Case No. A166606

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

California Department of Housing and Community Development and Gustavo Velasquez,

Petitioners,

v.

The Superior Court of the State of California for the County of Alameda,

Respondent;

Alliance of Californians for Community Empowerment (ACCE) Action; PolicyLink; Strategic Actions for a Just Economy (SAJE),

Real Parties in Interest.

Alameda County Superior Court, Case No. 22CV012263
The Honorable Frank Roesch, Judge

REPLY TO PRELIMINARY OPPOSITION

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INTRODUCTION

Real Parties' Preliminary Opposition fails to rebut any of the core legal premises underlying the State's request for this Court's intervention to vacate the trial court's sweeping, legally unjustifiable preliminary injunction.

First, Real Parties do not—and cannot—dispute that if due process protections are triggered by denying applicants emergency rental assistance, the trial court needed to have applied the test from *People v. Ramirez* (1979) 25 Cal.3d 260 to determine whether HCD's proposed processes meet constitutional due process standards. While they argue that the trial court discharged its "undisputed duty . . . to apply the applicable law," they cite nothing showing that the trial court identified and applied the correct legal standard. The fact that (as Real Parties note) the trial court told the parties that it had reviewed "the papers" is not helpful in this regard, and if that were all that were necessary, the legal basis for the decision would be effectively unreviewable by this Court. The trial court's failure to identify and apply the correct legal standard was a serious abuse of discretion that by itself warrants vacatur of its decision.

Second, Real Parties fail to show that the trial court's determination that the due process clause requires HCD to share more information and documents with ERAP applicants was consistent with *Ramirez*, especially when the court did not—and could not—show that the additional requirements would meaningfully reduce the risk of an erroneous deprivation of rental assistance.

Most notably, Real Parties fail to proffer evidence regarding the second *Ramirez* factor—the risk of erroneous deprivation of rental assistance through HCD's procedures and the value of additional procedures in preventing erroneous deprivation—despite volumes of data relating to ERAP applications that HCD has provided Real Parties. Nor have they presented any evidence that denials were arbitrary or malicious.

In fact, Real Parties still fail to identify a single ERAP applicant who has been erroneously deprived of rental assistance after exhausting the resources and processes afforded to applicants under the Program, including the appeal process, the Local Partner Network, and case management staff. The tenant declarations Real Parties presented to the trial court, far from evidencing erroneous deprivation resulting from HCD's prior or proposed processes, in fact demonstrate that those processes actually work when applicants utilize them. Yet even if those tenant declarants had been erroneously deprived of rental assistance (which Real Parties have not established), a handful of erroneous denials out of more than 635,000 applications would not demonstrate a meaningful risk of erroneous deprivation of assistance as a result of HCD's procedures. Moreover, HCD's proposed revised processes further guard against any such risk. Under those revised processes (which the trial court blocked HCD from implementing), before issuing even an initial denial, HCD would inform an applicant with a deficient application what section of their application is inadequate and what kind of documents are necessary to cure their application; HCD would

provide clear, reasoned, fact-based explanations for the initial denial determination; and HCD would provide applicants with multiple opportunities to cure deficiencies in their applications (including an appeal process through which applicants could submit additional information) before a final denial determination is made. Even assuming that constitutional due process is triggered by this non-entitlement grant program, the proposed revised process more than complies with due process requirements.

Third, in arguing that the preliminary injunction is not overbroad, Real Parties accuse HCD of "misconstruing . . . the trial court's conclusions" regarding HCD's motion to modify or dissolve the injunction. This argument is without merit. In ruling on that motion, the trial court focused on HCD's denial of applications based on information obtained from third parties. That concern, however, relates to at most two of the grounds for denial in the proposed denial notice. The trial court did not even mention the other eight grounds for denial in the notice, much less discuss why they fail to comport with due process. Nor does the actual order denying HCD's motion mention those other grounds. In the absence of a finding that the other bases for denial violate applicants' due process rights, the trial court should have modified the injunction, since injunctions are required to be tailored to eliminate only the specific harm alleged. The court's failure to do so was yet another serious abuse of discretion.

Next, Real Parties fail to show that the trial court properly considered the balance of harms in continuing the injunction. Perhaps most fundamentally, Real Parties fail to demonstrate any significant (let alone irreparable) harms to applicants resulting from the injunction's dissolution. Contrary to Real Parties' unsupported legal assertions, applicants who have rental debts are not shielded from eviction if they have a still-pending application in the limbo created by the trial court. Those protections ended on June 30, 2022. Thus, even with the injunction in place, applicants who have not received a denial may be at risk of eviction.

In addition, like the trial court, Real Parties misunderstand the irreparable harms to HCD and applicants as merely financial and focus primarily on disputing HCD's evidence regarding its available administrative funding. HCD's estimate of its remaining administrative funding is accurate. But regardless, the funding limitation is only one factor effecting a larger harm on HCD and applicants, which Real Parties ignore. Due to the injunction, HCD is unable to administer ERAP as directed by the Legislature and process the remaining applications. With each passing week, HCD has approximately the same number of pending applications but fewer administrative funds to process those applications and disburse funds to eligible applicants. Given the amount of work that will need to be done once HCD is able to begin issuing denials, the protracted delay will inevitably result in HCD having to conduct such efforts with a significant reduction in staff given the finite administrative resources that

remain available while the number of overall pending applications remains approximately the same, resulting in a significant delay in processing and the Program facing the risk of running out of administrative funding that is needed to resolve all pending applications. In short, the extraordinary invocation of interim equitable relief risks undermining the very goal underlying it—HCD may ultimately have to deny all pending applications due to lack of funds, which the trial court lacks authority to remedy because it cannot direct an appropriation by the Legislature. (See *Butt v. State of California* (1992) 4 Cal.4th 668, 698; *O'Connell v. Superior Ct.* (2006) 141 Cal.App.4th 1452, 1466-1467.) In the meantime, applicants who theoretically could cure a deficient application are being deprived the opportunity to do so due to the trial court's denial of HCD's request to modify its process in response to the preliminary injunction.

This Court should issue a writ directing the trial court to vacate its October 20, 2022 order and enter a new order modifying the preliminary injunction.

ARGUMENT

I. THE TRIAL COURT FAILED TO APPLY THE CORRECT LEGAL STANDARD

A. ERAP does not give ERAP applicants any entitlement or vested interest subject to protection from "deprivation"

As a threshold matter, Real Parties have not established that the kind of due process protections that accompany a deprivation of a statutorily conferred benefit apply to a situation, like here, where there is no entitlement. An aggrieved party claiming a violation of due process must establish that he or she

has been deprived of a statutorily conferred benefit, and that he or she has a legitimate claim of entitlement to the benefit. ERAP, however, is a temporary, emergency rental assistance program that is not funded to provide assistance to all eligible applicants, and is subject to statutory prioritization requirements whereby even applicants who meet all program eligibility criteria are not guaranteed rental assistance (i.e., it is not an entitlement program). Unlike other government programs, funding for ERAP is limited to a distinct amount of one-time funding (based on two rounds of federal funding), and due to outsized demand, supplemented with state funding authorized through the use of Senate Bill No. 115's ("SB 115") ((2021-2022 Reg. Sess.), Stats. 2022, ch. 2, § 3) cashflow loans. Moreover, consistent with the temporary and emergency nature of the Program, the Legislature entrusted HCD with quickly fashioning rules to address impacts of the pandemic on hundreds of thousands of households while also preventing fraud. Therefore, applicants who may otherwise meet all of the eligibility requirements will still be denied assistance once the program's remaining funds are depleted. They do not have "a legitimate claim of entitlement" to rental assistance, and thus cannot show that they have been "deprived" of it.

It is not, as Real Parties claim, "the end of the matter" that ERAP assistance is a statutorily conferred benefit. (Opp., p. 18.) While it is true that "under the state due process analysis an aggrieved party need not establish a protected property interest," the claimant must still "identify a statutorily conferred benefit or

interest of which he or she *has been deprived* to trigger procedural due process under the California Constitution and the *Ramirez* analysis of what procedure is due." (*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1071, emphasis added.) If even those applicants who qualify for ERAP are not guaranteed rental assistance if funds are depleted or due to statutory prioritization requirements (see Health & Saf. Code, § 50897.1, subd. (b)(1)[1]), it cannot be said that they have been "deprived" of that benefit. Rather, those applicants had no vested right to rental assistance benefits to begin with, a key point distinguishing this case from the cases that Real Parties largely rely upon. (See, e.g., *Webb v. Swoap* (1974) 40 Cal.App.3d 191, 193, 197 [involving the termination or reduction of *existing* benefits under welfare assistance entitlement programs and not addressing in any way

[1] This statute outlines three categories for priority assistance. The highest priority ("Priority 1") are households with a household income that is not more than 50 percent of the area median or households which have received a 3-day notice demanding payment for rent or an unlawful detainer summons. The next highest priority ("Priority 2") are communities disproportionately impacted by COVID-19, as determined by the HCD. Finally, eligible households not covered by Priority 1 or 2 with a household income not more than 80 percent of the area median income are considered "Priority 3." In addition, "[f]or purposes of stabilizing households and preventing evictions, rental arrears shall be given priority for purposes of providing rental assistance" and "[r]emaining funds not used [for rental arrears] may be used for any eligible use," including prospective rent. (Health & Saf. Code, § 50897.1, subds. (c)(2) and (c)(3).)

whether the applicants of a temporary emergency non-entitlement program are entitled to due process protections].)

Saleeby v. State Bar (1985) 39 Cal.3d 547 "appears to be the only case where [the California] Supreme Court applied the *Ramirez* analytical approach within a context where . . . the statute conferred no property or liberty interest sufficient to invoke the procedural protections of the due process clause . . . in order to ensure the decision maker (the State Bar) acted within its discretion in a nondiscriminatory and nonarbitrary manner." (*Ryan*, *supra*, 94 Cal.App.4th at p. 1070, fn. 17.) But the application of the *Ramirez* factors in that case only highlights that, as discussed below, the processes proposed by HCD more than satisfy due process requirements. (See *Saleeby*, *supra*, 39 Cal.3d at pp. 565-567 [requiring applicants to be afforded an opportunity to be heard and respond to the bar's proposed disposition].)

B. The trial court failed to apply the correct legal standard when conducting its due process analysis

Real Parties contend that the trial court was not required to identify or consider the four factors the California Supreme Court laid out in *People v. Ramirez* (1979) 25 Cal.3d 260 when conducting its due process analysis. This is contrary to both established case law and Real Parties' own arguments. Real Parties attempt to downplay the trial court's legal error by stating that due process only "generally" requires consideration of the four *Ramirez* factors and, in a footnote, imply that the trial court did, in fact, apply the correct legal standard when it

summarily stated that it read the papers. (Opp., p. 27) Of course, simply reading the papers is not a substitute for identifying the applicable law and actually conducting the required due process analysis.

Courts must evaluate the governmental and private interests at stake and apply the balancing test announced in *Ramirez* when assessing a due process claim. (See *Saleeby*, *supra*, 39 Cal.3d at pp. 564-565 ["[w]e specifically instructed that 'courts must evaluate the extent to which procedural protections can be tailored to promote more accurate and reliable administrative decisions in light of the governmental and private interests at stake'"]; *Van Atta v. Scott* (1980) 27 Cal.3d 424, 434 ["In *People v. Ramirez*…this court held that the extent to which procedural due process relief is available under the California Constitution depends on a careful weighing of the private and governmental interests involved"]; *In re Kavanaugh* (2021) 61 Cal.App.5th 320, 352-353 ["[i]n assessing a due process claim…[w]e apply the balancing test announced in *People v. Ramirez*…to assess the amount of process that is required under the circumstances"]; *Edward W. v. Lamkins* (2002) 99 Cal.App.3d 516, 530 [stating that *Ramirez* "established the test that has since been utilized by courts to evaluate due process claims under the California Constitution"].)

Indeed, Real Parties themselves have maintained that the court must consider the *Ramirez* factors in determining if HCD's processes comport with due process. In their Motion for Preliminary Injunction, Real Parties, citing *Ramirez*, stated that

"[t]he Supreme Court has held what procedures are required to comply with California due process depends upon (1) the importance of the private interest at stake; (2) the risk of erroneous deprivation through the procedures employed and the "probable value…of additional or substitute procedural safeguards"; (3) the "dignitary interest in enabling individuals "to present their side of the story before a responsible governmental official", and (4) the governmental interest and burdens the additional process would entail." (1 Tab 3, p. 58.) And they were correct: the *Ramirez* factors set the requirements of due process analysis; they are not merely "a general statement of the law" that a trial court can disregard or not apply. (Opp., p. 27.)

The trial court should have issued a statement of decision explaining its ruling. While a statement of decision is typically required only in connection with a trial, courts have created exceptions to that rule, which are instructive here. "In determining whether an exception should be created, the courts balance ' "(1) the importance of the issues at stake in the proceeding, including the significance of the rights affected and the magnitude of the potential adverse effect on those rights; and (2) whether appellate review can be effectively accomplished even in the absence of express findings."" (*Lien v. Lucky United Properties Investment, Inc.,* (2008) 163 Cal.App.4th 620, 624, citing *In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1040.) Given the importance of this matter impacting the future of the Program, and by extension the availability of ERAP funding to Californians in need, the trial court's decision required a

statement of decision. Further, without an order setting forth the applicable law and the trial court's findings, this Court cannot meaningfully review whether the trial court identified the correct legal standard or analyzed the *Ramirez* factors.

This matter is distinguishable from *People ex rel. Becerra v. Huber* (2019) 32 Cal.App.5th 524, which is cited by Real Parties for the proposition that a statement of decision is not required for a ruling on a motion. (See Opp., p. 28.) There, the Court of Appeal determined that no statement of decision by the trial court expressly balancing the various factors under the relevant legal standard was necessary because all of the findings necessary to uphold the orders could be implied because they were already supported by substantial evidence in the record. (*Becerra, supra,* 32 Cal.App.5th at pp. 548-49, fn.19.) Here, however, the question is not simply whether the trial court properly balanced the appropriate factors; the question is more fundamentally whether the trial court even *identified* the applicable legal standard to begin with. That question was not at issue in *Huber*. Furthermore, as shown in HCD's writ petition, there is no evidence in the record, much less substantial evidence, to support a balancing of interests under *Ramirez* in Real Parties' favor or even that the trial court considered the *Ramirez* factors. When a trial court fails to apply the correct legal standard, an abuse of discretion occurs. (See *Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420-421.) And when a trial court applies an incorrect legal standard, and the evidence does not support the decision under

the correct legal standard, reversal is appropriate. (*Munoz v. Purdy* (1979) 91 Cal.App.3d 942, 948.)

Recognizing the legal vulnerability of the trial court's decision, Real Parties resort to arguing that HCD somehow waived its right to object to the trial court's failure to apply the correct legal standard because HCD did not mention *Ramirez* in its motion to dissolve the preliminary injunction. This argument is without merit. In the parties' motion and opposition to preliminary injunction, they had already established the *Ramirez* factors as the legal test to be applied when determining if HCD's existing procedures provided sufficient due process. In deciding HCD's motion to dissolve or modify the existing preliminary injunction, the court should have engaged in the same due process analysis to determine if HCD's proposed amended procedures comport with due process. In addition, unlike *Steven W. v. Matthew S.*, the trial court's application of the wrong legal standard is not a procedural defect or objection that must be raised to be preserved. (*Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1117 [defendant's failure to object to bifurcation of the case before trial constituted waiver of the objection].)

Though the trial court may have read the moving papers, it abused its discretion by neither identifying nor applying the *Ramirez* factors when making its ruling.[2]

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[2] At an absolute minimum, the case should be remanded back to the trial court for consideration of the *Ramirez* factors and a statement of its reasoning. (See *In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1052.)

II. HCD'S PROPOSED PROCEDURES SATISFY DUE PROCESS UNDER THE CALIFORNIA CONSTITUTION

A. HCD's proposed procedures are supported by an analysis of the *Ramirez* factors

As the "determination of whether administrative proceedings were fundamentally fair is a question of law," the question of whether HCD's proposed processes satisfy due process is decided de novo on appeal. (*Rosenbilt v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443.) An analysis of the *Ramirez* factors weighs in favor of modifying the injunction to allow HCD to implement its proposed amended processes.

1. Real Parties' contention that the private interest at stake amounts to eviction and loss of home is inaccurate

As to the first *Ramirez* factor, there is no dispute that rental assistance could be an important private interest. However, Real Parties inaccurately attempt to equate a denial of ERAP rental assistance with automatic eviction and loss of home. Under Assembly Bill 2179 (A.B. No. 2179, (2021-2022 Reg. Sess.), Stats. 2022, ch. 13), State COVID-19-related eviction protections ended on June 30, 2022, and landlords are now, and have been, free to proceed with evictions regardless of whether a tenant's application for rental assistance is pending, subject to eviction protections provided at the local level. Real Parties claim that Health and Safety Code section 50897.3, subdivision (e)(2) blocks evictions so long as an application for rental assistance is pending, but fail to mention section 50897.3, subdivision (g), which was added on June 28, 2021, to limit the application of section 50897.3, subdivision (e), to the administration of the first and second rounds of federal funding, which have been depleted.

Applications are now funded through the Cash Flow Loans authorized by SB 115. Accordingly, section 50897.3, subdivision (e) no longer applies and pending applications for rental assistance do not stave off eviction proceedings.[3]

In truth, the private interest at stake can vary significantly depending on the application. It could be thousands of dollars in rental assistance or a few hundred dollars for utilities assistance. ERAP provides a wide variety of assistance and the private interest at stake depends very much on the specific applicant. Real Parties' argument that "the private interest at stake could not be higher" is unsupported and incorrect. (Opp., p. 30.) Lastly, as demonstrated in Section I.A, ERAP rental assistance is contingent on available funding, and applicants cannot show that they have a legitimate claim of entitlement to it.

[3] SB 115, enacted on February 9, 2022, provides, in relevant part, that the Program must use the Cash Flow Loans for expenditures to support eligible applicants that incurred rental or utility assistance before March 31, 2022. The private interest at stake is rental and/or utilities debt incurred before March 31, 2022. While the assistance could be a portion of a tenant's total current rental debt, a tenant currently facing eviction still needs to account for any unpaid rental or utilities debt accumulated after March 31, 2022. For this reason as well, Real Parties' contention that the private interest at stake amounts to eviction and loss of home is inaccurate.

2. An analysis of the second *Ramirez* factor weighs in favor of finding that HCD's proposed processes comport with due process

a. Petitioners have not shown a meaningful risk of erroneous deprivation under HCD's processes or the value of additional procedures

The trial court never considered the second *Ramirez* factor—the actual "risk of an erroneous deprivation"—under either HCD's pre-injunction procedures or proposed revised procedures. In particular, it never analyzed whether the multiple notices and opportunities HCD afforded to applicants to cure deficiencies and present evidence of eligibility, including the ability to appeal a denial determination and present new evidence to contest HCD's initial determination, were insufficient to avoid erroneous deprivation of rental assistance. Further, there was no evidence that the additional procedures that the trial court determined to be necessary would actually reduce the risk of erroneous deprivation. That should have proven fatal to the trial court's determination that additional procedures were necessary.

Marquez v. State Department of Health Care Services explained that to satisfy the second *Ramirez* factor, there must be some evidence in the record that shows a high risk that beneficiaries' private interests are being violated and the value of additional procedures (over what would otherwise be used) in reducing the risk of erroneous deprivation of benefits. (See *Marquez v. State Dep't of Health Care Servs.* (2015) 240 Cal.App.4th 87, 113-115.) Real Parties attempt to avoid this requirement by confining *Marquez* to its facts (Opp., p. 33), thereby implicitly acknowledging that they cannot produce any

satisfactory evidence on the risk of erroneous deprivation of rental assistance to tenants.

Real Parties explain their failure to provide evidence of a meaningful risk of erroneous deprivation by contending that they cannot possibly quantify the risk because the relevant information is solely within HCD's possession. (Opp., p. 32.) This is unpersuasive. Real Parties have received multiple datasets regarding ERAP applications and denials in response to an ongoing Public Records Act request (1 Tab 1, p. 24), and allegedly represent interested applicants. Yet Real Parties are still unable to show any number or percentage of applicants affected by HCD's alleged due process violations, or even any risk that ERAP applicants would be adversely affected by HCD's proposed or existing procedures (including anecdotal evidence that one of their clients was erroneously denied after fully exhausting the available procedures).

It is clear that Real Parties have not, and cannot, satisfy the second *Ramirez* factor regarding the risk of erroneous deprivation through either HCD's existing or proposed procedures. Though Real Parties repeatedly argue that ERAP's due process protections should be equal to those in cases involving long-standing entitlement programs from different circuits (Opp., pp. 22-24) or prisoners seeking work furloughs or facing disciplinary charges (Opp., p. 25), Real Parties argue that the case law should be "confined to its facts" when it is not in their favor. (Opp., p. 33.) The court should reject Petitioners' self-serving logic.

b. Nothing in the record demonstrates a high risk of erroneous deprivation of benefits, especially after exhausting all of the processes afforded to applicants under the program

The record not only shows that there is no significant risk of erroneous deprivation through ERAP's processes, but actually that the Program and appeals process work effectively. Real Parties' own submitted declarations show that denied applicants can have their determination overturned on appeal when they properly engage in the appeal process.

HCD of course does not contend that "none of its rental assistance denials have been erroneous." (Opp., p. 33.) Rather, what HCD argues is that, despite all the information available to them (including having "assisted literally thousands of tenants with rental assistance applications" (Opp., p. 33)), Real Parties have failed to establish that any of the over 635,000 ERAP applicants has been erroneously deprived of rental assistance after exhausting the processes afforded to them under the Program.

And far from rebutting HCD's argument, Real Parties' arguments and declarations demonstrate that HCD's appeals process and Local Partner Network system work as they were intended to. When setting up the Program, HCD anticipated that some applicants would need additional assistance with their applications, particularly due to technology or language barriers. To that end, HCD funded and partnered with community-based organizations, referred to collectively as the Local Partner Networks, to provide assistance. (2 Tab 17, p. 324.) Real Parties'

declarations from advocates show that the Program worked. Edna Monroy, an advocate with Strategic Actions for a Just Economy (SAJE), stated that "[a]ll of the appeals that I have helped with have been approved." (1 Tab 7, p. 143.) Jackie Zaneri, an advocate with Alliance of Californians for Community Empowerment (ACCE) Action stated that "I can usually get these denials reversed by emailing senior HCD staff until I can figure out what actually happened, and then submitting documents to address the issue in an appeal." (1 Tab 11, p. 188.) Real Parties' arguments only show that HCD's collaboration with Local Partner Networks served its intended purpose of assisting applicants most in need of obtaining rental assistance, and that applicants who properly appealed could often ultimately demonstrate eligibility.

Real Parties assert that the declarations from advocates show that (1) many denials are erroneous; and (2) denials can only be successfully appealed with the assistance of experienced advocates. (Opp., p. 34.) This argument is unsupported by the evidence. First, despite working with thousands of applicants, Real Parties have only submitted declarations from ten hand-picked applicants whose applications were allegedly erroneously denied. Moreover, after review of their applications, HCD determined that four of them received full funding, one is under investigation for fraud, one received rental assistance but failed to follow instructions for submitting a request for *additional* assistance, two failed to timely appeal, and two currently have open appeals. As such, Real Parties have failed to show evidence

of even one applicant who was erroneously deprived of rental assistance after exhausting ERAP's appeals process. Even if some of the ten declarants were erroneously denied—which Real Parties have not established—a handful of erroneous denials out of 635,000 applicants does not demonstrate a meaningful risk of erroneous deprivation of benefits as a result of HCD's procedures.

Real Parties suggest that these applicants would not have been approved without the help of an experienced advocate. This argument is speculative at best. Just because an applicant is approved after engaging with an advocate does not mean that the applicant would not have been approved without an advocate's help. The applicant could have obtained information from the HCD call center on their own or could have been on their way to approval despite the advocate's involvement. Advocates are only aware of the applications where they are assisting tenants, so they will naturally believe that all applicants need such assistance to appeal a denial determination. However, HCD has approved 357,602 applications, including 11,052 appeals of denial determinations. (Supplemental Declaration of Jessica Hayes ("Supp. Hayes Decl."), ¶ 2.) It is unlikely that most of those applicants relied on assistance from an advocate to successfully apply for ERAP assistance or appeal. Petitioners' assertion that an applicant would not have been approved but for an advocate's assistance is merely an assumption, not evidence.

In fact, Real Parties' evidence fails to show a likelihood of denial errors. Real Parties contend that 29% of reviewed applicants have been denied even though 93% of those applicants

were income-eligible for the Program, suggesting that the contrast in those numbers is meaningful. (Opp., p. 34.) But income eligibility is not the only requirement for rental assistance. Applicants must also demonstrate residency eligibility, COVID-19 financial hardship, and rental assistance or utility need. The fact that 93% of denied applicants were income-eligible does not demonstrate that there is a high likelihood of denial errors; it only shows that 93% of denied applicants met one of the multiple eligibility criteria. Real Parties also contend that HCD staff admitted that applications were denied as "non-responsive" even when the applicants were actively submitting requested documents. This allegation is unsupported by admissible evidence, because it relies only on a hearsay statement from HCD Section Chief Lorrie Blevins. (Opp., p. 35.) Nevertheless, Blevins reportedly stated that HCD pulled applications slated for denials *before* erroneous denials were issued. (*Ibid.*)

Despite Real Parties' access to multiple advocates, thousands of applicants, and data regarding applications and denials through an ongoing PRA request, they have failed to demonstrate a meaningful risk of deprivation to tenants due to HCD's processes. What they have instead shown is that the applicants in need of assistance are able to reach out to local partners and the call center networks for assistance with their applications as intended, and that applicants who believe their denials to be in error and who engage in the process and properly

file an appeal often are able to demonstrate their eligibility and get assistance.

3. HCD's proposed processes satisfy the third *Ramirez f*actor because they provide applicants with a chance to be heard

The third *Ramirez* factor—the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to "tell their side of the story"—weighs in favor of finding that HCD's proposed processes comport with due process. As explained in sections II.B and II.C below, HCD's proposed processes provide applicants with a reasoned explanation for their denial and a chance to be heard through the appeals process. HCD also provides applicants with other avenues to assist them in the denial and appeal process and to tell their side of the story. Applicants can reach out to members of the Local Partner Network, the call center, or their case manager to assist them with an appeal of their denial determination. Since the injunction was issued, case managers have sent out more than 5,858 emails, made 50,453 phone calls, sent 8,472 text messages, and emailed 39,098 task requests in an effort to assist applicants in obtaining clarification on outstanding applications. (2 Tab 18, p. 419; 4 Tab. 38, p. 868.) HCD's procedures more than satisfy the third *Ramirez* factor by treating applicants with respect and dignity.

4. The trial court failed to consider the fourth *Ramirez* factor—governmental interest and fiscal and administrative burdens

Despite Real Parties' attempt to downplay them, HCD's valid government interests in preventing fraud and the fiscal and

administrative burdens that Real Parties' additional requirements would impose are significant. HCD has a statutory obligation to safeguard public funds by preventing fraud. (See Health & Saf. Code, § 50897.4, subd. (c).) HCD staff estimates that approximately 1.4 percent of the total funds disbursed by the program involve fraudulent claims, and an additional $1.96 billion of suspected fraud claims have been detected during the application review process. (4 Tab 38, p. 870.) Preventing fraud is not only significant to protect program integrity, but also critical to maximizing assistance for legitimate applicants. Given the limited pot of ERAP funds, disbursement to fraudsters takes limited rental assistance funding away from eligible applicants, some of whom will simply not be able to receive assistance.

Real Parties would require HCD to identify and explain in detail why applications are defective, but this can help others fraudulently obtain rental assistance. Contrary to Real Parties' uninformed assumption, fraud does not always "work best in the dark." (Opp., p. 41.) As demonstrated in the record, HCD is aware of social media posts and websites that show applicants who are trying to fraudulently obtain rental assistance how to do so. (4 Tab 38, p. 870.) These websites already have a collection of what documents have and have not been accepted by ERAP. Real Parties' proposed requirement that HCD identify defective, and often fraudulent, documents will only strengthen scammers' ability to commit fraud. While these scammers may hide behind their anonymity online, their social media posts and "how-to"

websites teaching others how to bypass ERAP's fraud prevention procedures are very much in the open.

Despite the Program being closed to new applicants, fraud is still a valid concern. Currently, there are still over 100,000 pending applications that need to be processed. As explained in HCD's writ petition, the majority of those applications will likely be denied as they have failed to establish eligibility in the past eight months. If HCD is required to identify and explain why documents are defective in the denial notices, denied applicants can immediately post the information online and applicants trying to defraud the Program can use that information on appeal.

Real Parties contend that HCD's interest in fraud prevention does not "justify denying constitutionally adequate notice to all tenants, regardless of whether they are suspected of fraud." (Opp., p. 41.) HCD agrees. The Request for Further Information ("RFI") and denial notices inform applicants what section of their application is deficient and what types of documents are needed to cure their application on appeal. Due process requires nothing more.

An applicant does not need to know what document HCD believes is defective to successfully appeal a denial determination. If an applicant submits a lease that HCD cannot verify as authentic—either due to potential fraud or other reasons—HCD will send an RFI notifying the applicant that HCD needs additional paperwork for the "proof of rent owed" section. Even without a lease agreement, a valid applicant can

still prove eligibility by submitting alternative documents showing the amount of rent owed. The applicant does not need to know that it was specifically the submitted lease that HCD cannot authenticate. If the lease is fraudulent, HCD does not want an applicant to submit another fraudulent lease that corrects the defects of the prior fraudulent lease. Instead, applicants are told what other types of documents could be submitted to cure the application on appeal. This approach fully comports with due process while still preventing fraud. (See, e.g., *Ryan, supra,* 94 Cal.App.4th at p. 1072 ["What safeguards comport with due process or what due process requires under specific circumstances varies, as not every context to which the right to procedural due process applies requires the same procedure."].)

Lastly, the fiscal and administrative burden that Real Parties' proposed requirements would impose on HCD and its contractor, Horne, are overwhelming. HCD has a very limited amount of administrative funding left to operate the Program. Due to the decreasing funding, Horne had to decrease its ERAP staff from 1,229 to 460 in October 2022. If HCD is required to manually add in a narrative providing further explanation for each denial and identify and explain the reasons why documents are defective, HCD would need to implement a new system and train the remaining staff on how to work the new procedures. In addition to further slowing down a process that is already slowed due to the reduction in staff, the cost to implement these

procedures could exceed the limited administrative funding HCD has to operate the Program.

The government interest in preventing fraud to preserve funds for legitimate applicants, as well as the significant fiscal and administrative burdens that would be imposed by Real Parties' suggested safeguards, weigh in favor of finding that HCD's proposed process satisfy due process standards. The trial court erred by failing to even consider these factors.

B. HCD's proposed denial notice, which in most cases would only be issued after the proposed request for further information is sent to an applicant, more than satisfies any applicable due process requirements

Real Parties identify five reasons why they contend that HCD's proposed denial notice fails to comply with due process. They claim the denial notice is "insufficiently clear" (Opp., pp. 19-21); they state that HCD fails to provide any notice of denial in cases involving "duplicate" applications, and insufficient notice to tenants whose applications are only partially granted (*Id.* at pp. 21-22); they assert that HCD sometimes seeks to "recapture" funds without providing tenants an adequate explanation for the recapture, and, in some cases, with no opportunity to appeal the recapture (*Id.* at p. 22); and they claim that, although the denial notices state the "ultimate reasons for denial," they "fail to show the numbers or other information that support that conclusion," such as the Area Median Income range or the local fair market rent cap set by the Program (*Id.* at pp. 22-23). As discussed below, none of these arguments amounts to a due process violation.

1. The proposed denial notice is sufficiently clear

Real Parties erroneously rely on *Gresher v. Anderson* (2005) 127 Cal.App.4th 88 to challenge the specificity of the denial notice. *Gresher* held that the Department of Social Services was required to advise applicants which of their convictions to address in order to obtain an exemption from employment eligibility requirements for an entitlement program. (*Gresher*, *supra*, 127 Cal.App.4th at p. 110.) As explained above, ERAP is not an entitlement program. But even if it were, HCD's proposed denial process meets the standard set forth in *Gresher*. The proposed denial notice lists the specific grounds for denial based on the documents specified in the RFI that were either not submitted by the applicant or deemed inadequate to establish eligibility. (3 Tab 25, pp. 627-632.) Also, the RFI lists the specific section(s) of the application for which HCD was unable to establish eligibility for rental assistance based on the information submitted by the applicant. (*Id.* at pp. 627-629.) By notifying applicants which specific section(s) of their applications are deficient, providing applicants with a list of the specific documents needed to establish their eligibility, allowing applicants thirty days to submit those documents, meaningfully informing applicants of the specific reasons why their applications are being denied, and providing applicants the ability to appeal a denial determination, HCD's proposed procedure provides applicants all the process that is required and more. Neither *Gresher* nor any other case cited by Real Parties hold otherwise. And notably, none of those cases involve an

emergency and *temporary* rental assistance program like ERAP where the Legislature expressly gave the agency broad discretion to develop processes and rules suitable for standing up the program and disbursing assistance in an exceedingly short time period. (See, e.g., *Ryan*, *supra*, 94 Cal.App.4th at p. 1072 ["What safeguards comport with due process or what due process requires under specific circumstances varies, as not every context to which the right to procedural due process applies requires the same procedure. . . due process is a flexible concept, as the characteristic of elasticity is required in order to tailor the process to the particular need."].)

Next, Real Parties argue that some of the reasons for denial in the proposed denial notice are "bewildering and facially unclear." (Opp., p. 20.) For example, as to tenants who are denied because they are not "qualified resident[s] of the applied property or unit," Real Parties claim that "a self-represented tenant or even an experienced attorney could not possibly understand what it means to be a 'qualified resident,' much less how to refute the agency's determination that the tenant is not one." (Opp., p. 20.) To the contrary, there is nothing unclear about this basis for denial. Applicants are either residents of the property/unit listed in their applications or they are not. If HCD determines that they are not, then they do not qualify for assistance and will be denied. If these applicants disagree with that determination, they will have the opportunity to submit documentation on appeal demonstrating that they are residents of the property/unit listed in their applications. (See 4 Tab 38, p. 867.) They are also able to

reach out to a member of the Local Partner Network or their case manager for assistance with their appeal. (*Id.* at pp. 867-868.)

Real Parties also take issue with denials based on an applicant's lack of a "documented need for rental and/or utility assistance for the eligible period" and the lack of "any unpaid rents and/or utilities for the period starting April 1, 2020 through March 31, 2022," arguing that simply checking this box on the denial notice "leav[es] the tenant to wonder about the actual grounds for denial and whether there is a viable basis for appeal." (Opp., p. 21.) But this basis for denial is directly related to the information on the application, which requires applicants to list the amount of monthly rent they pay and to specify the amount of rental assistance they are seeking by month. (See 3 Tab 24, pp. 596-597.) Applicants are similarly required to specify the amount of utility assistance they are requesting by month. (*Id.* at pp. 601-608.) If, based on this information and other information obtained by HCD, HCD determines that applicants do not have a need for rent or utility assistance for an eligible period, or they do not have unpaid rents or utilities for an eligible period, they will be denied on that basis. This basis for denial provides applicants with adequate notice that the information they submitted does not establish that they have rental debt that is eligible for rental assistance.

Moreover, if an applicant disagrees with this determination because his or her landlord falsely declared under penalty of perjury that no rent is due in an effort to evict the applicant, the applicant will have the opportunity to submit documents

establishing their need for rental assistance in support of the appeal of the denial determination. In fact, before these applications are even denied, the applicants would be sent an RFI asking that they submit one or more documents that establish that they owe rent, including a lease, a rent due statement, or an eviction notice. (3 Tab 25, p. 629.) Only if these additional documents fail to establish a need for rent or utility assistance would the applicant be denied. The applicant does not need to know what information was in the landlord's submitted documents because they do not need to counter any incorrect statements in those documents to successfully appeal; they only need to provide documents sufficient to establish the rental need that they requested in their application.

Also, as mentioned above, these applicants have other resources at their disposal to assist them with any appeal of a denial determination, including reaching out to a member of the Local Partner Network and the call center to schedule communication with case managers. (See 4 Tab 38, pp. 867-868 ["Appeal case managers use the totality of the information provided during the appeal process and in the original application, including information provided on phone calls, to ensure that the appeal is adequately evaluated before a decision is rendered"]; 2 Tab 18, p. 419.) Real Parties have failed to point to any cases holding that an agency like HCD is required to provide any additional process for these categories of applicants.

2. HCD's process for addressing duplicate applications is appropriate

Real Parties' argument that HCD fails to provide adequate due process to applicants who submit duplicate applications should be rejected for two reasons. First, this argument is irrelevant to the due process claims at issue in this matter because Real Parties' complaint makes no mention of duplicate applications. (See 1 Tab 1, pp. 13-34.) Second, Real Parties misconstrue (or misunderstand) HCD's process for dealing with duplicate applications. If an applicant submits a second application to HCD, a case manager determines, through a "series of very specific steps," whether the applicant already has an existing application for the address listed. (5 Tab 46, Deposition of Jessica Hayes, p. 1110.) If there is an existing application, the case manager then determines which application is farthest along and that application is marked as the active application and prioritized, while the other application is marked as a duplicate. (*Id.* at pp. 1111-1112.) While HCD does not notify the applicant that the duplicate application has been marked as such, the applicant can nonetheless access the online portal, see the duplicate status of that application, and call the call center if the applicant has concerns about the duplicate status. (*Id.* at p. 1113.) Also, most importantly, duplicate applications *are not denied*. (*Ibid.*) Real Parties fail to adequately explain how this process is flawed and why it fails to comply with due process.

3. HCD provides adequate due process for partial approvals

To support their argument that HCD's process fails to provide sufficient notice to "tenants" whose applications are partially granted, Real Parties rely on a declaration submitted by a *single* ERAP applicant. (Opp., pp. 21-22.) Statements in one declaration, however, do not prove that HCD's processes violate the due process rights of all tenants who are partially approved for rental assistance. In any event, these applicants are given due process because all applicants, whether they are approved or denied, are entitled to appeal HCD's determination on their application. (See Supplemental Decl. of Jessica Hayes, ¶ 3.) Therefore, if a tenant disagrees with HCD's approval of only part of the rental assistance requested, that tenant can explain in the appeal why he or she believes the full amount should have been approved.

4. Real Parties misconstrue the evidence relating to HCD's prior recapture of rental assistance funds

Under both federal and state rules, HCD has an obligation to recapture payments made to applicants for which the applicants were not actually eligible. Real Parties misconstrue how HCD addressed the recapture of these funds. Prior to the injunction, when HCD confirmed an overpayment based on fraud, HCD would issue the applicant a notification that his or her application was being denied *with an opportunity to appeal*. (5 Tab 46, pp. 1097-1098.) Although a couple hundred other applicants were sent recapture notices and did not have an opportunity to appeal, it was because those applicants were

eligible for some assistance, just not all of the assistance that they had received. (*Id.* at p. 1099.) HCD plans to send notices to this latter group of applicants that will provide them an opportunity to appeal before HCD issues them a notice of recapture. Regardless, this issue does not support the overbroad injunction issued by the trial court blocking all denials.

5. Due process does not require that HCD "show the numbers" in its denial notice

To support their argument that due process requires HCD to "show the numbers or other information" that support the bases for denial, Real Parties rely on what they refer to as "well-established precedent governing the denial or reduction of public benefits." (Opp., pp. 22-23.) This "well-established precedent," however, does not consist of any cases construing the due process clause of the California Constitution, which is the legal basis for Real Parties' claims. (See 1 Tab 1, p. 25 [first cause of action brought under article 1, section 7 of the California Constitution]; Opp., 10 [arguing that "the trial court correctly held that HCD has violated the due process clause of the *California Constitution*" (emphasis added)].) Instead, the cases Real Parties rely on consist of a federal appellate decision and an opinion from the Supreme Court of Indiana construing the due process clause of the *U.S. Constitution* (*Ortiz v. Eichler* (3d Cir. 1986) 794 F.2d 889, 890 and *Perdue v. Gargano* (Ind. 2012) 964 N.E.2d 825, 829), and a second federal appellate decision that also appears to apply federal due process law (*Dilda v. Quern* (7th Cir. 1980) 612 F.2d 1055, 1056). Real Parties have failed to establish that these cases

are persuasive authority for construing the due process clause in the California Constitution.

Indeed, Real Parties have failed to point to a single case suggesting that the due process clause in the California Constitution requires a state agency administering an emergency and temporary rental assistance program to issue denial notices that "show the numbers," i.e., list things like the Area Median Income range and the local fair market rent cap set by the Program, which is information that applicants can obtain independently. Instead, if ERAP applicants had a right to due process protections, HCD would only be required to provide those applicants with the right to be heard at a meaningful time and in a meaningful matter. (See *Ryan*, *supra*, 94 Cal.App.4th at p. 1072 ["The primary purpose of procedural due process is to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner."]; *Bergeron v. Dept. of Health Servs.* (1999) 71 Cal.App.4th 17, 24 ["What due process does require is notice reasonably calculated to apprise interested parties of the pendency of the action affecting their property interest and an opportunity to present their objections."].) HCD's proposed RFI and denial process, as well as the appeal process, meets those requirements. The trial court's ruling to the contrary was an abuse of discretion.

C. Due process does not require that HCD provide applicants with access to documents that served as the basis for the denial of rental assistance

Relying primarily on *In re Winnetka V.* (1980) 28 Cal.3d 587, *Ramirez*, and *Gresher*, Real Parties argue that HCD's failure to

"provide immediate access to the documents relied upon for rental assistance denials is unconstitutional." (Opp., p. 24.) But there is only a single document, other than those provided by tenants, that HCD may rely on to deny applications (on only a single ground, and not all grounds that are enjoined by the trial court)—a ledger submitted by a tenant's landlord indicating that the tenant has no rental debt for the eligible period, in which case the tenant would be initially denied based on his or her lack of a documented need for rental assistance. (4 Tab 38, p. 866.) All of the other grounds for denial would be based on documents the applicant submitted (or failed to submit).

Real Parties suggest that *Gresher* supports the notion that HCD is required to provide applicants with the documents HCD "*actually relies on* for the denial," and to "specify the factual basis for denial that appears in the withheld documents." (Opp., pp. 25-26, emphasis in original.) But *Gresher* did not require that the agency at issue provide the employees and applicants with any actual documents. Instead, the court found that due process simply required the agency to *tell* the applicants what convictions they must address to obtain an exemption, including the nature and date of those convictions. (*Gresher*, *supra*, 127 Cal.App.4th at pp. 109-110.) As discussed above, HCD's proposed RFI and denial process, which provides more than an adequate factual basis for the various grounds for denial, meets that standard. (See HCD's Writ Petition, ¶¶ 52-53.)

Real Parties' reliance on *In re Winnetka V.* and *Ramirez* is similarly misplaced. Both of those cases involved liberty

interests, not what process was due applicants of a program like ERAP. Also, in *In re Winnetka V.*, the court held that a juvenile judge may not order a rehearing of a referee's decision involving a minor until the minor has been notified of the request for rehearing, supplied with a copy of the request, and "given access to all materials it brings to the court's attention *other than those already in the record*." (*In re Winnetka V.*, *supra*, 28 Cal.3d at p. 595, emphasis added). Similarly, the *Ramirez* court found a due process violation based, in part, on the absence of any indication in the record that the appellant "had access to information considered by the Director in making the exclusion decision." (*Ramirez*, *supra*, 25 Cal.3d at p. 277.) Here, by contrast, HCD makes determinations based on documents and information the applicants themselves submit, or the landlord ledger that the applicants had an opportunity to refute, and so there are no documents for HCD to provide to denied applicants.

In re Winnetka V. and *Ramirez* are factually distinguishable for other reasons. Importantly, neither case addresses what process is due applicants of a benefit program like ERAP that provides solely temporary, emergency relief. These cases, therefore, do not squarely address the unique demands of HCD's program. HCD also has a legitimate reason for not providing tenants with landlord ledgers—those documents contain personal and private information, sometimes including information for multiple tenants on the same document, and information that could put both landlords and tenants at risk of identity theft or other fraud. (4 Tab 38, p. 866.)

Finally, it is simply not true, as Real Parties argue, that "HCD takes the landlord's word as gospel in every single case." (Opp., p. 26.) In fact, even in cases where a tenant's landlord submits a ledger indicating that the tenant does not have any rental debt, HCD's proposed procedure would provide these tenants with multiple opportunities to show that they *do* have eligible rental debt. For example, before being issued a denial notice, these tenants would be sent an RFI and given an opportunity to submit documents establishing the existence of rental debt. (4 Tab 38, p. 866.) If those documents are insufficient to establish eligibility for rental assistance and a tenant's application is subsequently denied, the tenant would then have the right to submit substantiating information to HCD through the appeal process. (*Id.* at p. 867.) These tenants are also able to reach out to a member of the Local Partner Network and their case managers for assistance with their appeals. (*Id.* at pp. 867-868.)

In sum, while these tenants may want "to see th[e] ledgers and any other documents submitted by landlords to determine their accuracy" (Opp., pp. 26-27), the due process clause of the California Constitution does not require HCD to provide tenants with this information, and HCD's proposed processes provide adequate protections in its absence.

III. THE PRELIMINARY INJUNCTION IS OVERBROAD, AND THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO MODIFY IT

In arguing that the preliminary injunction is not overbroad, Real Parties concede that "some categories for denials may be

clearer than others," but they contend that HCD "must still explain the *basis* for concluding that the application fits into the category [of denial]." (Opp., 43, emphasis in original.) To support this argument, Real Parties focus primarily on the following two grounds for denial in the proposed denial notice: the monthly rental amount requested exceeds the local fair market rent cap set by the Program,[4] and the applicant is not a qualified resident of the applied property or unit. (*Id.* at pp. 43-44.) As to the first of these grounds, what other "basis" could HCD provide to a denied applicant? The applicant should know what amount of rent he or she requested, since the application requires the tenant to list that amount. (See 3 Tab 24, pp. 596-597.) Also, while due process does not require HCD to list objective information like the local fair market rent cap, HCD's previous denial notice actually *did* list that information, as evidenced by one of the declarations Real Parties rely on in their Opposition. (See 3 Tab 32, pp. 767, 771.) Moreover, as discussed above, the denial notice is sufficiently clear on what it means to be a qualified resident of the property

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[4] In their Opposition, Real Parties mention tenant Gilberto Camacho, who they claim was "denied rental assistance for the apparently straightforward reason that his rent exceeded the fair market rent cap," and whose denial notice "did not say what the fair market rent cap was." (Opp., 43.) It is not true that the denial notice Mr. Camacho received did not state what the fair market rent cap was. (See 3 Tab 32, p. 767 ["Mr. Camacho showed the denial letter he received to my team. The denial letter stated that his application was denied on multiple grounds, including that '*monthly rental amount is over program cap of 400% fair market rent value*." (emphasis added)]; see also *id.* at p. 771 [Mr. Camacho's notice, which refer specifically to the program cap of 400% fair market rent value].)

or unit. Nor is a successful appeal of a denial on this basis "virtually impossible," as Real Parties claim. If an applicant does not fully understand what it means to be a qualified resident, he or she can reach out to a member of the Local Partner Network, the program call center, or his or her case manager for assistance. (See 4 Tab 38, pp. 867-868; 2 Tab 18, p. 419.)

Real Parties' Opposition does not address many of the other bases for denial in the proposed denial notice, or explain how they are factually inadequate. In fact, they are not. For example, if the property applied for (which the applicant must list in the application) is not located in California, what further factual basis could HCD provide the denied applicant other than what is stated in the denial notice ("The property is not physically located within the State of California")? (3 Tab 25, p. 631.) Similarly, applicants are required to list in the application the specific COVID-19 related hardships that apply to their households. (3 Tab 24, p. 595.) If the hardship indicated by the applicant is not one that is eligible for rental assistance, the denial notice would inform the applicant that his or her household "has not suffered a COVID-19 related financial hardship." (3 Tab 25, p. 631.) Other than restating the hardship listed by the applicant in his or her application, there is no other factual basis for the denial that HCD could provide. The same reasoning applies to other bases for denial in the proposed denial notice (e.g., the applicant requested assistance for unpaid rent or utilities outside the program eligibility period of April 1, 2020 through March 31, 2022; the applicant applied for assistance for a utility that is not eligible for

assistance; the applicant already received COVID-19 rent relief assistance from the Program or another source that covers the full amount and time period for which the applicant qualifies). (3 Tab 25, p. 631.)

Real Parties further argue that HCD's claim that the preliminary injunction is overbroad "is based on misconstruing . . . the trial court's conclusions." (Opp., 43.) This argument is simply wrong. In ruling on HCD's motion to dissolve or modify the preliminary injunction, the trial court's primary (and mistaken) concern was that HCD was denying applications based on information obtained from DataTree[5] without providing that information to applicants. (5 Tab 47, p. 1132 ["[I]t's just inconceivable to me that an applicant . . . who is denied their application through the administrative process is denied because there is some information that was obtained from a public source such as *DataTree*, but the applicant isn't told the substance of the information that's used to disqualify them or given a copy of the documents that are disqualifying or told even the reasons that they're being disqualified . . . ." (emphasis added)].) The trial court also expressed concern that HCD does not provide tenants with their landlords' sworn statements that no rent is due. (5 Tab 47, pp. 1137-1138.)

These concerns with HCD's proposed denial process relate to no more than two of the grounds for denial in the proposed denial

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[5] DataTree is a third-party vendor HCD contracts with to provide information regarding property ownership in order to confirm that landlords are the actual owners of the properties identified in applications. (See 4 Tab 38, p. 866.)

notice—(1) the applicant failed to provide additional information requested by HCD for a specific section of his or her application that would enable HCD to independently verify eligibility; and (2) the applicant does not have a documented need for rent and/or utility assistance for the eligible period. The trial court did not even mention the other eight grounds for denial in the denial notice, much less discuss why they fail to comport with due process. Nor does the trial court's actual order denying HCD's motion mention those other grounds. (See 5 Tab 48, 1148.)

In the absence of a finding that those other bases for denial violate applicants' due process rights, the trial court should have granted HCD's motion to modify the injunction because injunctions are required to be "tailored to eliminate only the specific harm alleged" (*E. & J. Gallo Winery v. Gallo Cattle Co.* (1992) 967 F.2d 1280, 1297), and cannot be framed in a way that encompasses conduct that causes no "substantial injury." (*Thompson v. Kraft Cheese Co.* (1930) 210 Cal. 171, 176; see also *People v. Mason* (1980) 124 Cal.App.3d 348, 354 ["Since the injunction is overbroad the decree must thus be modified; it may proscribe the doing only of those acts which are calculated to cause injury to the residents of the subdivision."].)

In sum, the preliminary injunction is overbroad, and the trial court abused its discretion in denying HCD's motion to modify it. (See *E. & J. Gallo Winery*, *supra*, 967 F.2d at p. 1297.)

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER THE BALANCE OF HARMS TO HCD AND TO APPLICANTS

Like the trial court, Real Parties believe the harm to HCD and applicants is merely financial and focus primarily on disputing the amount of HCD's administrative funding. While significant, that is only one part of a larger harm. Due to the injunction, HCD is unable to administer ERAP as directed by the Legislature and process the bulk of the remaining applications. With each passing week, HCD has approximately the same number of pending applications but fewer administrative funds to process those applications and disburse funds to eligible applicants. Given the amount of work that will need to be done once HCD is able to begin issuing denials and the significantly reduced staff remaining, processing the remaining applications will be delayed and the Program faces the risk of running out of administrative funding and needing to shut down before it has resolved all pending applications. Further, the injunction is delaying approval of applications of tenants who may be found eligible for assistance on appeal, thereby delaying disbursement of funds to eligible tenants who may be in dire need of rental assistance. Real Parties' proposed solutions—to violate federal and state law by approving all pending applications regardless of eligibility, violate federal and state law by ignoring mandated statutory caps, or hoping for more federal reallocation funds—are not viable options.

A. Real Parties' attempts to diminish HCD's urgent need for relief from the injunction should be rejected

Real Parties argue that "HCD's litigation tactics contradict its claim that it faces a sudden financial crisis." (Opp., p. 44.) To support this contention, Real Parties allege delays between the issuance of the preliminary injunction and the motion to modify or dissolve the injunction, and the denial of that motion and the writ petition. They also contend that "HCD has not demanded . . . a speedy resolution of all claims," but instead has requested a postponement of the merits hearing, which is currently scheduled for February 10, 2023. (*Id.* at pp. 44-45, citing Howard Decl., ¶ 2.)

These arguments border on the frivolous and should be rejected. In response to the trial court's issuance of the preliminary injunction, and as described in HCD's motion to modify or dissolve the injunction, HCD "comprehensively evaluated its review and denial procedures in an effort to exceed due process requirements," the result of which was the "amended denial notice[ ] that provide[s] more specific explanations for the bases of [ ] denial." (2 Tab 23, p. 502.) Before filing its motion to dissolve the injunction, HCD's counsel also communicated extensively with Real Parties' counsel to discuss possible settlement terms, which resulted in some recommendations that HCD eventually incorporated into the proposed denial process. (See 4 Tab 39, p. 892.) HCD should not be penalized for taking time to explore options for addressing the concerns of Real Parties.

As to the writ petition filing, Real Parties do not, and cannot, claim that the petition was untimely. While an appellate

court may consider a petition for an extraordinary writ at any time (see *Volkswagen of America, Inc. v. Superior Ct.* (2001) 94 Cal.App.4th 695, 701), non-statutory writ petitions, like HCD's writ petition, should generally be filed within the 60-day period that applies to appeals. (*Labor & Workforce Development Agency v. Superior Ct.* (2018) 19 Cal.App.5th 12, 24; *Volkswagen*, *supra*, 94 Cal.App.4th at p. 701.) HCD filed its writ petition well within that timeframe.

Lastly, it is misleading and disingenuous for Real Parties to argue that "HCD has not demanded . . . a speedy resolution of all claims." On November 17, 2022, the trial court ordered that the merits hearing (which was previously scheduled for January 13, 2023) be continued to a later date so that the parties can complete discovery. (See Tsukamaki Decl., Ex. A; see also Writ Petition, ¶ 31.) After Real Parties' counsel stated their preference for the earliest available date (February 10, 2023), HCD's counsel informed the court that it did not "oppose that date, as [HCD's] goal is *to be able to resolve all pending applications as soon as possible*." (*Ibid.*, emphasis added.) Nevertheless, HCD's counsel made clear that HCD "may not be able to complete [its] document production in time for [Real Parties] to review the production and file their Opening Brief if [Real Parties] continue to expand the scope of their discovery requests and refuse to meaningfully meet and confer." (*Ibid.*)

On December 1, 2022, and in light of Real Parties' mounting discovery demands, HCD's counsel sent Real Parties' counsel an email stating that their discovery demands had delayed the

completion of discovery, thus necessitating a later date for the merits hearing. (Tsukamaki Decl., Ex. B.) That email also stated that HCD "believe[s] resolution of this matter is *urgently needed*." (*Ibid.*, emphasis added.)

In sum, HCD has consistently expressed the need for a speedy resolution of the litigation.

B. The trial court failed to consider that continuing the injunction prevents HCD from administering ERAP as the legislature directed

The trial court, and Real Parties, incorrectly dismissed the harm to the HCD as merely one of "finances." In doing so, Real Parties and the trial court ignored the significant ongoing harm to the HCD by disabling it from administering emergency rental assistance as Congress and the Legislature intended, and the "significant showing of irreparable injury" that must be satisfied to enjoin the HCD in this situation. (See *Tahoe Keys Property Owners' Association v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1471 [noting "a general rule against enjoining public officers or agencies from performing their duties"]).

The trial court's continuation of the injunction effectively blocks HCD from being able to administer the Program and process pending applications since the bulk of the remaining applicants have not proven eligibility, despite months of efforts from HCD staff. The trial court's blanket injunction means that the Program is now expending $6-7 million of limited, irreplaceable administrative funds every month on fixed staff costs without the ability to resolve the remaining applications

and close out the Program as the Legislature intended. Real Parties dismiss this harm by asserting that "nothing is stopping the Department from continuing to approve applications while the injunction is in place." (Opp., p. 48.) Of course, this ignores HCD's statutory duty to only approve applications and provide rental assistance for eligible applicants, not just anyone who applies.

Further, the trial court and Real Parties ignore the harm that continuing the injunction will have on applicants. The injunction is delaying approval of applicants who may be found to be eligible for rental assistance on appeal. Once HCD is able to issue denials again, a significant amount of work will remain to resolve the over 100,000 outstanding applications. With only one-third of its prior workforce left due to budgetary constraints, there will therefore be significant delays in processing those applications. Staff processing of RFIs and appeals will take significantly longer, leading to probable delays of many months to disburse funds to eligible applicants. In sum, every day that HCD is unable to proceed with its proposed revised review and denial processes means less funding available to administer the Program once the injunction is lifted, and more delays for applicants. Continuing the injunction will result in delaying disbursement of funds to eligible low-income tenants who may be in dire need of rental assistance.

In addition, it is possible that the administrative funds will be depleted before HCD can even finish processing all outstanding applications. If the administrative funding runs out

and the Program has to shut down, all pending applicants will be denied rental assistance, and any remaining rental assistance funds will be returned to the State or the Treasury Department, contrary to what Congress and the Legislature intended.

Lastly, Real Parties have not demonstrated any significant harm to applicants that will result from dissolution or modification of the injunction. In their underlying motion for a preliminary injunction (1 Tab 3, p. 63), Real Parties argue that applicants may lose thousands of dollars of rental assistance and possibly their home because they were denied due process. Real Parties have not modified their stance on applicants' harm in their subsequent oppositions to HCD's motion to dissolve the injunction or HCD's writ petition. As demonstrated above, with the sunset of COVID-19 eviction protections on June 30, 2022, denial of rental assistance does not equate to automatic eviction and loss of home, Real Parties have failed to demonstrate that any applicant has been erroneously deprived of rental assistance after exhausting all of the due process procedures currently available to them, and HCD's proposed processes provide applicants with more than adequate due process protections.

C. The record demonstrates that HCD is continuously depleting its limited administrative funding

HCD has provided ample evidence of the ever-decreasing Program funding. Real Parties challenge the declaration of Jessica Hayes as inadequate (Opp., pp. 46-47), but Ms. Hayes is the Federal Recovery Branch Chief for HCD and is responsible for the ERAP program. Although Ms. Hayes may not have been

able to provide the exact amount of the remaining administrative budget at her deposition, she testified that she worked with HCD's accounting team to determine the administrative funding and she has provided a detailed explanation regarding the dire status of the various components of ERAP funding, inclusive of available funding for direct assistance and administrative expenses, with the latter specifically limited through administrative limits provided under federal and state law. (5 Tab 46, pp. 1106-1107; 4 Tab 38, pp. 872-874.) This evidence, in addition to the evidence regarding the recent federal allocations, firmly supports HCD's argument that it has a mere $65 million available to process the remaining applications.

Real Parties' argument that HCD has ample funds for the Program, including $212 million received since filing its motion to dissolve the preliminary injunction, only demonstrates Real Parties' gross misunderstanding of the Program's funding, and particularly how federal reallocations are handled. California's demand for rental assistance is greater than the combined ERA 1 and ERA 2 amounts allocated by the U.S. Treasury. (Supp. Hayes Decl., ¶4.) HCD completely expended the initial ERA 1 funds by September 30, 2021, and had to use ERA 2 funds to cover Program costs. (*Ibid.*) Time-sensitive rental assistance demands continued to outpace HCD's available ERA 1 and ERA 2 federal funds for rental assistance and administration throughout the existence of the Program, requiring HCD to expend temporary funds from special state Cash Flow Loans. (*Id.* at ¶5.) These funds were appropriated due to a lack of federal resources

compared to program demand, providing the program with the ability to assist additional eligible households while pending the receipt of additional federal resources. (*Id.*) When the U.S. Treasury began reallocating ERA 1 funds to California in January 2022, all of those reallocated funds were used to offset expenditures already incurred by the Program from the Cash Flow Loan. (*Id.* at ¶¶6-13) The $212 million received from the U.S. Treasury since HCD filed its motion has already been or will be used to fund costs that have already been incurred by the Program, in addition to utilizing available administrative funding subject to the administrative expenses that are capped under federal and state law. (*Id.* at ¶14.) As explained in its writ petition, HCD has already calculated that the Program has $65 million remaining to be used for administrative expenses. (Writ Petition, p. 26.) As such, most of the $212 million that Real Parties contend shows that HCD has "ample" funding has either already been expended or obligated against, with merely $65 million remaining for administrative expenses. (*Id.* at ¶¶10, 12-14.) Moreover, this dynamic is exacerbated through HCD having to utilize its scarce administrative funding to maintain operations, expending $6-7 million each month, without being able to make any significant progress towards winding down the Program. The funds spent on administrative costs while the Program languishes can never be recovered. With each week that passes, HCD has approximately the same number of pending applications but fewer administrative funds available to process those applications and disburse funds to eligible applicants.

Real Parties' argument that HCD's contract with Horne already anticipated changes in staffing level shows a fundamental misunderstanding of the contract. While the contract did account for changes in staffing level, those changes directly correlated with workload, and by extension, the number of pending applications. (5 Tab 6, pp. 1119, 1125-1126.) The higher the number of pending applications, the more staff were needed to process those applications. HCD and Horne expected that with over 100,000 pending applications, they needed to retain a staff of over 1,200 to process the applications in a timely manner. However, due to the decreasing administrative funding resulting from the injunction, Horne was required to lay off approximately 800 staff. As a result, there are still over 100,000 pending applications but only one-third of the necessary staff remaining to timely process those applications. While changes in staffing levels have been predicated off of program workload, the October lay-offs were a direct result of the continuous depletion of administrative funding. Due to the injunction, HCD has run out of money on its existing contract with Horne and is currently in the process of renegotiating a contract amendment for Horne to continue operating the Program. (4 Tab 45, pp. 1016-1017; 5 Tab 47, p. 1140.) However, HCD's ability to negotiate with Horne is heavily dependent on HCD obtaining relief from this Court to provide certainty about how HCD can implement the Program in light of its diminishing limited administrative funding.

D. HCD is unlikely to obtain additional administrative funding

Real Parties' answer to HCD's limited administrative funding problem is to waive "program rules regarding administrative caps" and simply re-allocate funding from rental assistance funds to program administration. This would violate federal and state law setting caps on the percentage of funding that can be used for administration, and is therefore not a viable solution. Further, this proposal would take rental assistance funding away from needy eligible tenants, harming the very individuals that Real Parties are supposed to be advocating for. Real Parties' alternative solution is to hope for additional federal re-allocations. Despite Real Parties' optimism that "[w]here there is a political will, there is a way," (Opp., p. 50), HCD is unlikely to obtain any significant additional administrative funding for what was always intended to be a temporary program. Ultimately, the Program faces the risk of running out of administrative funding and shutting down before it has resolved all pending applications, which is in the interest of neither applicants nor HCD.

CONCLUSION

For these reasons, HCD requests that the Court issue an appropriate writ directing the trial court to vacate its October 20, 2022 order and enter a new order modifying the preliminary injunction.

Dated: December 12, 2022

Respectfully submitted,

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/s/ Jackie K. Vu

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY TO PRELIMINARY OPPOSITION** uses a 13-point Century Schoolbook font and contains 13,031 words.

Dated: December 12, 2022

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL

Case Name: **California Department of Housing and Community Development and Gustavo Velasquez v. Superior Court of California, County of Alameda**
Case No.: **A166606**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence by electronic service.

On December 12, 2022, I served the attached document(s):

REPLY TO PRELIMINARY OPPOSITION

by transmitting a true copy via electronic mail addressed as follows:

Please see the attached service list

DECLARATION OF SERVICE BY E-MAIL

Case Name: **California Department of Housing and Community Development and Gustavo Velasquez v. Superior Court of California, County of Alameda**
Case No.: **A166606**

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 12, 2022, at Los Angeles, California.

Jazmine Cortez
Declarant

JCortez
Signature

LA2022601962