property" when such regulations are necessary "for the common good and the protection of others" (citation omitted)).

Lastly, the MOO reflects a striking usurpation of policymaking authority from the City of Albuquerque in that it mandates that City surrender the vast majority of its outdoor public spaces to occupation by unhoused individuals – and the teachings of *City of Grants Pass* and *Martin* make clear that the consequences for public health and safety will be devastating. The Petition and the Amicus briefs from the *City of Grants Pass* litigation now before the United States Supreme Court collectively and consistently explain the disastrous impact that *Martin* and analogous decisions have had on the ability of localities to implement policy-based solutions to address problems associated with homelessness and homeless encampments in public spaces.

The *City of Grants Pass* filings also describe a resulting proliferation of homeless encampments on public lands as authorities have become powerless to disperse them, and a resulting downspiral into jaw-dropping, heart-wrenching conditions within the encampments and the areas surrounding them. The localities report now being hamstrung in their ability to address conditions associated with the growing encampments such as: (1) drug overdoses (from fentanyl, meth, and heroin, among other drugs); (2) deaths from hypothermia and excessive heat; (3) a high volume of calls for medical help; (4) increasingly volatile behavior; (5) murders; (6) sexual assaults; (7) subjugation to sex work and physical abuse; (8) fights, assaults, thefts, and armed robberies; (9) fires; (10) filthy and unsanitary

living conditions, including massive amounts of debris such as needles and human excrement polluting the environment; (11) heightened risks of disease transmission, and a resurgence of "medieval" diseases such as typhus and tuberculosis; and (12) for areas surrounding the encampments – increased crime, the flight of businesses, decreasing property values, and an overall loss of habitability. Petition at 16, 31-34, *City of Grants Pass v. Johnson* (U.S., No. 23-175); Brief for California Governor Gavin Newsom as Amicus Curiae Supporting Petitioner at 8-9, *City of Grants Pass v. Johnson* (U.S., No. 23-175).

Although crime affects everyone whether housed or unhoused, Amicus is painfully aware that the homeless that the MOO seeks to protect are a population that is vulnerable to criminal victimization. For example, Amicus knows of the following pending/recent cases in the Second Judicial District that involve victims who identify as homeless:

- D-202-CR-2023-01186: 2 counts Agg. Battery (Deadly Weapon) (Victim M.D.)
- D-202-CR-2022-03057: 1 count Agg. Battery (Deadly Weapon) (Victim L.M.)
- D-202-CR-2023-00961; D-202-CR-2023-00960: First-Degree Murder; Conspiracy to Commit First-degree Murder; Agg. Assault (Deadly Weapon) (Victim M.G.)
- D-202-CR-2022-03053: Second-Degree Murder (Victim S.G.)
- D-202-CR-2022-00375: 11 counts Agg. Battery (Deadly Weapon) (upon ten apparently homeless victims)

- D-202-CR-2022-02902: First-Degree Murder (Victim K.W.)
- T-4-FR-2022-003698: First-degree Murder; Tampering with Evidence (at Coronado Park, Albuquerque; Victim A.A.)
- D-202-JR-2023-00245; D-202-JR-2023-00247; D-202-JR-2023-00248; D-202-JR-2023-00249 (Four Defendants): 2 Counts Agg. Battery (Deadly Weapon) (Victim T.M.)

The unhoused and housed alike must not be subjected to additional criminal victimization due to the adverse effect the MOO will have on public safety.

CONCLUSION

The City of Albuquerque already faces many challenges in addressing issues surrounding homelessness. *See, e.g.*, Mencinger, Alaina, *This year's Point-In-Time count identified 2,394 people experiencing homelessness in Albuquerque. Organizers say that could be an undercount.* Albuquerque Journal, Oct. 4, 2023, *available at* https://www.abqjournal.com/this-years-point-in-time-count-identified-2-394-people-experiencing-homelessness-in-albuquerque-organizers/article_072d451c-630d-11ee-8b29-17db0ad4a084.html (last visited Oct. 5, 2023). The lessons of *Martin* and *City of Grants Pass* teach that a preliminary injunction like the one in this case will significantly *worsen* City's ability to implement policy-based choices to address homelessness and to regulate the use of public spaces. For this reason and the many reasons set forth above, Amicus respectfully urges this Court to grant Plaintiff City of Albuquerque's Petition and Request for Stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 10th day of October, 2023 I filed this document electronically through the Odyssey/E-File & Serve System, and either through that system or by other means, I caused service of this document to be made upon the following parties at the service addresses indicated below:

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