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20 **UNITED STATES DISTRICT COURT**  
 21 **CENTRAL DISTRICT OF CALIFORNIA**

22 HOUSING IS A HUMAN RIGHT  
 23 ORANGE COUNTY, et al.,

24 Plaintiffs,

25 v.

26 THE COUNTY OF ORANGE, et al.,

27 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

1  
2 The social problems posed by homelessness in California are very serious.  
3 But the legal claims pressed in this action are not. Plaintiffs—a group of homeless  
4 individuals and advocacy groups—invoke a wide array of constitutional and statutory  
5 provisions under both federal and state law, stretching to find some way to inject the  
6 courts into this thorny issue. All of their efforts fail. As to the Cities of San Juan  
7 Capistrano, Aliso Viejo, and San Clemente (“the Cities”), Plaintiffs state no legally  
8 viable claims, and those Defendants must accordingly be dismissed.

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

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



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

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

### 19            **SUMMARY OF COMPLAINT**

20            Plaintiffs in this action are three individuals as well as three advocacy groups.  
 21 The individual Plaintiffs allege that they are disabled and homeless. Duane Nichols  
 22 and Darren James reside in San Clemente, and Bruce Stovall lives in Irvine. *See* Dkt.  
 23 17 (“Am. Compl.”) ¶¶ 86-95. Nichols and James allege that law enforcement officers  
 24 in San Clemente have threatened to arrest them for sleeping on public property, but  
 25 that no shelter space is available. Am. Compl. ¶¶ 89-90, 92. James also alleges that,  
 26 in February 2019, his personal belongings “were taken from the location where he  
 27 left them daily” and that he was told by an unidentified person that “the City did not  
 28 retain the property.” Am. Compl. ¶ 91.

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

14 The Amended Complaint asserts nine counts against six Defendants (Orange  
15 County and five Cities within it). Its counts fall into several categories. *First*, Counts  
16 1-3 are federal constitutional claims under the First, Fourth, Eighth, and Fourteenth  
17 Amendments, all premised on the allegation that Defendants threaten to cite or arrest  
18 homeless individuals for sleeping in public, despite a lack of adequate shelters. Am.  
19 Compl. ¶¶ 107-121. *Second*, Counts 5 and 8 assert that Defendants have “subjected  
20 the Plaintiffs ... to discrimination based on their disability,” in violation of federal  
21 and state law. Am. Compl. ¶¶ 129-134, 146-150. *Third*, through Count 4, Plaintiffs  
22 seek to impose tort liability for violation of the California Housing Accountability  
23 Act, which requires each city to adopt a “housing element” that evaluates its need for  
24 shelters. Am. Compl. ¶¶ 48-54, 122-128. *Fourth*, Count 7 asserts that San Clemente  
25 destroyed Plaintiff James’ property without due process. Am. Compl. ¶¶ 140-145.  
26 *Finally*, Counts 6 and 9 are derivative of the other counts; the former by invoking the  
27 Bane Act (which forbids coercive interference in constitutional rights), and the latter  
28 by seeking declaratory and injunctive relief. Am. Compl. ¶¶ 135-139, 151-157.

**LEGAL STANDARD**

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

5 As to the former, lack of standing is “properly raised in a motion to dismiss  
6 under Federal Rule of Civil Procedure 12(b)(1),” because standing “pertain[s] to a  
7 federal court’s subject-matter jurisdiction under Article III.” *White v. Lee*, 227 F.3d  
8 1214, 1242 (9th Cir. 2000). To establish Article III standing, a plaintiff must show  
9 “an injury in fact” that is “fairly traceable to the challenged conduct of the defendant”  
10 and “likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*,  
11 136 S. Ct. 1540, 1547 (2016). To seek prospective relief, a plaintiff must demonstrate  
12 a “sufficiently imminent” threat of impending injury from the defendant. *Susan B.*  
13 *Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). “The party asserting federal  
14 subject matter jurisdiction bears the burden of proving its existence.” *Chandler v.*  
15 *State Farm Mut. Auto Ins. Co.*, 596 F. Supp. 2d 1314, 1322 (C.D. Cal. 2008). But this  
16 Court must “accept as true all material allegations in the complaint.” *Id.*

17 As to the Rule 12(b)(6) motion, the Court should dismiss if there is “either a  
18 ‘lack of a cognizable legal theory’ or ‘the absence of sufficient facts alleged under a  
19 cognizable legal theory.’” *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973, 976 (C.D.  
20 Cal. 2013). In evaluating the sufficiency of the allegations, “[t]hreadbare recitals of  
21 the elements of a cause of action, supported by mere conclusory statements, do not  
22 suffice,” and “labels and conclusions” too are discounted. *Ashcroft v. Iqbal*, 556 U.S.  
23 662, 678 (2009). Rather, a complaint overcomes a motion to dismiss only if “the  
24 plaintiff pleads factual content that allows the court to draw the reasonable inference  
25 that the defendant is liable for the misconduct alleged.” *Id.*; *see also Bell Atl. Corp.*  
26 *v. Twombly*, 550 U.S. 544, 555 (2007) (“Factual allegations must be enough to raise  
27 a right to relief above the speculative level.”); *Yumul v. Smart Balance, Inc.*, 733 F.  
28 Supp. 2d 1134, 1137 (C.D. Cal. 2010) (outlining *Iqbal* pleading standard).

1 ARGUMENT

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

4 At the heart of Plaintiffs’ Amended Complaint are their federal constitutional  
5 claims, building off of the Ninth Circuit’s recent decision in *Martin v. City of Boise*,  
6 920 F.3d 584 (9th Cir. 2019). As to two of the Cities, however, Plaintiffs lack  
7 Article III standing to pursue these claims: None of the individual homeless Plaintiffs  
8 reside in these Cities, and the organizational Plaintiffs do not allege any cognizable  
9 injury from the Cities’ alleged threats to cite or arrest homeless people. Two  
10 individual Plaintiffs do adequately allege a basis for standing to sue the City of San  
11 Clemente, but their allegations do not make out an entitlement to substantive relief.<sup>1</sup>

12 **A. Plaintiffs Lack Standing To Sue Two of the Cities**

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

21 \_\_\_\_\_  
22 <sup>1</sup> Counts 1-3 assert the constitutional claims. Counts 4 and 6 assert derivative state-  
23 law claims premised on the alleged violation of constitutional rights. Am. Compl. ¶¶ 122-  
24 128 (state tort claim based in part on violation of constitutional duties); Am. Compl. ¶¶ 135-  
25 139 (claim under California’s Bane Act for interference with constitutional rights). Those  
26 derivative claims fail for the same reasons as the principal claims. They also fail on their  
27 own terms. “General constitutional provisions ... do not create an affirmative mandatory  
28 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. McMahan*, 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).

1 To start, no individual Plaintiff alleges that he has suffered past injury—or will  
2 imminently suffer a future injury—traceable to San Juan Capistrano or Aliso Viejo.  
3 Duane Nichols and Darren James are homeless in San Clemente. Am. Compl. ¶¶ 86-  
4 87, 90. Bruce Stovall “sleeps outdoors in Irvine.” Am. Compl. ¶ 93. None of the  
5 three alleges *anything* as to San Juan Capistrano or Aliso Viejo. That is, none of the  
6 three individual Plaintiffs alleges that he has been homeless in those cities, been cited  
7 or arrested in those cities, been asked to leave public places in those cities, or for that  
8 matter ever *visited* those cities. Nor do any of these Plaintiffs allege that they *intend*  
9 to visit San Juan Capistrano or Aliso Viejo in the future. *Cf. Martin*, 920 F.3d at 610  
10 (plaintiff had standing to challenge anti-camping ordinance as he “still visits Boise  
11 several times a year”). The individual Plaintiffs have thus alleged no past or future  
12 injury traceable to San Juan Capistrano or Aliso Viejo, and so cannot maintain suit  
13 against them. *Bell v. City of Boise*, 709 F.3d 890, 893 n.3 (9th Cir. 2013) (dismissing  
14 analogous claims of plaintiff who had not been cited or arrested by Boise).

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

26  
27 <sup>2</sup> Although the organizational plaintiffs also attempt to invoke “taxpayer standing”  
28 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).

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

9 The third organizational Plaintiff—HHROC—does allege that, because of “the  
10 lack of adequate shelter,” it has “shift[ed] and expend[ed] resources” away “from its  
11 primary focus of achieving supportive, affordable and permanent housing” for the  
12 homeless, toward providing them with “direct services” (such as food and clothing).  
13 Am. Compl. ¶ 81. Even if that conferred standing on HHROC to challenge the Cities’  
14 failure to provide “adequate shelter”—since it is the alleged lack of shelter that has  
15 caused HHROC to divert resources—it is axiomatic that standing must be established  
16 for *each claim*. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351-52 (2006);  
17 *Hoffman v. Blattner Energy, Inc.*, 315 F.R.D. 324, 333 (C.D. Cal. 2016). HHROC  
18 makes no allegation of any injury that is traceable to the distinct conduct that Counts  
19 1-3 challenge. That is, HHROC does not allege diversion of resources flowing from  
20 the Cities’ alleged threats to cite or arrest individuals for sleeping or being present in  
21 public. Nor would any such allegation be plausible: The alleged threats have no  
22 effect on HHROC or its work. Thus, HHROC too lacks standing for these counts.<sup>3</sup>

23 <sup>3</sup> One paragraph of Count 3 alleges that the Cities’ failure to provide shelter for the  
24 homeless population “constitutes a state-created danger,” and thus violates the Due Process  
25 Clause. Am. Compl. ¶ 120. HHROC may have standing to pursue this theory, but it fails  
26 on the merits as a matter of law. The Complaint includes no plausible allegation that the  
27 Cities engaged in “affirmative conduct” that placed the homeless in danger. *Munger v. City*  
28 *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).

1           **B. There Are No Viable Claims Against San Clemente**

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

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

15           *Martin* involved a Boise ordinance that prohibited using the streets, sidewalks,  
16 parks, or other public places for sleeping “at any time.” 920 F.3d at 603 (quoting  
17 Boise City Code § 9-10-02). The Ninth Circuit invalidated the ordinance, reasoning  
18 that the Eighth Amendment forbids the state to criminalize conduct that a person  
19 “is powerless to change.” *Id.* at 616 (quoting *Powell v. Texas*, 392 U.S. 514, 567  
20 (1968) (Fortas, J., dissenting)). “[T]he Eighth Amendment prohibits the state from  
21 punishing an involuntary act or condition if it is the unavoidable consequence of  
22 one’s status or being.” *Id.* (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118,  
23 1135 (9th Cir. 2006)). Based on that principle, *Martin* reasoned that a city cannot  
24 criminalize “sitting, sleeping, or lying outside on public property for homeless  
25 individuals who cannot obtain shelter.” *Id.*

26           <sup>4</sup> San Clemente actually has reason to believe that both Nichols and James are no  
27 longer homeless—or, at least, are no longer without the option of housing—and therefore  
28 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.

1 San Clemente has—at all relevant times—had a general anti-camping law that  
2 declares camping on any city property “unlawful.” San Clemente Municipal Code  
3 (“SCMC”) § 8.86.010.<sup>5</sup> Since March 2019, however, the City has supplemented this  
4 general anti-camping rule with ordinances that ensure compliance with *Martin*.

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

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

25 <sup>5</sup> A true and correct copy of this ordinance is attached as Exhibit 1 to the  
26 accompanying Request for Judicial Notice (“RJN”).

27 <sup>6</sup> A true and correct copy of this ordinance is attached as Exhibit 2 to the RJN.

28 <sup>7</sup> 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.



1 added) (quoting *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla.  
2 1992)). Accordingly, “an ordinance prohibiting sitting, lying, or sleeping outside at  
3 particular times or in particular locations might well be constitutionally permissible.”  
4 *Id.* at 617 n.8.

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

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

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

26 <sup>8</sup> After March 2019, an unconstitutional citation or arrest would not expose the City  
27 to § 1983 liability, because it would not be “action pursuant to official municipal policy.”  
28 *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).

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

5 Allegations of a *threatened* constitutional violation—as opposed to an *actual*  
6 one—“fail[] to state a cause of action under section 1983,” for “a threat to do an act  
7 prohibited by the Constitution” is not “equivalent to doing the act itself.” *Gaut v.*  
8 *Sun*, 810 F.2d 923, 925 (9th Cir. 1987) (*per curiam*); *see, e.g., Corales v. Bennett*,  
9 567 F.3d 554, 564 (9th Cir. 2009) (applying *Gaut*); *Butitta v. Garbajal*, 116 F.3d  
10 1485 (9th Cir. 1997) (mem.) (dismissing claims where plaintiff alleged that officers  
11 threatened warrantless arrest, but did not allege “actual deprivation of a protected  
12 right”). While threats may create standing to seek pre-enforcement relief from a  
13 statute or ordinance, *see Susan B. Anthony List*, 134 S. Ct. at 2342, here there is no  
14 basis for prospective relief (as explained) and the threats alone do not entitle Plaintiffs  
15 to money damages. *See Ramirez v. Holmes*, 921 F. Supp. 204, 210 (S.D.N.Y. 1996)  
16 (“without any injury or damage, [they] do not state a claim under 42 U.S.C. § 1983”).

17 Even if mere threats were a constitutional injury, Plaintiffs’ factual allegations  
18 are “inherently contradictory”—which itself “warrants dismissal.” *Warner v. Tinder*  
19 *Inc.*, 105 F. Supp. 3d 1083, 1098 (C.D. Cal. 2015); *see, e.g., Somers v. Apple, Inc.*,  
20 729 F.3d 953, 964-65 (9th Cir. 2013) (claim lacked plausibility where plaintiff’s  
21 “allegations do not square” with her “theory” of liability); *Atkins v. City of Chicago*,  
22 631 F.3d 823, 832 (7th Cir. 2011) (courts should consider whether plaintiff’s  
23 allegations “contradict” each other in deciding whether plausible claim has been  
24 stated). On the one hand, Plaintiffs allege that they were repeatedly threatened with  
25 arrest by the Sheriff’s Department for sleeping in public. Am. Compl. ¶¶ 89-90, 92.  
26 On the other, they admit that the sheriff “has stopped arresting homeless individuals  
27 for quality-of-life violations” such as these. Am. Compl. ¶ 102. And, as noted, they  
28 do not allege that they were ever in fact cited or arrested, despite continuing to sleep

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

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

10       *First*, insofar as Plaintiffs’ First Amendment claim just replicates their Eighth  
11 Amendment claim under a different label, it fails for the same reasons: The current  
12 policy is constitutional, and Plaintiffs were never cited or arrested under the old  
13 policy. Regardless, the First Amendment is inapposite, because Plaintiffs do not  
14 identify any expressive activity that is implicated here. Sleeping or camping in public  
15 is “pure physical conduct” that does not “contain an expressive element.” *Roulette*  
16 *v. City of Seattle*, 850 F. Supp. 1442, 1448-49 (W.D. Wash. 1994), *aff’d*, 97 F.3d 300,  
17 303-05 (9th Cir. 1996); see also *Joyce v. City & Cty. of San Francisco*, 846 F. Supp.  
18 843, 862 (N.D. Cal. 1994) (observing that a First Amendment challenge to similar  
19 ordinance “would [not]... strike the Court as a meritorious one”).

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

24       *Third*, Plaintiffs’ “vagueness” challenge under the Due Process Clause (Am.  
25 Compl. ¶ 118) is too threadbare to state a claim. The Amended Complaint does not  
26 even identify which City ordinances are “vague,” let alone plead facts alleging that  
27 Plaintiffs—or anyone else—cannot understand their scope. See *Bell v. City of Boise*,  
28 834 F. Supp. 2d 1103, 1114-15 (D. Idaho 2011) (rejecting vagueness challenge to

1 anti-camping ordinance); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (statute is  
2 vague only if ordinary people cannot “understand what conduct is prohibited”).<sup>9</sup>

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

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

16 The legal standard for a disability discrimination claim is straightforward.  
17 “To establish a violation of Title II of the ADA, a plaintiff must show that (1) she is  
18 a qualified individual with a disability; (2) she was excluded from participation in or  
19 otherwise discriminated against with regard to a public entity’s services, programs,  
20 or activities, and (3) such exclusion or discrimination was by reason of her  
21 disability.” *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). The California  
22 statute expressly adopts the “protections and prohibitions” of the ADA as its own.  
23 See Cal. Govt. Code § 11135(b); *Bassilios v. City of Torrance*, 166 F. Supp. 3d 1061,  
24 1084 (C.D. Cal. 2015) (“Section 11135 is also coextensive with the ADA.”).

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

27 \_\_\_\_\_  
28 <sup>9</sup> 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*.

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

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

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

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

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

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

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

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

23 Plaintiffs do not *directly* challenge the Cities’ housing elements, however.  
24 That is likely because any such challenge would be time-barred. *See* Cal. Govt. Code  
25 § 65009(d)(2)(A) (generally allowing challenges to housing elements only within six  
26 months after state agency approval). As to San Clemente, it would also be barred by  
27 *res judicata*, since one of the Plaintiffs here acknowledges that it already prevailed  
28 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



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

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

19 The same is true of the Act’s requirement to identify a zone where a homeless  
20 shelter sufficient to meet the city’s needs can be built without further permits.  
21 While that certainly creates a mandatory duty to identify a zone, the *selection* of the  
22 zone—and the inquiry into whether it would be *sufficient* for the city’s needs—are  
23 left up to the city, and “require[] the exercise of considerable discretion based on  
24 consideration of a host of competing factors.” *Cty. of L.A.*, 209 Cal. App. 4th at 550.  
25 And it is the latter, discretionary aspects of the obligation that Plaintiffs challenge;  
26 they say the Cities have not “*fully* complied” with this rule, not that they failed to  
27 designate *any zone at all*. Am. Compl. ¶ 52 (emphasis added); *see also* Am. Compl.  
28 ¶ 85 (alleging that San Clemente’s zone is “not conducive to a shelter”). Again,

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

6 Injury. Nor have Plaintiffs alleged an “injury” within the meaning of the Tort  
7 Claims Act—*i.e.*, “death, injury to a person, damage to or loss of property, or any  
8 other injury that a person may suffer to his person, reputation, character, feelings or  
9 state, of such nature that it would be actionable if inflicted by a private person.” Cal.  
10 Govt. Code § 810.8. The definition “make[s] clear that public entities ... may be held  
11 liable only for injuries to the kind of interests that have been protected by the courts  
12 *in actions between private persons.*” *Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962,  
13 968 (Cal. 1992) (quoting Law Revision Commission); *see also id.* (rejecting § 815.6  
14 claim where the plaintiffs alleged injury that “by its very nature could not exist in an  
15 action between private persons”).

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

26 <sup>10</sup> Insofar as Count 4 seeks damages for the individual Plaintiffs (Am. Compl. ¶ 128),  
27 that request is also barred because no claim was first presented to the Cities in accordance  
28 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.*

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

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

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

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26 § 905 (setting forth requirement to present “all claims for money or damages,” subject to  
27 exceptions not relevant here); *see also, e.g., Young v. City of Visalia*, 687 F. Supp. 2d 1141,  
28 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.”).

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

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

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

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

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

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

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

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<sup>11</sup> A true and correct copy of this ordinance is attached as Exhibit 4 to the RJN.

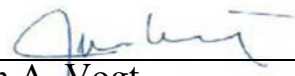
1 In short, James does not plausibly allege that a City employee destroyed his  
2 property and, even if an employee did, such actions would be contrary to official  
3 San Clemente policy and therefore could not give rise to municipal liability. James  
4 could perhaps sue an individual employee who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

6 **CONCLUSION**

7 The Court should dismiss Plaintiffs' claims against the City of Aliso Viejo, the  
8 City of San Juan Capistrano, and the City of San Clemente.<sup>12</sup>

9 Dated: July 1, 2019

JONES DAY

11 By:   
12 John A. Vogt

13 CITY OF ALISO VIEJO, CITY OF  
14 SAN JUAN CAPISTRANO, AND  
15 CITY OF SAN CLEMENTE

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25 <sup>12</sup> Count 9 of the Amended Complaint, which is not otherwise addressed above, seeks  
26 declaratory and injunctive relief. Those are not independent causes of action, however.  
27 See *TYR Sport Inc. v. Warnaco Swimwear Inc.*, 679 F. Supp. 2d 1120, 1141 n.13 (C.D. Cal.  
28 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.”).