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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HOUSING IS A HUMAN RIGHT ORANGE COUNTY, et al., Plaintiffs, v. THE COUNTY OF ORANGE, et al., Defendants.	Case No. 8:19-cv-00388-PA Honorable Percy Anderson **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANTS CITY OF ALISO VIEJO, CITY OF SAN JUAN CAPISTRANO, AND CITY OF SAN CLEMENTE TO DISMISS THE AMENDED COMPLAINT**

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INTRODUCTION

The social problems posed by homelessness in California are very serious. But the legal claims pressed in this action are not. Plaintiffs—a group of homeless individuals and advocacy groups—invoke a wide array of constitutional and statutory provisions under both federal and state law, stretching to find some way to inject the courts into this thorny issue. All of their efforts fail. As to the Cities of San Juan Capistrano, Aliso Viejo, and San Clemente ("the Cities"), Plaintiffs state no legally viable claims, and those Defendants must accordingly be dismissed.

First, at the core of Plaintiffs' lawsuit are their federal constitutional claims, alleging that the Cities have threatened to cite or arrest homeless people for sleeping in public despite their lack of any lawful, available alternative. But as to two of the Cities, none of the Plaintiffs has Article III standing, because they do not live in those Cities, and are not otherwise injured by the alleged conduct. Two Plaintiffs do allege that they live in the third City—San Clemente—but their allegations do not state a claim for relief. Since March 2019, San Clemente's municipal code has made clear that no categorical prohibition on sleeping in public will be enforced against indigent homeless people. There is thus no basis for injunctive relief against San Clemente, because the City's current policy is constitutional, and imposes no injury on Plaintiffs. Of course, had Plaintiffs been cited or arrested before March 2019, in violation of the Eighth Amendment, they could theoretically seek damages for those violations, but Plaintiffs do not allege any such past citations or arrests.

Second, Plaintiffs assert claims for disability discrimination under both federal and state law. Their Amended Complaint, however, provides absolutely no factual content for these claims. It does not identify the municipal programs that allegedly discriminate based on disability, or explain how they do so. Nor do Plaintiffs allege any concrete injury tethered to the discrimination claims. The Amended Complaint's conclusory recitation of the elements of the causes of action is entirely insufficient to plead a legally viable claim under these statutes.

Third, Plaintiffs make a host of allegations about the Cities' non-compliance with California's Housing Accountability Act. But Plaintiffs do not proceed directly under that statute, presumably because any such claims would (among other defects) be time-barred. Instead, Plaintiffs invoke California's *tort claims statute*, asserting liability based on the Cities' alleged failure to comply with purportedly mandatory duties under the Housing Accountability Act. That work-around does not state a claim, either. Contrary to Plaintiffs' assertions, the Housing Accountability Act does not require cities to affirmatively *provide* shelter; it simply requires that they *assess* their need for shelter. That is not the type of non-discretionary, specific, ministerial duty that could give rise to public-entity liability under the California Tort Claims Act. Nor is the alleged violation of that duty a proximate cause of any cognizable injuries to Plaintiffs under the Act.

Finally, one individual Plaintiff (Darren James) pursues a constitutional due-process claim against San Clemente, for allegedly seizing and destroying his personal property. Yet the Amended Complaint does not include plausible factual allegations to support an inference that the City took his property. And even if a rogue municipal employee had done so, the City would not bear liability for his actions, because official policy (reflected in the municipal code) is to the contrary.

SUMMARY OF COMPLAINT

Plaintiffs in this action are three individuals as well as three advocacy groups. The individual Plaintiffs allege that they are disabled and homeless. Duane Nichols and Darren James reside in San Clemente, and Bruce Stovall lives in Irvine. *See* Dkt. 17 ("Am. Compl.") ¶¶ 86-95. Nichols and James allege that law enforcement officers in San Clemente have threatened to arrest them for sleeping on public property, but that no shelter space is available. Am. Compl. ¶¶ 89-90, 92. James also alleges that, in February 2019, his personal belongings "were taken from the location where he left them daily" and that he was told by an unidentified person that "the City did not retain the property." Am. Compl. ¶ 91.

The organizational Plaintiffs are Housing Is a Human Right Orange County ("HHROC"), Orange County Catholic Worker ("OCCW"), and Emergency Shelter Coalition of San Clemente ("ESC"). HHROC purports to be "a coalition of entities and individuals working together to achieve supportive, affordable, and permanent housing for homeless individuals in Orange County." Am. Compl. ¶ 80. It alleges that "[b]ecause of the lack of adequate shelter for people experiencing homelessness in Orange County," HHROC "is required to shift and expend resources to providing immediate direct services," like providing food to the homeless. Am. Compl. ¶ 81. OCCW alleges that it offers "meals, shelter, food, clothing, showers, and emergency assistance to homeless persons throughout the area." Am. Compl. ¶ 82. Finally, ESC alleges that it seeks "to establish a year-round emergency shelter and resource center in San Clemente," and also "provides assistance" to homeless individuals in "almost every city in South County." Am. Compl. ¶ 83.

The Amended Complaint asserts nine counts against six Defendants (Orange County and five Cities within it). Its counts fall into several categories. *First*, Counts 1-3 are federal constitutional claims under the First, Fourth, Eighth, and Fourteenth Amendments, all premised on the allegation that Defendants threaten to cite or arrest homeless individuals for sleeping in public, despite a lack of adequate shelters. Am. Compl. ¶¶ 107-121. *Second*, Counts 5 and 8 assert that Defendants have "subjected the Plaintiffs ... to discrimination based on their disability," in violation of federal and state law. Am. Compl. ¶¶ 129-134, 146-150. *Third*, through Count 4, Plaintiffs seek to impose tort liability for violation of the California Housing Accountability Act, which requires each city to adopt a "housing element" that evaluates its need for shelters. Am. Compl. ¶¶ 48-54, 122-128. *Fourth*, Count 7 asserts that San Clemente destroyed Plaintiff James' property without due process. Am. Compl. ¶¶ 140-145. *Finally*, Counts 6 and 9 are derivative of the other counts; the former by invoking the Bane Act (which forbids coercive interference in constitutional rights), and the latter by seeking declaratory and injunctive relief. Am. Compl. ¶¶ 135-139, 151-157.

LEGAL STANDARD

The Cities move to dismiss the Amended Complaint in part under Federal Rule of Civil Procedure 12(b)(1) due to lack of standing, and in part under Federal Rule of Civil Procedure 12(b)(6) due to failure to state a claim.

As to the former, lack of standing is "properly raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1)," because standing "pertain[s] to a federal court's subject-matter jurisdiction under Article III." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). To establish Article III standing, a plaintiff must show "an injury in fact" that is "fairly traceable to the challenged conduct of the defendant" and "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To seek prospective relief, a plaintiff must demonstrate a "sufficiently imminent" threat of impending injury from the defendant. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). "The party asserting federal subject matter jurisdiction bears the burden of proving its existence." *Chandler v. State Farm Mut. Auto Ins. Co.*, 596 F. Supp. 2d 1314, 1322 (C.D. Cal. 2008). But this Court must "accept as true all material allegations in the complaint." *Id.*

As to the Rule 12(b)(6) motion, the Court should dismiss if there is "either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973, 976 (C.D. Cal. 2013). In evaluating the sufficiency of the allegations, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and "labels and conclusions" too are discounted. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, a complaint overcomes a motion to dismiss only if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level."); *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1134, 1137 (C.D. Cal. 2010) (outlining *Iqbal* pleading standard).

ARGUMENT

I. PLAINTIFFS DO NOT PLEAD VIABLE CONSTITUTIONAL CLAIMS AGAINST SAN JUAN CAPISTRANO, ALISO VIEJO, OR SAN CLEMENTE (COUNTS 1-3)

At the heart of Plaintiffs' Amended Complaint are their federal constitutional claims, building off of the Ninth Circuit's recent decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). As to two of the Cities, however, Plaintiffs lack Article III standing to pursue these claims: None of the individual homeless Plaintiffs reside in these Cities, and the organizational Plaintiffs do not allege any cognizable injury from the Cities' alleged threats to cite or arrest homeless people. Two individual Plaintiffs do adequately allege a basis for standing to sue the City of San Clemente, but their allegations do not make out an entitlement to substantive relief.[1]

A. Plaintiffs Lack Standing To Sue Two of the Cities

"Article III of the Constitution empowers [courts] to adjudicate only live cases or controversies, not to issue advisory opinions or to declare rights in hypothetical cases." *Clark v. City of Seattle*, 899 F.3d 802, 808 (9th Cir. 2018). Here, Plaintiffs fail to establish that they have Article III standing to sue San Juan Capistrano or Aliso Viejo for Counts 1-3. All three claims derive from the Cities' alleged practice of ordering homeless individuals to leave (or to cease sleeping in) public places—but no Plaintiff has alleged an injury from that practice that is traceable to Aliso Viejo or San Juan Capistrano. *See Spokeo*, 136 S. Ct. at 1547.

[1] Counts 1-3 assert the constitutional claims. Counts 4 and 6 assert derivative state-law claims premised on the alleged violation of constitutional rights. Am. Compl. ¶¶ 122-128 (state tort claim based in part on violation of constitutional duties); Am. Compl. ¶¶ 135-139 (claim under California's Bane Act for interference with constitutional rights). Those derivative claims fail for the same reasons as the principal claims. They also fail on their own terms. "General constitutional provisions ... do not create an affirmative mandatory duty" that triggers liability under Govt. Code § 815.6, the basis of Count 4. *Rodriguez v. City of L.A.*, No. 11-1135, 2015 WL 13260395, at *16 (C.D. Cal. May 8, 2015); *see also McKibben v. McMahon*, No. 14-2171, 2015 WL 10382396, at *6-7 (C.D. Cal. Apr. 17, 2015) (explaining that contrary rule would improperly "turn [§] 815.6 into a general civil rights statute"). As to Count 6, neither the arrest of homeless persons nor the threat of such arrest satisfies the "coercion" element of the Bane Act, even if the arrest would violate the Constitution. *Venice Justice Comm. v. City of L.A.*, 205 F. Supp. 3d 1116, 1127-28 (C.D. Cal. 2016); *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 69-70 (Cal. Ct. App. 2015).

To start, no individual Plaintiff alleges that he has suffered past injury—or will imminently suffer a future injury—traceable to San Juan Capistrano or Aliso Viejo. Duane Nichols and Darren James are homeless in San Clemente. Am. Compl. ¶¶ 86-87, 90. Bruce Stovall "sleeps outdoors in Irvine." Am. Compl. ¶ 93. None of the three alleges *anything* as to San Juan Capistrano or Aliso Viejo. That is, none of the three individual Plaintiffs alleges that he has been homeless in those cities, been cited or arrested in those cities, been asked to leave public places in those cities, or for that matter ever *visited* those cities. Nor do any of these Plaintiffs allege that they *intend* to visit San Juan Capistrano or Aliso Viejo in the future. *Cf. Martin*, 920 F.3d at 610 (plaintiff had standing to challenge anti-camping ordinance as he "still visits Boise several times a year"). The individual Plaintiffs have thus alleged no past or future injury traceable to San Juan Capistrano or Aliso Viejo, and so cannot maintain suit against them. *Bell v. City of Boise*, 709 F.3d 890, 893 n.3 (9th Cir. 2013) (dismissing analogous claims of plaintiff who had not been cited or arrested by Boise).

The three organizational Plaintiffs do not have standing to pursue these claims, either. An organization suing on its own behalf can establish an injury, sufficient for Article III purposes, when it has suffered "both a diversion of its resources and a frustration of its mission" as a result of the defendant's challenged conduct. *See Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)). But an organization "cannot manufacture the injury by ... simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). Rather, the organization "must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Id.*[2]

[2] Although the organizational plaintiffs also attempt to invoke "taxpayer standing" under California law (Am. Compl. ¶ 157), "[a] party seeking to commence suit in federal court must meet the stricter federal standing requirements of Article III." *Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001).

Two of the organizational Plaintiffs—OCCW and ESC—do not even purport to allege any diversion of their resources or frustration of their mission traceable to the Cities. Both organizations allege that they provide "emergency shelter" to people without shelter options or who are "experiencing homelessness." Am. Compl. ¶¶ 82-83. But neither entity alleges that the Cities' conduct has caused them to divert any resources from this purpose. Instead, their response to the Cities' alleged failure to provide housing has been to *continue* to provide the services that form the core of their mission. That does not confer standing. *See Lake Forest*, 624 F.3d at 1088.

The third organizational Plaintiff—HHROC—does allege that, because of "the lack of adequate shelter," it has "shift[ed] and expend[ed] resources" away "from its primary focus of achieving supportive, affordable and permanent housing" for the homeless, toward providing them with "direct services" (such as food and clothing). Am. Compl. ¶ 81. Even if that conferred standing on HHROC to challenge the Cities' failure to provide "adequate shelter"—since it is the alleged lack of shelter that has caused HHROC to divert resources—it is axiomatic that standing must be established for *each claim*. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351-52 (2006); *Hoffman v. Blattner Energy, Inc.*, 315 F.R.D. 324, 333 (C.D. Cal. 2016). HHROC makes no allegation of any injury that is traceable to the distinct conduct that Counts 1-3 challenge. That is, HHROC does not allege diversion of resources flowing from the Cities' alleged threats to cite or arrest individuals for sleeping or being present in public. Nor would any such allegation be plausible: The alleged threats have no effect on HHROC or its work. Thus, HHROC too lacks standing for these counts.[3]

[3] One paragraph of Count 3 alleges that the Cities' failure to provide shelter for the homeless population "constitutes a state-created danger," and thus violates the Due Process Clause. Am. Compl. ¶ 120. HHROC may have standing to pursue this theory, but it fails on the merits as a matter of law. The Complaint includes no plausible allegation that the Cities engaged in "affirmative conduct" that placed the homeless in danger. *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000). Indeed, the "failure ... to provide for the needs" of the homeless (Am. Compl. ¶ 120) is a classic *omission*, not an affirmative act. *Accord Martin*, 920 F.3d at 617 (making clear that court was not requiring cities to "provide sufficient shelter for the homeless"); *see also Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 433 (N.D. Cal. 2017) (dismissing similar state-created danger claim by homeless plaintiffs).

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B. There Are No Viable Claims Against San Clemente

Two individual plaintiffs—Nichols and James—have alleged facts giving rise to standing to sue San Clemente, because they allege that they are homeless in that city, and have been threatened with arrest or citation for sleeping in public places. Am. Compl. ¶¶ 86-90.[4] But their constitutional claims fail on the merits as a matter of law. They have no entitlement to injunctive relief, as the City's current ordinances *authorize* camping in public, and are perfectly constitutional. Nor do they have any right to retrospective monetary relief, because they do not allege that they were ever actually cited or arrested in contravention of the Constitution.

1. Plaintiffs' claims for injunctive relief against the City must be dismissed for a simple reason: Since March 19, 2019, the City's official ordinances have made clear that homeless individuals are *not* forbidden to sleep anywhere in public. Those ordinances fully comply with the Constitution and the Ninth Circuit's decision in *Martin*. There is therefore neither a need nor a basis to enjoin the City.

Martin involved a Boise ordinance that prohibited using the streets, sidewalks, parks, or other public places for sleeping "at any time." 920 F.3d at 603 (quoting Boise City Code § 9-10-02). The Ninth Circuit invalidated the ordinance, reasoning that the Eighth Amendment forbids the state to criminalize conduct that a person "is powerless to change." *Id.* at 616 (quoting *Powell v. Texas*, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting)). "[T]he Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Id.* (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006)). Based on that principle, *Martin* reasoned that a city cannot criminalize "sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Id.*

[4] San Clemente actually has reason to believe that both Nichols and James are no longer homeless—or, at least, are no longer without the option of housing—and therefore no longer have standing to pursue their claims for prospective relief. But because this lack of standing is not apparent from the face of the Amended Complaint, San Clemente will defer pressing that point until a later stage of the litigation, if it becomes necessary.

San Clemente has—at all relevant times—had a general anti-camping law that declares camping on any city property "unlawful." San Clemente Municipal Code ("SCMC") § 8.86.010.[5] Since March 2019, however, the City has supplemented this general anti-camping rule with ordinances that ensure compliance with *Martin*.

To start, on March 19, 2019, the San Clemente Council adopted an ordinance that codified *Martin* and declared that, absent "exigent circumstances relating to immediate threats to the public health, safety, or welfare," the City would not enforce its anti-camping laws against homeless persons if "no alternative shelter is available." SCMC § 8.86.040.[6] Then, on May 21, 2019, the City Council enacted an Urgency Ordinance authorizing homeless persons in San Clemente to lawfully camp in a designated zone on City property. *See* San Clemente Ord. No. 1673, § 4.[7] Because homeless persons in the City now have a readily available place to lawfully camp and sleep (on public property), the Ordinance declares that the City's general anti-camping rule may now be enforced as usual outside the designated camping zone. *Id*. § 3.

The City's current regime fully complies with the Constitution. *Martin* did not hold that cities must "allow anyone who wishes to sit, lie, or sleep on the streets ... *at any time and at any place*." 920 F.3d at 617 (emphasis added) (quoting *Jones*, 444 F.3d at 1138). Rather, only enforcement of anti-camping laws "at all times and places" raises constitutional problems, because that categorical prohibition punishes the homeless for "involuntary," "unavoidable" behavior. *Jones*, 444 F.3d at 1138. "As long as the homeless plaintiffs do not have *a single place where they can lawfully be*, the challenged ordinances ... punish them for something for which they may not be convicted under the Eighth Amendment." *Martin*, 920 F.3d at 617 (emphasis

[5] A true and correct copy of this ordinance is attached as Exhibit 1 to the accompanying Request for Judicial Notice ("RJN").

[6] A true and correct copy of this ordinance is attached as Exhibit 2 to the RJN.

[7] The Urgency Ordinance has yet to be formally codified, but it is available to the public, and the Court may take judicial notice of it. *See N. Cty. Community Alliance, Inc. v. Salazar*, 573 F.3d 738, 746 n.1. (9th Cir. 2009). *See* RJN, Ex. 3.

added) (quoting *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992)). Accordingly, "an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible." *Id.* at 617 n.8.

Under the Urgency Ordinance, camping on public land in San Clemente is not forbidden "at all times and places," *Jones*, 444 F.3d at 1138, or "in *all* public spaces," *Martin*, 920 F.3d at 589, and therefore does not leave homeless individuals without "a single place where they can lawfully be," *Pottinger*, 810 F. Supp. at 1565. To the contrary, the Ordinance designates an area of public property on which the homeless *may lawfully camp*, forbidding camping only "in particular locations." *Martin*, 920 F.3d at 617 n.8. If a person insists on camping outside the designated zone—and, notably, Plaintiffs never allege that they wish to do so—that is neither "involuntary" nor "unavoidable" conduct, *id.* at 616, and the individual is not "powerless" to desist from that behavior, *Powell*, 392 U.S. at 567. It follows from *Martin*'s logic that the City is free to enforce its anti-camping ordinances against them.

In short, nothing in the Eighth Amendment or *Martin* entitles the homeless to sleep *anywhere they want*; it merely requires that a lawful alternative be available to them. The Urgency Ordinance provides that lawful alternative. Accordingly, there is no basis for any prospective relief against San Clemente: The City's current policy complies with the Constitution, and there is no "imminent" threat that Plaintiffs will be cited or arrested for camping in public going forward, *Susan B. Anthony List*, 134 S. Ct. at 2342, so long as they do so within the designated zones.

2. In theory, had Plaintiffs been cited or arrested for camping, in violation of *Martin*, before San Clemente amended its ordinances in March 2019, they might have had viable claims for damages arising from those past constitutional violations.[8]

[8] After March 2019, an unconstitutional citation or arrest would not expose the City to § 1983 liability, because it would not be "action pursuant to official municipal policy." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978). Under *Monell*, municipalities "may not ... be sued under a *respondeat superior* theory." *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 603 (9th Cir. 2019).

Yet Nichols and James do not allege that they were ever *actually* arrested or cited (or otherwise punished) for sleeping in public. They claim to have been *threatened* with arrest (Am. Compl. ¶¶ 89-90, 92), but these purported threats were apparently never enforced, even though Plaintiffs apparently never ceased their behavior.

Allegations of a *threatened* constitutional violation—as opposed to an *actual* one—"fail[] to state a cause of action under section 1983," for "a threat to do an act prohibited by the Constitution" is not "equivalent to doing the act itself." *Gaut v. Sun*, 810 F.2d 923, 925 (9th Cir. 1987) (*per curiam*); *see*, *e.g.*, *Corales v. Bennett*, 567 F.3d 554, 564 (9th Cir. 2009) (applying *Gaut*); *Butitta v. Garbajal*, 116 F.3d 1485 (9th Cir. 1997) (mem.) (dismissing claims where plaintiff alleged that officers threatened warrantless arrest, but did not allege "actual deprivation of a protected right"). While threats may create standing to seek pre-enforcement relief from a statute or ordinance, *see Susan B. Anthony List*, 134 S. Ct. at 2342, here there is no basis for prospective relief (as explained) and the threats alone do not entitle Plaintiffs to money damages. *See Ramirez v. Holmes*, 921 F. Supp. 204, 210 (S.D.N.Y. 1996) ("without any injury or damage, [they] do not state a claim under 42 U.S.C. § 1983").

Even if mere threats were a constitutional injury, Plaintiffs' factual allegations are "inherently contradictory"—which itself "warrants dismissal." *Warner v. Tinder Inc.*, 105 F. Supp. 3d 1083, 1098 (C.D. Cal. 2015); *see*, *e.g.*, *Somers v. Apple, Inc.*, 729 F.3d 953, 964-65 (9th Cir. 2013) (claim lacked plausibility where plaintiff's "allegations do not square" with her "theory" of liability); *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011) (courts should consider whether plaintiff's allegations "contradict" each other in deciding whether plausible claim has been stated). On the one hand, Plaintiffs allege that they were repeatedly threatened with arrest by the Sheriff's Department for sleeping in public. Am. Compl. ¶¶ 89-90, 92. On the other, they admit that the sheriff "has stopped arresting homeless individuals for quality-of-life violations" such as these. Am. Compl. ¶ 102. And, as noted, they do not allege that they were ever in fact cited or arrested, despite continuing to sleep

in public. Plaintiffs' "[c]ontradictory allegations … are inherently implausible, and fail to comply with Rule 8, *Twombly*, and *Iqbal*." *Hernandez v. Select Portfolio, Inc.*, No. CV 15-01896, 2015 WL 3914741, at *10 (C.D. Cal. Jun. 25, 2015). For this reason too, Plaintiffs have not pleaded viable constitutional claims.

3. While *Martin* focused on the Eighth Amendment and Plaintiffs naturally do the same, the Amended Complaint also invokes, in scattershot fashion, the First, Fourth, and Fourteenth Amendments. *See* Am. Compl. ¶¶ 114-121. In the interests of being comprehensive, Plaintiffs do not state a legally viable claim under any of these other constitutional provisions either.

First, insofar as Plaintiffs' First Amendment claim just replicates their Eighth Amendment claim under a different label, it fails for the same reasons: The current policy is constitutional, and Plaintiffs were never cited or arrested under the old policy. Regardless, the First Amendment is inapposite, because Plaintiffs do not identify any expressive activity that is implicated here. Sleeping or camping in public is "pure physical conduct" that does not "contain an expressive element." *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1448-49 (W.D. Wash. 1994), *aff'd*, 97 F.3d 300, 303-05 (9th Cir. 1996); *see also Joyce v. City & Cty. of San Francisco*, 846 F. Supp. 843, 862 (N.D. Cal. 1994) (observing that a First Amendment challenge to similar ordinance "would [not]… strike the Court as a meritorious one").

Second, the Amended Complaint includes no well-pleaded factual allegations to support a claim that the Cities have engaged in "unlawful seizure[s]" within the meaning of the Fourth Amendment. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("mere police questioning does not constitute a seizure").

Third, Plaintiffs' "vagueness" challenge under the Due Process Clause (Am. Compl. ¶ 118) is too threadbare to state a claim. The Amended Complaint does not even identify which City ordinances are "vague," let alone plead facts alleging that Plaintiffs—or anyone else—cannot understand their scope. *See Bell v. City of Boise*, 834 F. Supp. 2d 1103, 1114-15 (D. Idaho 2011) (rejecting vagueness challenge to

anti-camping ordinance); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (statute is vague only if ordinary people cannot "understand what conduct is prohibited").[9]

II. THE DISABILITY DISCRIMINATION COUNTS ARE TOO CONCLUSORY AND VAGUE TO STATE A CLAIM (COUNTS 5 AND 8)

In Count 5, Plaintiffs assert violation of the Americans with Disabilities Act ("ADA"), and specifically the provision protecting the disabled from, "by reason of such disability, be[ing] excluded from participation in or be[ing] denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. And, in Count 8, Plaintiffs assert violation of a state law that also prohibits discrimination (including on the basis of disability) in any state "program or activity." Cal. Govt. Code § 11135. Plaintiffs have not pleaded viable claims under either statute, because the Amended Complaint includes absolutely no factual allegations that would allow the conclusion that the Cities have engaged in disability discrimination. Indeed, the Amended Complaint fails even to identify the municipal service, program, or activity that Plaintiffs are challenging as discriminatory.

The legal standard for a disability discrimination claim is straightforward. "To establish a violation of Title II of the ADA, a plaintiff must show that (1) she is a qualified individual with a disability; (2) she was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities, and (3) such exclusion or discrimination was by reason of her disability." *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). The California statute expressly adopts the "protections and prohibitions" of the ADA as its own. *See* Cal. Govt. Code § 11135(b); *Bassilios v. City of Torrance*, 166 F. Supp. 3d 1061, 1084 (C.D. Cal. 2015) ("Section 11135 is also coextensive with the ADA.").

Here, as it relates to the Cities, two of the individual Plaintiffs allege that they have disabilities within the meaning of the statutes. *See* Am. Compl. ¶¶ 88, 90. They

[9] The substantive due process claim alleging "a state-created danger" to the homeless population (Am. Compl. ¶ 120) fails for reasons explained in n.3, *supra*.

do not, however, allege that they have been excluded from participation in any city program or activity by reason of their disabilities, or were otherwise subjected to discrimination by the Cities based on their disabilities. For this reason, the Amended Complaint is deficient and must be dismissed as a matter of law.

The Amended Complaint includes conclusory language to the effect that the Cities have discriminated against Plaintiffs by "offer[ing] services that fail to provide reasonable accommodations to people experiencing homelessness," by implementing "policies and programs" in ways that have the "effect of subjecting [Plaintiffs] ... to discrimination based on their disability," and by making "programs" inaccessible to disabled individuals. Am. Compl. ¶¶ 130-131, 134. Those are simply "labels and conclusions," however, tracking "the elements of a cause of action." *Twombly*, 550 U.S. at 555. There is no "factual content" in the Amended Complaint that would "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Among other notable deficiencies, the Amended Complaint never even identifies the "policies and programs" that allegedly discriminate, or the "services" that allegedly lack accommodations for the disabled, much less spell out *how* those programs, policies, or services exclude Plaintiffs. This is insufficient. Indeed, the Amended Complaint fails to serve its most basic purpose: "to give the defendant fair notice of the factual basis of the claim." *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 841 (9th Cir. 2007) (per curiam).

The Amended Complaint does include a few paragraphs alleging that certain shelters, including the Courtyard in Santa Ana, are inhospitable to individuals with disabilities. *See* Am. Compl. ¶¶ 38-39, 41-47. But those allegations have no apparent connection to the Defendant Cities, which are not alleged to own or operate them. Nor do they have any apparent nexus to Plaintiffs, who do not allege that they have been excluded by these shelters by reason of their disabilities. *Cf.* Am. Compl. ¶ 87 (Nichols alleges that Courtyard is not a viable shelter for him since it is "generally at or over capacity"). Meanwhile, Plaintiff Nichols alleges that his disabilities make it

hard for him to seek help from "Family Assistance Ministries" (Am. Compl. ¶ 88), but he does not allege any relationship between that private charitable organization and Defendant Cities. In short, Plaintiffs have failed to allege facts sufficient to state a claim against the Cities under the ADA or its state-law analogue.

III. THE TORT CLAIM PREMISED ON THE STATE HOUSING ACCOUNTABILITY ACT FAILS ON MULTIPLE GROUNDS (COUNT 4)

Count 4 of the Amended Complaint invokes the California Tort Claims Act, and specifically the provision of that statute providing that a public entity is liable in tort for an injury proximately caused by violation of "a mandatory duty imposed by an enactment that is designed to protect against the risk of [that] particular kind of injury." Cal. Govt. Code § 815.6. *See* Am. Compl. ¶¶ 123-128.

To the extent that Plaintiffs premise their Count 4 tort claim on the Cities' alleged violation of the constitutional provisions addressed in Part I, *supra*, or the discrimination statutes addressed in Part II, *supra*, the claim fails for the same reason as the claims brought directly under those statutes. *See also supra* n.1.

The only additional substantive "enactment" that Plaintiffs invoke in Count 4 is the California Housing Accountability Act, which requires municipalities to adopt "housing elements" as part of their General Plans. *See* Cal. Govt. Code § 65583 *et seq*. Plaintiffs allege that the Cities' housing elements do not comply with the Act in various respects, including because they allegedly do not fully "evaluate [the] need for shelters," or designate an appropriate location "where a year-round shelter may be operated without further approval." Am. Compl. ¶¶ 48-54.

Plaintiffs do not *directly* challenge the Cities' housing elements, however. That is likely because any such challenge would be time-barred. *See* Cal. Govt. Code § 65009(d)(2)(A) (generally allowing challenges to housing elements only within six months after state agency approval). As to San Clemente, it would also be barred by *res judicata*, since one of the Plaintiffs here acknowledges that it already prevailed in a state-court action that directed the City "to revise its Housing Element to conform

1 to its statutory obligations." Am. Compl. ¶ 84. Moreover, it is far from clear that a
2 direct challenge to a housing element could be filed in federal court at all: The statute
3 appears to contemplate exclusive enforcement through a writ of mandate sought in
4 state court. *See* Cal. Govt. Code § 65751.

5 Regardless of their reasons, Plaintiffs' indirect attempt to enforce the Housing
6 Accountability Act does not state a viable claim under the California Tort Claims
7 Act. Plaintiffs have not identified either the type of mandatory duty or the type of
8 personal injury that could give rise to tort liability under the statute—much less a
9 proximate causal link between the two.

10 To state a tort claim under § 815.6, a plaintiff "must establish (1) the existence
11 of an enactment that imposes a mandatory, not discretionary, duty on the public entity
12 and (2) that the enactment is intended to protect against the particular kind of injury
13 the plaintiff suffered." *Tuthill v. City of Buenaventura*, 223 Cal. App. 4th 1081, 1089
14 (Cal. Ct. App. 2014). "If these two prongs are met, the next question is whether the
15 breach of the duty was a proximate cause of the plaintiff's injury." *Guzman v. Cty.*
16 *of Monterey*, 46 Cal. 4th 887, 898 (Cal. 2009).

17 Duty. At times, Plaintiffs appear to contend that the Housing Accountability
18 Act imposes on the Cities a mandatory "requirement to provide for housing and
19 shelter for low-income and homeless individuals." Am. Compl. ¶ 71; *see also* Am.
20 Compl. ¶ 76(a) (referring to "statutory duty to provide low-income housing and a
21 continuum of shelter facilities"). That is wrong as a matter of law. The Act requires
22 cities to adopt housing elements that *assess and analyze* housing needs and *identify*
23 goals, policies, and objectives toward meeting those needs. Cal. Govt. Code § 65583.
24 It also requires each city to designate a zone where an emergency shelter sufficient
25 to meet the city's need can be built "without a conditional use or other discretionary
26 permit." Cal. Govt. Code § 65583(a)(4)(A). But the Act is clear that the city is not
27 obligated to provide any emergency shelters itself. *See* Cal. Govt. Code § 65589(a)
28 ("Nothing in this article shall require a city ... [to] [e]xpend local revenues for the

1 construction of housing ....”). In short, nothing in the Act requires any city to *provide*
2 shelter, and therefore the Cities’ alleged failure to do so does not trigger tort liability.
3 *Cf. Tuthill*, 223 Cal. App. 4th at 1091 (distinguishing duties to assess or investigate
4 from duties to “take some affirmative action”).
5 As for the duties the Act *does* impose, they are not the type that can give rise
6 to tort liability under § 815.6. Statutory duties can trigger such liability only if they
7 require “that a *particular* action be taken.” *Haggis v. City of L.A.*, 22 Cal. 4th 490,
8 498 (Cal. 2000) (emphasis added). “It is not enough, moreover, that the public
9 entity ... have been under an obligation to perform a function if the function itself
10 involves the exercise of discretion.” *Id.* And courts apply this element “strictly.”
11 *Guzman*, 46 Cal. 4th at 898. Accordingly, courts find a liability-creating duty “only
12 where the statutorily commanded act did not lend itself to a normative or qualitative
13 debate over whether it was adequately fulfilled.” *De Villers v. Cty. of San Diego*,
14 156 Cal. App. 4th 238, 260 (Cal. Ct. App. 2007). “In contrast, when the statutorily
15 prescribed act involves debatable issues over whether the steps taken by the entity
16 *adequately* fulfilled its obligation, ... this discretion removes the duty from the type
17 of activity that supports a claim under [§] 815.6.” *Id.* at 260-61. In *de Villers*, for
18 example, the duty to adopt “effective controls and procedures” could not support a
19 claim, because it involved “qualitative judgments.” *Id.* at 261; *see also, e.g.*,
20 *Sutherland v. City of Fort Bragg*, 86 Cal. App. 4th 13, 20 (Cal. Ct. App. 2000) (duty
21 to conduct site and architectural review for building permit did not support claim,
22 because such review involves “discretion”); *Cty. of L.A. v. Super. Ct.*, 209 Cal. App.
23 4th 543, 550 (Cal. Ct. App. 2012) (duty to capture any animal posing a “hazard” did
24 not support claim, because whether animal poses such hazard is “inherently
25 subjective question which requires the exercise of considerable discretion based on
26 consideration of a host of competing factors”); *San Mateo Union High Sch. Dist. v.*
27 *Cty. of San Mateo*, 213 Cal. App. 4th 418, 429-30 (Cal. Ct. App. 2013) (duty to act
28 as “prudent investor” did not support claim, because “manner in which the required

standard ... is to be attained entails the exercise of extensive discretion" and was not a "ministerial directive"); *Tuthill*, 223 Cal. App. 4th at 1091 (duty to "cooperate in the provision of affordable housing" was too vague and discretionary to support claim).

Under these standards, the duty under the Housing Accountability Act to adopt a housing element that analyzes and assesses the city's "need for emergency shelter," including "based on annual and seasonal need," Cal. Govt. Code § 65583(a)(7), and to "identify adequate sites for housing" to meet "the existing and projected needs of all economic segments of the community," *id.* § 65583, is clearly not the type of mandatory duty that can support a claim. This is not a "ministerial" act; rather, it involves "the exercise of extensive discretion." *San Mateo*, 213 Cal. App. 4th at 430. Indeed, the Act's repeated use of the word "adequate" (seven times in § 66583 alone) illustrates that Plaintiffs' claim would invite "normative or qualitative debate over whether [the duty] was adequately fulfilled." *De Villers*, 156 Cal. App. 4th at 260. Put another way, the Accountability Act does not require "that a *particular* action be taken." *Haggis*, 22 Cal. 4th at 498 (emphasis added). It simply obligates cities to undertake an analysis and assessment that itself "involves the exercise of discretion." *Id.* That does not provide a foundation for tort liability under § 815.6.

The same is true of the Act's requirement to identify a zone where a homeless shelter sufficient to meet the city's needs can be built without further permits. While that certainly creates a mandatory duty to identify a zone, the *selection* of the zone—and the inquiry into whether it would be *sufficient* for the city's needs—are left up to the city, and "require[] the exercise of considerable discretion based on consideration of a host of competing factors." *Cty. of L.A.*, 209 Cal. App. 4th at 550. And it is the latter, discretionary aspects of the obligation that Plaintiffs challenge; they say the Cities have not "*fully* complied" with this rule, not that they failed to designate *any zone at all*. Am. Compl. ¶ 52 (emphasis added); *see also* Am. Compl. ¶ 85 (alleging that San Clemente's zone is "not conducive to a shelter"). Again,

however, § 815.6 is not a vehicle for litigating whether a municipality has "*adequately* fulfilled" some statutory duty. *De Villers*, 156 Cal. App. 4th at 260. It is a method of establishing tort liability based on a public entity's failure to take a mandatory, non-discretionary, ministerial action. Plaintiffs have not identified such an action.

Injury. Nor have Plaintiffs alleged an "injury" within the meaning of the Tort Claims Act—*i.e.*, "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or state, of such nature that it would be actionable if inflicted by a private person." Cal. Govt. Code § 810.8. The definition "make[s] clear that public entities ... may be held liable only for injuries to the kind of interests that have been protected by the courts *in actions between private persons*." *Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962, 968 (Cal. 1992) (quoting Law Revision Commission); *see also id.* (rejecting § 815.6 claim where the plaintiffs alleged injury that "by its very nature could not exist in an action between private persons").

Here, Plaintiffs have not alleged that they suffered any traditional private tort injuries—death, harm to their persons, or even reputational harm. Instead, they allege that they "are unable to obtain appropriate housing or shelter and are threatened, cited and, in some instances arrested, for living in public places." Am. Compl. ¶ 127. That does not fall within the statutory definition of "injury." Failure to obtain appropriate housing is not the type of injury for which a private plaintiff could seek relief from a private defendant. And the injury of being threatened with arrest or citation is, as in *Aubry*, an injury that "by its very nature could not exist" in a private tort suit, because only public law enforcement officers could make such (credible) threats. 2 Cal. 4th at 968. For this reason too, Plaintiffs' § 815.6 claim fails.[10]

[10] Insofar as Count 4 seeks damages for the individual Plaintiffs (Am. Compl. ¶ 128), that request is also barred because no claim was first presented to the Cities in accordance with the procedures of the Tort Claims Act. *See* Cal. Govt. Code § 945.4 ("no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented ... until a written claim therefor has been presented to the public entity and has been acted upon ... or has been deemed to have been rejected"); *id.*

Proximate Cause. Finally, even if the Housing Accountability Act created the type of duty that could support liability, and even if Plaintiffs' alleged injuries were the type that the Tort Claims Act addresses, the Amended Complaint does not allege a proximate causal link between them.

Proximate cause focuses on the "the degree of connection between the conduct and the injury" as well as "considerations of policy that limit an actor's responsibility for the consequences of his conduct." *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal. 4th 1037, 1045 (Cal. 2003). Where a plaintiff alleges that a public entity violated a mandatory duty, but compliance with that duty would not itself have necessarily prevented the plaintiff's injury, courts hold that proximate cause is absent and reject the claim. *See California v. Super. Ct.*, 150 Cal. App. 3d 848, 857-59 (Cal. Ct. App. 1984) (failure to *investigate* real estate licensee was not proximate cause of fraud by that licensee, since investigation might not have led to *action*); *Fleming v. California*, 34 Cal. App. 4th 1378, 1384 (Cal. Ct. App. 1995) (failure to arrest parolee for breach of parole was not proximate cause of his later crime, "since arrest without a period of incarceration would not necessarily have prevented the crime"); *Whitcombe v. Cty. of Yolo*, 73 Cal. App. 3d 698, 700 (Cal. Ct. App. 1977) (failure of probation officer to investigate probationer was not proximate cause of his later crimes, because "revoking probation is within the discretion of the trial court").

Here, a more complete *assessment* of the Cities' housing needs would not, by itself, provide Plaintiffs with appropriate shelter. Nor would the Cities' *designation* of zones where shelters may be built. Only the actual *construction* of shelters could remedy Plaintiffs' injuries—and that would require available property, funding, and other speculative actions by third parties, even if the Cities perfectly complied with

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§ 905 (setting forth requirement to present "all claims for money or damages," subject to exceptions not relevant here); *see also, e.g.*, *Young v. City of Visalia*, 687 F. Supp. 2d 1141, 1152 (E.D. Cal. 2009) ("As a prerequisite for money damages litigation against a public entity, the California Tort Claims Act requires presentation of the claim to that entity," and "the failure to allege facts that either demonstrate or excuse compliance with the California Tort Claims Act will subject a state law claim to dismissal.").

their purported duties. "The causal link is thus tenuous at best." *California*, 150 Cal. App. 3d at 859. Because "the facts pleaded in this complaint are legally insufficient to connect the breach of mandatory duty with the injury," Count 4 must be dismissed. *State Dep't of State Hosps. v. Super. Ct.*, 61 Cal. 4th 339, 357 (Cal. 2015).

IV. DARREN JAMES DOES NOT STATE A DUE-PROCESS CLAIM AGAINST SAN CLEMENTE (COUNT 7)

Last, one individual Plaintiff, Darren James, asserts a claim against the City of San Clemente under 42 U.S.C. § 1983, seeking monetary damages for the alleged violation of his due-process rights. This claim is based on James' allegation that City employees "seized and destroyed" his personal property "without due process, lawful justification, or just compensation." Am. Compl. ¶¶ 102, 144. The Court should dismiss James' claim due to both the inadequacy of his factual allegations and the limits of municipal liability under § 1983.

First, the factual allegations do not "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The Amended Complaint alleges as follows: In February 2019, "all of [James'] possessions were taken from the location where he left them daily for two years." Am. Compl. ¶ 91. James then "approached a person in the area that he understood to be a City employee, asked about his possessions, and was informed that the City did not retain the property." *Id.* The first allegation—that the property was "taken"—obviously does not support an inference that it was taken *by the City* as opposed to anyone else who may have happened by. Nor does the second allegation: Even if the unidentified person was indeed a City employee (and James fails to allege the basis for his understanding to that effect), the statement that the City "did not retain the property" does not imply that the City ever took it in the first place. By disclaiming that the City "retain[ed]" the property—*i.e.*, making clear to James that the City *did not have* his belongings—the alleged employee did not somehow admit that the City had seized and destroyed them. At best, then, the allegations are

"merely consistent with" the theory that the City took James' property; they are thus legally insufficient to state a claim, because they do not "nudge[] [James'] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 555, 570.

Second, and even if the Amended Complaint had adequately alleged that a City employee had seized and destroyed James' property, there would be no § 1983 claim against the City. The Supreme Court has held that a municipality "cannot be held liable *solely* because it employs a tortfeasor—or, in other words ... on a *respondeat superior* theory." *Monell*, 436 U.S. at 691. Rather, "[t]o create liability under § 1983, the constitutional violation must be caused by 'a policy, practice, or custom of the entity,' or be the result of an order by a policy-making officer." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012).

Here, the City's policy on abandoned property is expressed in an ordinance. The ordinance—which represents official municipal policy, *see Sandoval v. Cty. of Sonoma*, 912 F.3d 509, 517-18 (9th Cir. 2018)—allows the City to impound property that is left unattended for more than 24 hours, *and allows the owner of the property to recover it thereafter*. *See* SCMC § 8.86.020.[11] That ordinance is plainly consistent with due process. James does not say otherwise. And, insofar as a rogue employee violated the ordinance, either by seizing property without waiting 24 hours or by not allowing James to recover it from impoundment, the City cannot be held liable—since such action would be *contrary* to City policy, not pursuant to it. *See, e.g.*, *Herd v. Cty. of San Bernardino*, 311 F. Supp. 3d 1157, 1167-68 (C.D. Cal. 2018); *Nichols v. Brown*, 859 F. Supp. 2d 1118, 1136 (C.D. Cal. 2012). After all, James does not even assert (much less plausibly allege) that, despite its ordinance, San Clemente's seizure and destruction of property forms a custom "of sufficient duration, frequency and consistency" as to have "become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

[11] A true and correct copy of this ordinance is attached as Exhibit 4 to the RJN.

In short, James does not plausibly allege that a City employee destroyed his property and, even if an employee did, such actions would be contrary to official San Clemente policy and therefore could not give rise to municipal liability. James could perhaps sue an individual employee who took his property, but he has no viable claim against the City. Count 7 must therefore also be dismissed.

CONCLUSION

The Court should dismiss Plaintiffs' claims against the City of Aliso Viejo, the City of San Juan Capistrano, and the City of San Clemente.[12]

Dated: July 1, 2019

JONES DAY

By:
John A. Vogt

CITY OF ALISO VIEJO, CITY OF SAN JUAN CAPISTRANO, AND CITY OF SAN CLEMENTE

[12] Count 9 of the Amended Complaint, which is not otherwise addressed above, seeks declaratory and injunctive relief. Those are not independent causes of action, however. *See TYR Sport Inc. v. Warnaco Swimwear Inc.*, 679 F. Supp. 2d 1120, 1141 n.13 (C.D. Cal. 2009) ("[A] claim for injunctive relief is not a substantive claim, but merely a remedy which must be supported by a viable substantive theory."); *Tesoro Refining & Mktg. Co. v. City of Long Beach*, 334 F. Supp. 3d 1031, 1049 (C.D. Cal. 2017) ("Declaratory relief is not a stand-alone cause of action.").