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This motion requires you to respond. Please see the Notice to Responding Party.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DANIELLE BARRANI; KADRI BARRANI; LIESA COVEY; SCOTT EVANS; JIM GRISLEY; JUAN GUTIERREZ; CLOTILDE HOUCHON; DAVID IBARRA; and RANDY TOPHAM, Plaintiffs, vs. SALT LAKE CITY, Defendant.	**SALT LAKE CITY'S MOTION TO DISMISS** Case No. 230907360 Judge Andrew H. Stone Tier 2 **Oral Argument Requested**

Pursuant to Utah Rules of Civil Procedure 12(b) and 19(b), Defendant Salt Lake City, through counsel, hereby submits this *Motion to Dismiss* and respectfully requests the Court dismiss with prejudice and on the merits the Verified Complaint filed by Plaintiffs Danielle Barrani, Kadri Barrani, Liesa Covey, Scott Evans, Jim Grisley, Juan Gutierrez, Clotilde Houchon, David Ibarra, and Randy Topham (collectively, "**Plaintiffs**").

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INTRODUCTION

In this matter, Plaintiffs ask this Court to take extraordinary and unprecedent action. They request the Court enter an injunction removing high-level policy decisions from duly elected public officials and policy experts and in their stead elevating nine plaintiffs as arbiters of municipal policy and resources. That is an improper use of this Court's equitable powers.

There can be no doubt that homelessness is a crisis engulfing a majority of Western states. Its causes are hotly debated, but it is beyond dispute that the issues are complex and multi-faceted. Utah, like most other states, is experiencing a drastic lack of affordable housing, even as the population along the Wasatch Front continues to grow. The unsheltered population also suffers disproportionately high rates of severe mental health issues and substance abuse, without nearly enough available resources. For years, Salt Lake City has engaged with its partners at the State, County, and community levels to address these persistent and systemic issues. Every year, it has devoted more and more municipal resources even as it sees the ranks of the unsheltered grow.

Without acknowledging these exceptionally complicated issues, Plaintiffs filed this suit alleging that individuals experiencing homelessness within Salt Lake City constitute a legal nuisance. Incredibly, Plaintiffs assert Salt Lake City is responsible for this alleged nuisance and has intentionally and unreasonably caused it. Without any further detail or specification, they request this Court "enter a preliminary and permanent injunction directing [the City] immediately to take all steps necessary to abate the nuisance." (Compl. at 27.) Yet Plaintiffs' Complaint disregards both the City's enormous efforts and the realities of the challenge facing government actors. Plaintiffs see the unsheltered community not as individuals, but as an aggregate nuisance to be gotten rid of. And without even acknowledging the tremendous challenges facing government entities, Plaintiffs make the incredible statement that "[t]here are no unresolvable

impediments to the City abating the nuisance"—i.e., removing all unsheltered individuals from Utah's capital city. Thus, what Plaintiffs seek is a drastic expansion of nuisance law, requesting a court order to compel a municipality to prevent every unlawful act committed by a third party anywhere on a public right-of-way. That is the stuff of science fiction movies, not reality.

The City's efforts carefully balance enforcement of existing laws with support to our most vulnerable neighbors, all while utilizing finite resources as responsible stewards of taxpayer money. Plaintiffs' Complaint fails for a host of legal reasons, each discussed in detail below. But even if that were not the case, this Court, sitting in equity, should decline Plaintiffs' invitation to take over Salt Lake City's response to homelessness. For the reasons discussed herein, the City respectfully requests that the Court deny the Complaint with prejudice and on the merits.

RELEVANT FACTS

The following are taken from the allegations of Plaintiff's Complaint, which are assumed to be true for purposes of this Motion to Dismiss only:

1. Plaintiffs allege third parties have engaged in various criminal activities, including breaking windows, robbery, assault, arson, and drug use. (*See, e.g.*, Compl. ¶¶ 24, 27, 27, 33–37, 42, 51, 53, 55, 57.)

2. Plaintiffs allege that Salt Lake City is "allowing homeless encampments to proliferate in violation of existing City ordinances and state laws." (*Id.* at 2.)

3. They allege that "[f]or several years now, Salt Lake City has adopted a policy of inviting and fostering vagrancy, public camping, public urination, public defecation, and the public use of illegal drugs . . . on its property." (*Id.*)

4. Plaintiffs allege the City has "encouraged unsheltered individuals from other cities who often suffer from substance abuse and mental health issues to move to Salt Lake City and live on its streets and public easements." (*Id.*)

5. They allege "[o]ver the past four to five years the City has allowed the erection of encampments on public lands and easements in front of or nearby Plaintiffs' residences and businesses." (*Id.* ¶ 13.)

6. Plaintiffs allege the City "has taken no meaningful steps" related to unlawful actions of third parties. (*Id.* ¶ 58.)

7. Plaintiffs allege "[t]he City's actions in allowing the unlawful encampments are themselves unlawful," but they do not identify what laws the City has broken. (*Id.* ¶ 64.)

8. Plaintiffs allege the City "has exempted certain individuals in certain areas from the operation of the City's anti-camping laws." (*Id.* ¶ 67.)

9. They allege the City "caused the nuisance through creating an amenity—the allowing of public camping—that attracts the unsheltered population to create encampments on its land." (*Id.* ¶ 70.)

10. Plaintiffs allege "the City is allowing the encampments by choice" and that it "is permitting individuals to sleep, pitch tents, consume illegal drugs, urinate, defecate and perform public sex acts on property it controls." (*Id.* ¶¶ 76–77.)

11. Plaintiffs allege "[t]he City's actions are unreasonable as a matter of law as they violate state law," but they do not identify what state law the City has violated. (*Id.* ¶ 72.)

12. Plaintiffs allege "[t]he City's actions are intentional," but they do not identify what actions or how they are intentional. (*Id.* ¶ 88.)

13. Plaintiffs do not make any allegations about any particular alleged nuisance, including how long it has been present, when and how the City was notified, and whether the alleged nuisance still exists. (*See generally id.*)

14. Plaintiffs do not make any allegations about any particular act or omission on the part of the City that they claim caused any alleged nuisance. (*See generally id.*)

15. Plaintiffs seek a Court order "instructing the City to abate the nuisances that it has created by permitting the erection of tents and the associated unlawful and disorderly behaviors on public lands for which is it responsible." (*Id.* at 2.) They request the Court "enter a preliminary and permanent injunction directing the Defendant immediately to take all steps necessary to abate the nuisance" or "issue a writ of mandamus requiring Defendant to abate the public nuisances on its streets, sidewalks, easements, and parks." (*Id.* at 26, 27) However, nowhere in their Complaint do Plaintiffs identify what specific actions the City should or should not take to abate the nuisance.

16. They contend a "court order is necessary to clarify the City's legal obligations." (*Id.* ¶ 76.)

ARGUMENT

Plaintiffs' Complaint asserting private and public nuisance against the City related to the nationwide homelessness crisis fails for a host of legal reasons. First, Plaintiffs' claims are barred by Utah's public duty doctrine, which provides that a governmental actor cannot be liable for failing to perform a general duty owed to all members of the public. Second, Plaintiffs' requested relief is improper as a matter of law because a municipality cannot be compelled to carry out a discretionary act in a particular manner, the request is so vague and ambiguous that compliance would be impossible, the requested relief is impossible to accomplish and impracticable to enforce, and such order could harm individuals not party to this suit. Third, Plaintiffs failed to state a claim

for private nuisance because they did not allege facts to show the City caused or was responsible for the alleged invasions, nor that the invasions were intentional and unreasonable. Fourth, Plaintiffs failed to state a claim for public nuisance because, in addition to failing to meet the elements of private nuisance, Plaintiffs also failed to show the City acted unlawfully. Fifth, Plaintiffs' Complaint should be dismissed pursuant to Rule 19, because Plaintiffs' requested relief would substantially impact the rights of the unsheltered individuals Plaintiffs target, who are not a party to this action and cannot protect their own interests.

I. PLAINTIFFS' CLAIMS ARE BARRED BY THE PUBLIC DUTY DOCTRINE

Plaintiffs' claims that Salt Lake City failed to prevent the unlawful conduct of third parties are barred by Utah's public duty doctrine. "Under the public duty doctrine, a governmental entity cannot be held liable for a breach of an obligation owed to the general public at large" if the alleged failure to discharge the duty is by omission or is an alleged failure to take certain action. *Simons v. Sanpete Cnty*., 2018 UT App 106, ¶¶ 10–14, 427 P.3d 467 (citation and internal quotation marks omitted); *see also Cope v. Utah Valley State Coll.*, 2014 UT 53, ¶ 12, 342 P.3d 243 ("For a governmental agency and its agents to be liable for negligently caused injury suffered by a member of the public, the plaintiff must show a breach of a duty owed him as an individual, not merely the breach of an obligation owed to the general public at large by the governmental official." (quoting *Ferree v. State,* 784 P.2d 149, 151 (Utah 1989), *overruled on other grounds by Scott v. Univ. Sales, Inc.*, 2015 UT 64, 356 P.3d 1172)). "The most common examples of public duties include (1) the duty a police officer assumes to protect the public from harm caused by the criminal acts of third parties and (2) the duty of a firefighter to protect the public from fires or natural disasters." *Cope*, 2014 UT 53, ¶ 31; *see also id.* ("Under the [public duty] doctrine a governmental entity is not liable for injury to a citizen where liability is alleged on the ground that the governmental entity

owes a duty to the public in general, as in the case of police or fire protection." (internal quotation marks omitted) (alteration in original)).

Here, Plaintiffs' claims are based entirely on the City's alleged duties owed to all members of the public. Plaintiffs assert that Salt Lake City has failed to sufficiently prevent illegal behavior. (*See, e.g.*, Compl. ¶¶ 13–14 (alleging the City has "allowed" individuals to engage in unlawful camping); *id.* ¶¶ 15–19 (alleging third parties have committed criminal acts).) The prevention of crime and unlawful acts is certainly "a general duty" owed "to all members of the public." *Cope v. Utah Valley State Coll.,* 2012 UT App 319, ¶ 12, 290 P.3d 314, *aff'd on other grounds*, 2014 UT 53 (citation omitted). Indeed, Utah's appellate courts have recognized that "police or fire protection" are quintessential public duties, and a governmental actor's discharge of these duties cannot be the basis of a claim. *Cope*, 2014 UT 53, ¶ 31; *Faucheaux v. Provo City*, 2015 UT App 3, ¶ 15, 343 P.3d 288; *see, e.g.*, *Johnson v. Humboldt Cnty.,* 913 N.W.2d 256, 266 (Iowa 2018) (holding public duty doctrine barred nuisance claim for government's failure to remove obstructions from public right-of-way). In fact, Plaintiffs themselves acknowledge that their claims are based on what they characterize as the City's "*general duty* to enforce its ordinances and to protect the life, liberty, and property of the citizens." (Compl. ¶ 91 (emphasis added).)

Moreover, Plaintiffs have made no allegations that they had any sort of "special relationship" with Salt Lake City to fall within an exception to the public duty doctrine. *See Simons*, 2018 UT App 106, ¶ 20 (recognizing that "[b]ecause the public duty doctrine prevents an individual from enforcing a public duty in tort, [government entity] did not owe a duty of care to [plaintiff] unless it had created a special relationship with him"). Nor can they. The only relationship that exists between Plaintiffs and the City is that they are residents and business owners in it. That is insufficient as a matter of law to establish a special relationship for which

Plaintiffs were owed a duty, separate and apart from the general duty owed to the public. *See Cope*, 2014 UT 53, ¶ 12. In sum, even assuming the truth of Plaintiffs' allegations, their claims are barred by the public duty doctrine. The Complaint should be dismissed in full.

II. PLAINTIFFS' CLAIMS PRESENT NON-JUSTICIABLE POLITICAL QUESTIONS

Plaintiffs' claims are also barred by Utah's political question doctrine. "The political question doctrine, rooted in the United States Constitution's separation-of-powers premise, prevents judicial interference in matters wholly within the control and discretion of other branches of government." *Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995) (citing *Baker v. Carr,* 369 U.S. 186, 210–11 (1962); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 165–66 (1803)). This doctrine "preserves the integrity of functions lawfully delegated to political branches of the government and avoids undue judicial involvement in specialized operations in which the courts may have little knowledge and competence." *Id.* And the Utah appellate courts have held that this doctrine "is equally applicable to prevent interference by Utah state courts into the powers granted to the executive and legislative branches of our state and local governments." *Id.*; *see also id.* n.3 ("The Utah Constitution explicitly establishes separation of powers between the legislative, judicial, and executive branches at the state level." (citing Utah Const. art. V, § 1)); *In re Childers-Gray*, 2021 UT 13, ¶ 64, 487 P.3d 96 ("Article V, section 1 of the Utah Constitution and the political question doctrine both focus on the proper roles of each branch of government and aim to curtail interference of one branch in matters controlled by the others.").

Here, Plaintiffs' claims go to the heart of a political question. Their allegations are based entirely on the City's policy determination regarding the most appropriate and effective allocation of municipal resources, including deployment of law enforcement. The City's responses to homelessness are undoubtedly "specialized operations in which the courts may have little

knowledge and competence." *Skokos*, 900 P.2d at 541. These determinations are committed to the discretion of City officials. The political question doctrine prevents judicial intervention in just these kinds of challenging and complex decisions.

III. PLAINTIFFS' REQUESTED RELIEF IS IMPROPER AS A MATTER OF LAW

Under Utah law, "a court, sitting in equity, exercises discretion in granting or denying relief," but "it does not have the authority to ignore existing principles of law in favor of its view of the equities." *Warner v. Sirstins*, 838 P.2d 666, 670 (Utah Ct. App. 1992) (citations omitted); *see also* 30A C.J.S. Equity § 5 ("The propriety of affording equitable relief in a particular case rests in the sound discretion of the trial court and is to be exercised according to the circumstances and exigencies of the case."). In this matter, there is no authority to issue the injunctive relief Plaintiffs request because courts cannot order public officials to exercise discretion in a particular manner, the requested relief is too vague to be complied with, and Plaintiffs lack standing to seek City-wide relief. And even if there was authority, the Court should decline to exercise its discretion because the requested relief would be impossible to comply with and impracticable to enforce, and it may violate the rights of non-parties over which the Court has no jurisdiction.

A. The Judiciary Cannot Order a Municipality to Exercise Its Discretion in a Particular Manner

Plaintiffs' Complaint should be dismissed because the City cannot be commanded to exercise its discretion in responding to the homelessness crisis in any particular way. The Utah Supreme Court mandated that courts cannot utilize their equitable powers to "compel the performance of acts necessarily involving the exercise of judgment and discretion on the part of the officer, board or commission at whose hands performance is desired." *Rose v. Plymouth Town*, 173 P.2d 285, 286 (Utah 1946). It further explained:

> The court may, under proper circumstances, require an inferior tribunal to exercise its discretion *but will not prescribe how it shall do so*. *The court cannot substitute*

> *its own judgment for that of the tribunal to which the discretion was committed by law.* The writ can be used only to compel an officer or town officials to perform a duty, a ministerial act or an administrative act, about which it would have no discretion.

Id. (emphasis added). It has since confirmed that it "is not for the courts to intrude into or interfere with the functions or the policies of other departments of government." *Wright Dev. v. City of Wellsville*, 608 P.2d 232, 233 (Utah 1980). Thus, "where the action sought is a matter of discretion, the court may require the public body (or public official) to act, but will not substitute its judgment for that of the public body, by telling it how it must decide," "unless the determination made is in violation of substantial rights, or is so totally discordant to reason and justice that its action must be deemed capricious and arbitrary." *Id.* at 233–34; *see also Rice v. Utah Sec. Div.,* 2004 UT App 215, ¶ 7, 95 P.3d 1169 (holding courts may "compel the performance of a nondiscretionary duty and to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way" (citation and internal quotation marks omitted)); 30A C.J.S. Equity § 65 ("In the absence of fraud or gross abuse, a court sitting in equity will not interfere with the exercise of discretion by administrative boards or public officials acting within their jurisdiction, but it will interfere when there is fraud, gross abuse, or illegality."); *Wilbur v. United States*, 281 U.S. 206, 218 (1930) (holding courts may "compel the performance, when refused, of a ministerial duty" or "compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either").

Here, the allocation of municipal resources to address the significant issues pertaining to individuals experiencing homelessness is certainly a matter of "judgment and discretion" committed to the City to decide. *Rice*, 2004 UT App 215, ¶ 7. Yet Plaintiffs ask this Court to mandate that the City exercise that discretion in a particular way. The Court cannot do so: "The

court cannot substitute its own judgment for that of the [City] to which the discretion was committed by law." *Rose*, 173 P.2d at 286. Plaintiffs' requested relief is therefore improper as a matter of law, and the Complaint must be dismissed.

B. Plaintiffs' Requested Relief Is Too Vague to Put the City on Notice of How to Comply

The Complaint must also be dismissed because Plaintiffs' requested relief is so vague that the City would have no notice of how to comply and the Court could not enforce it. Rule 65A(d) mandates that any order granting an injunction "shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Utah R. Civ. P. 65A(d). Plaintiffs' Complaint does not comply with this mandate.

Interpreting Rule 65A, the Utah Court of Appeals has required that "[t]o be enforced, an order must be sufficiently specific and definite as to leave no reasonable basis for doubt regarding its meaning." *Salt Lake City v. Dorman-Ligh*, 912 P.2d 452, 455 (Utah Ct. App. 1996); *see also Cook Martin Poulson PC v. Smith*, 2020 UT App 57, ¶ 26, 464 P.3d 541 (same). Addressing the nearly identical federal rule, the United States Supreme Court has similarly admonished that "the specificity provisions of Rule 65(d) are no mere technical requirements." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). Rather, the Rule "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Id.* (citation omitted). Indeed, "[s]ince an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Id.* This is because "[t]he judicial contempt power is a potent weapon," and "[w]hen it is founded upon a decree too vague to be understood, it can be a deadly one." *Int'l Longshoremen's Ass'n, Loc. 1291 v. Phila. Marine Trade*

Ass'n, 389 U.S. 64, 76 (1967). As a result, a court must "frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid." *Id.*

Here, Plaintiffs request a "preliminary and permanent injunction directing the Defendant immediately to take all steps necessary to abate the nuisance." (Compl. at 27.) Such relief would not comply with the requirements of Rule 65A(d). The requested order would *not* "describe in reasonable detail . . . the act or acts sought to be restrained" because Plaintiffs do not identify what "all steps necessary" means. *See also* 58 Am. Jur. 2d Nuisances § 272 ("[A] decree enjoining a nuisance should be as definite, clear, and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it[.]"). The Utah Supreme Court holds that an injunction is improper if it "is so vague and uncertain in its terms that the parties restrained or enjoined are not able to determine what they are restrained from doing." *Thompson v. Liquor Control Comm'n of Utah*, 52 P.2d 463, 464 (Utah 1935) (per curiam); *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1244 (10th Cir. 2001) (holding preliminary injunction is impermissibly vague when "the delineation of the proscribed activity lacks particularity or when containing only an abstract conclusion of law, not an operative command capable of enforcement"). Because Plaintiffs have not identified what specific acts are required or enjoined, it is impermissible for an injunction to issue, and their Complaint fails as a matter of law.

C. Plaintiffs Lack Standing to Request City-Wide Injunctive Relief

To the extent Plaintiffs seek a court order to abate all nuisances in the City, Plaintiffs plainly lack standing to assert such claim. Utah law is clear that a nuisance claim "is not available for the protection of those interests to a person *who has no property rights or privileges in land*." *Turnbaugh v. Anderson*, 793 P.2d 939, 942–43 (Utah Ct. App. 1990) (emphasis added); *see also Erickson v. Sorensen*, 877 P.2d 144, 148 (Utah Ct. App. 1994) ("[A] cause of action will only lie when the private plaintiff has suffered damages different from those of society at large.").

Plaintiffs' allegations make clear that each only has a right or interest in a single property within the City. (*See* Compl. ¶¶ 1–9.) As a result, Plaintiffs do not have standing to assert a nuisance claim related to any property other than ones for which they have an individual interest. A City-wide injunction, to the extent that is what they seek, is therefore impermissible.

D. Plaintiffs' Requested Relief Is Impossible to Accomplish and Impracticable to Enforce

The Complaint also fails as a matter of law because they seek, in equity, relief that would be impossible to accomplish and impracticable to enforce. "[I]t is a basic premise of equity that the law will never compel a person to do that which is vain or useless." *Reed v. Alvey*, 610 P.2d 1374, 1379 n.23 (Utah 1980) (citation omitted); *see also Thomas v. Johnson*, 186 P. 437, 438 (Utah 1919) (same). Thus, "[a] court sitting in equity . . . will not use its authority to accomplish a useless purpose, nor will it grant a decree that does not confer a benefit, that is impracticable to enforce or [un]enforceable, or that is ineffectual because compliance is impossible." 30A C.J.S. Equity § 16. Furthermore, "[i]njunctive relief may be inappropriate if it requires constant supervision by the court." 42 Am. Jur. 2d Injunctions § 23. Plaintiffs' requested relief violates these maxims.

Plaintiffs request that the Court enter an order mandating the City "immediately to take all steps necessary to abate the nuisance." (Compl. at 27.) That request would be impossible to accomplish and impracticable to enforce. It is beyond dispute that homelessness is a nationwide crisis afflicting most major cities in the U.S. It is multifaceted, involving issues of severe housing shortages, substance abuse and the rise of fentanyl, and significant mental health challenges. The City is neither responsible for nor in control of these and other crucial factors. Yet Plaintiffs effectively seek a Court mandate that Salt Lake City solve homelessness. Plaintiffs' requested order would obligate the City to constantly and without fail control the independent acts of third parties. Similarly, as discussed above, Plaintiffs do not have standing to seek a City-wide

injunction, meaning any court-order would apply only to specific parcels dispersed throughout the City, which would effectively turn Salt Lake City into a private security force for Plaintiffs. Even if the injunction were limited to Plaintiffs' neighborhoods, that is still insufficient and Plaintiffs lack standing to seek such a broad and overreaching order. The request is impossible on its face and no basis for an injunction.

For the same reasons, such order would be impracticable to enforce because the Court would be forced to monitor, perhaps on a daily basis, whether independent third parties have engaged in unlawful conduct, whether the City is responsible for such conduct, what the City has done in response, and what the City should have done instead. In short, Plaintiffs have not met their required burden to show "authority, ability and means to perform that act." *Colo. Dev. Co. v. Creer*, 80 P.2d 914, 921 (Utah 1938). Plaintiffs' Complaint should be denied on this basis.

E. Plaintiffs' Requested Relief May Violate the Rights of Non-Parties

The Court should also decline to exercise its equitable powers to grant Plaintiffs' relief that may impact the rights of unsheltered individuals. Although it is unclear, Plaintiffs appear to seek a court order mandating the City cite or arrest every individual encountered camping in violation of City ordinance. It goes without saying, however, that these individuals themselves have rights. Indeed, at least one federal court of appeal has held that criminally or civilly citing individuals for camping when no alternative is available violates the Cruel and Unusual Punishment Clause of the United States Constitution. *See Johnson v. City of Grants Pass*, 72 F.4th 868, 894 (9th Cir. 2023) (striking down municipality's anti-camping ordinance as violating the Eighth Amendment as applied to individuals who are involuntarily experiencing homelessness).

Here, however, the individuals who will be targeted by Plaintiffs' order are not parties to the present action. They are therefore unable to assert their interests and, by extension, a court order directed at the City may well violate their rights. The Court's equitable powers cannot be

used in a manner that may violate the rights of others, particularly those that are not before the Court. *See* 30A C.J.S. Equity § 99 ("Equity seeks to do justice and equity between all parties. It does not act unless justice and good conscience demand that relief should be granted, and it will not do unjust or inequitable things."). The Court should decline to issue such orders.[1]

IV. PLAINTIFFS FAILED TO STATE A CLAIM FOR PRIVATE NUISANCE

Plaintiffs' claim for private nuisance should be dismissed because they failed to state a claim. To state a claim for private nuisance, Plaintiffs must establish all of the following: (1) "a substantial invasion in the private use and enjoyment of land"; (2) "caused by Defendants or for which Defendants are responsible"; and (3) "the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable." *Whaley v. Park City Mun. Corp*., 2008 UT App 234, ¶ 21, 190 P.3d 1 (citations and internal quotation marks omitted). Plaintiffs failed to state a claim because they insufficiently pled that the City caused or was responsible for the acts of third parties, or that the invasion was intentional and unreasonable.

A. Plaintiffs Failed to Allege Facts Showing the City Caused or Is Responsible for Alleged Nuisances Resulting from Activities of Third Parties

Plaintiffs failed to establish the causation element of their claim. Plaintiffs must sufficiently plead facts to show the alleged invasion were "caused by Defendants or for which Defendants are responsible." *Id.* Plaintiffs' allegations show neither.

1. Plaintiffs Did Not Show the City Caused the Acts of Third Parties

Plaintiffs failed to allege the City "caused" any invasion. It is not sufficient for Plaintiffs to simply claim a nuisance exists. Rather, they must show the City was the cause of any alleged invasion. Under Utah law, legal causation, or proximate cause, is "that cause which, in natural and

[1] For these same reasons, and as discussed further below, unsheltered individuals who may be targets of a court order are indispensable parties to this action. *See infra* Part VI.

continuous sequence, (unbroken by efficient intervening cause), produces the injury and without which the result would not have occurred." *Bansasine v. Bodell*, 927 P.2d 675, 676 (Utah Ct. App. 1996) (citation and internal quotation marks omitted). "It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury." *Id.* (citation and internal quotation marks omitted). Plaintiffs of course do not allege that the City's employees or agents themselves unlawfully camped or engaged in criminal behavior. Rather, they contend that the City *caused* third parties to engage in such behavior. But where third parties independently chose to do so, the City's action cannot be the cause that—in "natural and continuous sequence" and unbroken by an "intervening cause"—produced the injury. A federal district court recently rejected the same argument Plaintiffs advance here. In *Schonbrun v. SNAP, Inc.*, plaintiffs alleged the City of Los Angeles was liable for a public nuisance because it "failed to maintain the public property under their control by permitting a homeless encampment to exist adjacent to Plaintiff's building that contributed to causing the fire that burned down the building." 2022 WL 2903118, at *9 (C.D. Cal. Mar. 15, 2022). The court rejected this claim, holding that "proximate cause is not satisfied because the injury Plaintiff suffered was caused by 'the independent intervening acts of others'—i.e., those in the homeless encampment." *Id.* (citing *Martinez v. Pac. Bell*, 275 Cal. Rptr. 878, 884 (Ct. App. 1990) (affirming dismissal of a public nuisance claim on proximate cause grounds where plaintiff was attacked by third parties near defendants' public telephones after defendants "ignored warnings and requests" to remove the public telephones)).

Moreover, Plaintiffs failed to plead *facts* to support causation. "[M]ere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal," and the Court should "not accept legal conclusions or opinion couched as facts." *Koerber v. Mismash*, 2013 UT App 266, ¶ 3, 315 P.3d 1053 (citations and internal quotation

marks omitted). Here, Plaintiffs merely asserted that the City "caused the nuisance through creating an amenity—the allowing of public camping—that attracts the unsheltered population to create encampments on its land." (Compl. ¶ 70.) But Plaintiffs adduced no "relevant surrounding facts" to support this, as is required under Utah law. *Koerber*, 2013 UT App 266, ¶ 3 (citation and internal quotation marks omitted). They have not even identified what conduct on the part of the City constitutes "allowing."

Nor have they connected the specific incidents they allege occurred with an action the City did or did not take. This connection is crucial. There is crime in every city. No law enforcement agency could possibly prevent every crime. But in order to make a third party's crime actionable against the City, Plaintiffs must—at the very least—connect it to actions of the City. The mere fact that unlawful behavior or a crime occurred, without more, is simply insufficient to establish causation. Were that the case, every government entity in the country could be said to be "causing" injury to each crime victim. It cannot be that the City's policy decision of how to most effectively deploy law enforcement constitutes proximate cause of every single illegal act committed within its jurisdiction. Plaintiffs' allegations merely speculate that the City caused third parties to engage in illegal behavior. That is insufficient. *See Clark v. Farmers Ins. Exch*., 893 P.2d 598, 601 (Utah Ct. App. 1995) ("When the proximate cause of an injury is left to speculation, the claim fails as a matter of law." (citation and internal quotation marks omitted)).

2. Plaintiffs Did Not Show the City Was Responsible for the Unlawful Acts of Third Parties

Plaintiffs likewise failed to sufficiently allege that the City was responsible for the acts of third parties. Again, Plaintiffs rely on a wholly conclusory assertion that "[t]he City is responsible for the nuisance that occurs on its lands." (Compl. ¶ 87.) This is nothing more than a "legal conclusion[] or opinion couched as facts." *Koerber*, 2013 UT App 266, ¶ 3 (citation omitted). At

most, Plaintiffs allege the City "allowed" or "invited" third parties to engage in unlawful behavior, but Plaintiffs adduced no "relevant surrounding facts" to support this, as is required under Utah law. *Id.* In particular, they have not alleged any actions the City has taken or not taken that could constitute allowance or invitation. Were this pleading sufficient, every governmental entity across the State could be rendered liable for every instance of unlawful behavior within their jurisdiction; a plaintiff could simply allege that by failing to stop the behavior, the entity "allowed" it.

Indeed, Plaintiffs' own reliance on the Restatement demonstrates that their claim fails. (*See* Compl. ¶ 66.) Plaintiffs cite Section 838, which provides:

> A possessor of land upon which a third person carries on an activity that causes a nuisance is subject to liability for the nuisance if it is otherwise actionable, and
> (a) the possessor knows or has reason to know that the activity is being carried on and that it is causing or will involve an unreasonable risk of causing the nuisance, and
> (b) he consents to the activity or fails to exercise reasonable care to prevent the nuisance.

Restatement (Second) of Torts § 838 (1979). Plaintiffs have not pled facts to establish either of these requirements. As to subsection (a), Plaintiffs' vague and general allegations state that at unidentified times and unidentified locations throughout the City over the course of the last four to five years, individuals camped or engaged in illegal behavior on public rights-of-way. They failed to plead that the City "kn[ew] or ha[d] reason to know" of any of these alleged incidents at the time they occurred. This is not a circumstance of a property owner charged with awareness of what occurs on a single parcel. Plaintiffs seek to hold the City liable for third-party conduct along hundreds of miles of streets and in hundreds of acres of public space, dispersed across the City. In order to be actionable, at a minimum, the City has to have had reason to know about the specific incidents complained of. Plaintiffs did not, and cannot, allege that is the case.

As to subsection (b), Plaintiffs also failed to allege facts to show the City consented to the activity or failed to exercise reasonable care. As discussed above, all that Plaintiffs allege is the

conclusory assertion that the City "invited" or "allowed" this third-party conduct. That is insufficient to show consent, which must be "manifested by specific words or by other conduct." Restatement (Second) of Torts § 838 cmt. f. Nor have Plaintiffs alleged facts to show the City failed to take reasonable steps because they have not addressed the steps the City takes at all.[2] *See id.* cmt. g (providing there is liability is landowner fails to take "simple and easy steps," but recognizing that owner is "not required to do more than is reasonable" and there is no liability "when the nuisance can be prevented only by measures involving great effort and expense").

In sum, Plaintiffs seek to impose strict liability on a government actor for failing to completely prevent illegal behavior. That is not the purpose of a nuisance action. *See District of Columbia v. Fowler*, 497 A.2d 456, 462 (D.C. 1985) ("But the mere existence of a nuisance and the finding that the District had notice of it are not sufficient to impose liability on the District. The evidence must show, in addition, that the District was guilty of some sort of tortious conduct[.]"). Because Plaintiffs have failed to show Salt Lake City caused or has responsibility for the acts of third parties at unidentified times and unidentified locations all throughout the City, their claim fails.

B. Plaintiffs Failed to Allege Facts Showing the City's Conduct Was Intentional and Unreasonable

Finally, Plaintiffs failed allege facts to show that the alleged invasion was "intentional and unreasonable." *Whaley*, 2008 UT App 234, ¶ 21 (internal quotation marks omitted).

1. Plaintiffs Did Not Show the Invasion Was Intentional

Plaintiffs fail to allege any facts to establish the City intentionally caused any alleged invasion. Rather, Plaintiffs cite provisions of the Restatement and allege only the following:

[2] Plaintiffs' Application for Preliminary Injunction is even more conclusory, asserting only that "the City has either consented to the activities on its lands, or has failed to take reasonable steps to abate the conditions." (Pls.' App. at 14.) They do not identify any facts related to either assertion.

- "The City's actions are intentional." (Compl. ¶ 88.)
- "The City's actions in allowing nuisances on its land are therefore intentional." (Compl. ¶ 90.)
- "The City further has a general duty to enforce its ordinances and to protect the life, liberty, and property of the citizens, and a specific duty to abate nuisances, and its failure to act is intentional conduct." (Compl. ¶ 91.)

The Restatement and these assertions are nothing more than legal conclusions. They are not factual allegations that can withstand dismissal. *See Koerber*, 2013 UT App 266, ¶ 3. Indeed, these allegations do not even provide notice of what "actions" or what "failure to act" Plaintiffs allege has occurred. This does not meet the minimal standard of notice pleading.

2. Plaintiffs Did Not Show the Invasion Was Unreasonable

Plaintiffs failed to meet their burden to show the invasion was unreasonable under nuisance law. The Utah Supreme Court has mandated that the reasonableness determination must "evaluate, among other things, the severity of the harm vis-a-vis its social value or utility." *Walker Drug Co. v. La Sal Oil Co*., 972 P.2d 1238, 1245 (Utah 1998) (citation omitted). This includes analysis of "the degree of a defendant's interference in the use and enjoyment of the plaintiff's land and the reasonableness of the interference in the context of wider community interests." *Id.*

Plaintiffs allege unreasonableness is met because the City could simply create a "managed campsite" or, even more incredibly, "require[] unsheltered individuals to utilize available emergency shelter beds and available supportive, rapid, and transitional housing units." (Compl. ¶ 93.) As to the former, whether to operate a regulated campsite is a substantial policy decision that requires consideration of a wide variety of factors, not to mention the enormous amount of time and taxpayer money that is needed to create and then sustain that operation. Such operation also requires a coordinated partnership with other governmental entities and stakeholders, including the State. As to the latter, the City cannot force individuals into shelters or specific housing and hold them there against their will as it may well constitute an illegal seizure under the

Fourth Amendment. In short, Plaintiffs have not sufficiently alleged that the City's conduct is unreasonable. For this additional reason, their claim fails.

V. PLAINTIFFS FAILED TO STATE A CLAIM FOR PUBLIC NUISANCE

Plaintiffs' burden to state a claim for public nuisance is even higher, and they failed to do so. To state a claim for public nuisance, Plaintiffs must establish all of the following: (1) "the alleged nuisance consisted of *unlawfully* doing any act or omitting to perform any duty"; (2) "the act or omission . . . in any way render[ed] three or more persons insecure in life or the use of property"; (3) "Plaintiffs suffered damages different from those of society at large"; (4) the City "caused or [is] responsible for the nuisance complained of"; and (5) the City's "conduct was unreasonable." *Whaley v. Park City Mun. Corp*., 2008 UT App 234, ¶ 13, 190 P.3d 1 (citations and internal quotation marks omitted) (emphasis and first and second alterations in original).

The fourth and fifth elements are the same for a private nuisance, and thus Plaintiffs' public nuisance claim fails for the same reasons articulated above.

Plaintiffs also failed to establish the first element, because they did not allege the purported nuisance results from the City "*unlawfully* doing any act or omitting to perform any duty." *Whaley*, 2008 UT App 234, ¶ 13 (emphasis in original). Plaintiffs make only a single allegation in attempt to establish the City's unlawful conduct: "A long line of municipal corporation cases provide that a municipality is obligated to remove nuisances from the public streets, sidewalks, and other public areas." (Compl. ¶ 64 (citing *Salt Lake City v. Schubach,* 159 P.2d 149, 151–52 (Utah 1945).) In *Schubach*, a pedestrian tripped on the edge of a metal trap door installed in the sidewalk by the abutting property owner, and Plaintiffs cite it for the unremarkable proposition that a city has "the duty of maintaining the sidewalks within its limits in a safe condition for use in the usual mode by pedestrians." 159 P.2d at 151–52. *Schubach* is inapposite. Plaintiffs do not allege they were harmed by a stretch of sidewalk that was not "in a safe condition for use in the usual mode by

pedestrians." Rather, Plaintiffs allege the City has not made the policy decision to devote resources and law enforcement in the precise manner they desire. Plaintiffs have cited no provision of statute or common law that makes it unlawful for the City to do so. Plaintiffs have therefore failed to state a claim upon which the Court can grant relief, and their claim should be dismissed.[3]

VI. PLAINTIFFS FAILED TO JOIN INDISPENSABLE PARTIES

Alternatively, the Complaint should be dismissed for failure to join indispensable parties. Utah Rule of Civil Procedure 19 mandates that a person "shall be joined as a party in the action if . . . in his absence complete relief cannot be accorded among those already parties." Utah R. Civ. P. 19(a). The Rule further provides that if such person "cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." *Id.* 19(b). Thus, "a court must engage in a two-part inquiry to determine whether joinder is required": (1) "the court must ascertain whether a party has sufficient interest in the action to make it a necessary party," and (2) "if the court indeed deems the party necessary to the action, and joinder is unfeasible, the court must then determine whether the party is indispensable." *Brimhall v. Ditech Fin. LLC*, 2021 UT App 34, ¶ 26, 487 P.3d 165 (citations and internal quotation marks omitted).

As noted above, Plaintiffs may be seeking a court order mandating the City aggressively and without exception enforce anti-camping ordinances, potentially in violation of the rights of

[3] In their Application for Preliminary Injunction, Plaintiffs also contend the City is acting unlawfully because (1) homeless encampments are unlawful; (2) unsheltered individuals are discharging trash into storm drains; (3) the City is de facto exempting certain individuals from camping ordinances. (Pls.' App. at 12–15.) These arguments are without merit. First, the alleged unlawfulness must be something the City is doing; thus, Plaintiffs' contentions that others are camping or polluting illegally does not show that the *City* is doing anything unlawful. Second, in any event, Plaintiffs' claims have nothing to do with water pollution, so that contention has no nexus to this action. Third, Plaintiffs' uniform operation of laws argument does not track because Plaintiffs do not allege the City has prohibited *them* from camping while allowing others to do so.

those impacted. Because such individuals are not parties to this action, they are unable to assert their interests and, by extension, a court order directed at the City may well violate their rights. As a result, complete relief cannot be accorded among those already parties where the City is in no position to assert the rights of third parties but may be forced to violate them. Individuals experiencing homelessness are therefore necessary parties. *See* 30A C.J.S. Equity § 131 (recognizing the maxim that "[e]quity delights to do justice, and that not by halves," meaning **"**it is the aim of equity to have all interested parties in court and to render a complete decree adjusting all rights and protecting the parties against future litigation").

To determine whether the action should be dismissed because the persons are indispensable, a court should consider the following factors: (1) "to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties," (2) "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided," (3) "whether a judgment rendered in the person's absence will be adequate," and (4) "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Utah R. Civ. P. 19(b). These factors weigh in favor of dismissal of the present action. First, a judgment rendered in the absence of unsheltered individuals would be highly prejudicial because any order would necessarily impact their daily lives and potentially their constitutional rights. Second, it is not practical to lessen the prejudice these individuals would suffer because there is no party that will adequately represent their interests. The contours of constitutional rights are not well-defined in Utah and the Tenth Circuit, and neither the Plaintiffs nor the City are in a position to advocate for those rights. Third, a judgment would not be adequate because it may subject the City to future litigation and damages if it was determined that the City's conduct in compliance with the judgment violated the rights of non-

parties. Finally, Plaintiffs have an adequate remedy if the action is dismissed because this is quintessentially a policy question. Plaintiffs ask this Court to usurp the policy decisions made by the elected officials of the City (and of the County and State, for that matter). Plaintiffs may influence these policy issues in the same way available to every constituent—through participation in the political process, such as contacting their representatives, exercising their free speech rights, voting in elections, and running for office. Because each of these factors weighs in favor of dismissal, the Complaint should be dismissed pursuant to Rule 19.

CONCLUSION

Plaintiffs attempt to shoehorn their disagreement on resource allocation and law enforcement policy into the law of nuisance. Their allegations fail as a matter of law. For the foregoing reasons, Salt Lake City respectfully requests the Court dismiss the Complaint with prejudice and on the merits.

DATED: November 2, 2023.

SALT LAKE CITY CORPORATION

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2023, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court, which effectuated service upon the following:

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- within 14 days of this motion being filed, if the motion will be decided by a judge, or
- at least 14 days before the hearing, if the motion will be decided by a commissioner.

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- dentro de 14 días del día que se presenta la moción, si la misma será resuelta por un juez, o
- por lo menos 14 días antes de la audiencia, si la misma será resuelta por un comisionado.

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