No. B_____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

California Department of Housing and Community Development and Gustavo Velasquez,

Petitioner,

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

PETITION FOR EXTRAORDINARY WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JESSICA HAYES

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CERTIFICATE OF INTERESTED PARTIES

The undersigned hereby certifies that no entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, rule 8.208(e)(1)); or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves. (Cal. Rules of Court, rule 8.208 (e)(2).)

Dated: November 18, 2022

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INTRODUCTION

The Department of Housing and Community Development (HCD) and its director, Gustavo Velasquez (collectively "HCD"), seek this Court's intervention to vacate a sweeping, legally defective preliminary injunction issued by the trial court that has effectively disabled the largest eviction protection and rent relief program in the country.

The trial court issued the injunction on vague "due process" grounds, even though Petitioners have failed to establish that any of the over 635,000 applicants has been erroneously deprived of rental assistance after exhausting the process afforded to them under the program, including the right to appeal a denial.[1] And despite the substantial prejudice that the injunction is inflicting upon the State (and upon applicants whose pending applications will remain unresolved for the foreseeable future), the trial court recently rejected HCD's plea to dissolve—or even so much as modify—the injunction. Absent immediate relief from this Court, the judicial disablement of California's emergency rental

[1] HCD reviewed the applications of the 10 applicants identified by name in the various declarations submitted by Real Parties in support of the relief they have sought. Of those 10 applicants, which were hand-picked by Petitioners and in no way provide a statistically representative sample of the applicant pool, four in fact 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. HCD is currently reviewing these files in more depth to ensure that all actions taken were appropriate and correct. (Declaration of Jessica Hayes ("Hayes Decl."), ¶ 8.)

assistance program will continue, bleeding $6-7 million of limited and irreplaceable administrative funding on fixed staffing costs every month (which, at the current rate of spending, would mean the complete exhaustion of administrative funds to run the program by late summer 2023), while applicants (and those to whom they owe debts) continue to languish in uncertainty, contrary to the intent of Congress and the Legislature.

The federal government authorized Emergency Rental Assistance ("ERA") funding to assist individuals facing evictions and rental debt arising from the COVID-19 pandemic. To administer and distribute ERA funds, the Legislature established the State Rental Assistance Program ("ERAP" or "Program") and gave HCD broad discretion to adopt, amend, and repeal rules, guidelines, or procedures necessary to carry out ERAP.

California has delivered more direct assistance than any other state in eviction protection and rent relief during the COVID-19 pandemic. HCD's nation-leading rental assistance program has delivered approximately $4 billion in financial assistance to over 350,000 renter households, preventing homelessness and providing housing stability to over 700,000 Californians. At the same time, getting this unprecedented assistance into the hands of eligible renters and landlords swiftly has required HCD to exercise special caution and implement safeguards against fraudulent applications. Such applications are rampant; HCD has detected nearly $2 billion in suspected fraudulent claims buried within the hundreds of thousands of applications it has received.

On July 7, 2022, just as HCD was preparing its final push to resolve pending applications and begin to wind-down the program, the trial court issued a sweeping preliminary injunction at the urging of Real Parties in Interest Alliance of Californians for Community Empowerment Action ("ACCE") and Strategic Actions for a Just Economy's ("SAJE") (collectively "Real Parties"), blocking HCD from issuing denial notices *of any kind* indefinitely. This extraordinarily overbroad and legally unjustifiable injunction prohibited denials even in cases where the basis for the denial was uncontested by the applicant.

The legal basis given for this blanket injunction—which was never reduced to writing—was vague due process concerns coupled with speculation that applicants would be erroneously denied rental assistance. However, Petitioners have failed to establish that any applicant has been erroneously deprived of rental assistance after exhausting the process afforded to them under the program, including the right to appeal any denial.

Despite the absence of any evidence of erroneous denials after applicants exhausted the procedures afforded to them, HCD diligently worked to make its review and denial procedures even more accessible and friendly to applicants. Within two months of the issuance of the injunction, HCD proposed a revised set of review and denial procedures that again provide more due process to applicants than the California Constitution's due process clause requires, and asked the court to dissolve the injunction and permit HCD to implement its new procedures. But on October 20, the trial court denied HCD's motion. The court

concluded that even HCD's *revised* review and denial procedures violated constitutional due process requirements. It declined (again) to put any of its legal reasoning into writing.

Four serious legal errors now warrant this Court's intervention.

First, the trial court failed to identify and apply the correct legal standard in analyzing what process is due. Assuming due process applies even where no applicant is statutorily guaranteed assistance, the court should have analyzed due process under the four-factor test set forth in *People v. Ramirez* (1979) 25 Cal.3d 260. It did not. It never even identified the *Ramirez* test, let alone analyzed each of its four factors—a clear abuse of discretion.

Had the court properly applied the *Ramirez* test, it would have concluded that the revised review and denial processes proposed by HCD more than satisfy due process requirements, and that no additional process is necessary. Under HCD's revised procedures (which go far beyond anything required under the relevant statute), applicants are to be informed *before* any denial is even issued which section of their application is deficient and which documents would cure the deficiency, and given an opportunity to address the deficiencies. In the case of a denial, the revised denial notice provides specific reasons why an application is being denied. Applicants then have a right to appeal any denial, which provides applicants a further opportunity to present additional evidence and documentation. Underscoring the accuracy and reliability of these enhanced procedures is Real Parties' failure to identify even a single

applicant who was ever erroneously denied rental assistance after exhausting all of HCD's pre-injunction procedures.

Ignoring all of this, the trial court determined that HCD's revised procedures are constitutionally insufficient, and that the due process clause requires HCD to *further* share with applicants all documents that are obtained from third parties and used during HCD's review of applications. This was clear legal error under *Ramirez*, because the court did not—and could not—show that the additional procedures would meaningfully reduce the risk of an erroneous deprivation of rental assistance. Further, the court failed to consider the broad discretion the Legislature granted to HCD to adopt procedures necessary to carry out the Program. ERAP is not a statutory entitlement program that guarantees payment of rental assistance to applicants eligible under the statute. Rather, the Legislature created ERAP as an emergency, temporary assistance program that is contingent on the availability of funds.

The trial court compounded these errors by basing its due process analysis on multiple factual misunderstandings about how HCD's processes work. The court determined that HCD's procedures do not comport with due process because it mistakenly believed, for example, that HCD failed to tell applicants "the reasons that they're being disqualified." The court repeatedly disregarded HCD counsel's attempts to correct its flawed factual misunderstandings.

A third way in which the court abused its discretion was by failing to cure in any way the preliminary injunction's significant

overbreadth. The injunction continues to categorically block HCD from issuing denials even in cases where the basis of a denial is uncontested by an applicant or where an applicant refuses to provide HCD with the information specifically requested to prove eligibility. Even under the theory of Real Parties, there can be no due process violation where an applicant is denied after being told by HCD exactly why they are ineligible, is asked to provide specific information to prove eligibility, and does not respond. Indeed, under this theory, HCD cannot close out an application as denied even if an applicant fails to complete the required elements of a valid application, and neither the trial court nor parties have articulated what obligation HCD has under due process in those circumstances.

Lastly, the trial court abused its discretion by failing to consider whether continuing the injunction was warranted based on the balance of harms. Incorrectly dismissing the harm to the State as merely "financial," the court disregarded the fact that because of the preliminary injunction, HCD is unable to administer ERAP as directed by the Legislature. The trial court's unprecedented 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. The depletion of administrative funds has already resulted in extensive staff lay-offs and impaired HCD's ability to hire and train staff after the injunction is lifted. With each week, HCD has approximately the same number of

pending applications but fewer administrative funds to process those applications and disburse funds to eligible applicants. Ultimately, the Program faces the risk of running out of administrative funding and needing to shut down before it has resolved all pending applications, which is neither in the interest of applicants or HCD.

In contrast, there are no significant (let alone irreparable) harms to applicants if the injunction were dissolved. As noted above, Petitioners have failed to establish that any applicant has been erroneously deprived rental assistance after exhausting their administrative appeal, and HCD's proposed modified procedures would provide even further safeguards against hypothetical erroneous denials. These relative harms tip the scales overwhelmingly in favor of dissolving the preliminary injunction.

HCD now seeks a peremptory or alternative writ of mandate directing the trial court to vacate its October 20, 2022 order denying HCD's motion to dissolve or modify the preliminary injunction, and to issue a writ directing the trial court to grant HCD's motion and allow HCD to issue denials based on its proposed amended procedures. Doing so will allow HCD and its Program contractor, Horne, to implement an amended review process for over 100,000 pending emergency rental assistance applications that failed to provide verifiable information or were suspected of being fraudulent. Mandamus is warranted because the continuation of the preliminary injunction will cause HCD to expend most, if not all, of ERAP's remaining administrative

funding before an appeal of the order can be realistically heard in this matter, potentially resulting in harm to thousands of low-income tenants who otherwise could have received awards through the amended procedures that HCD proposed. As HCD is currently in the process of renegotiating its current contract with the program operator to determine how to continue implementing the program in light of HCD's diminishing limited administrative funding, HCD requests relief from this Court by the end of November, or as soon thereafter as relief can be granted.

PETITION FOR WRIT OF MANDATE

JURISDICTION

This Court has jurisdiction. (Cal. Const., art. VI, § 10; Code Civ. Proc., § 1085.)

AUTHENTICITY OF EXHIBITS

All exhibits accompanying this petition are true and correct copies of original documents on file with the Respondent Superior Court. The exhibits are incorporated herein by reference as though fully set forth in this petition and are paginated consecutively in the concurrently filed five-volume Petitioners' Appendix. The exhibits are referenced by their volume, tab, and page number (e.g., "[Vol.] Tab [x], p. [y]").

PARTIES

1. Petitioners California Department of Housing and Community Development and its Director, Gustavo Velasquez (collectively "HCD"), are the respondents in *Alliance of Californians for Community Empowerment (ACCE) Action, et al.*

v. California Department of Housing and Community Development, et al., Alameda Superior Court, Case No. 22CV012263. HCD is the state agency authorized by the Legislature to administer the Emergency Rental Assistance Program ("ERAP" or "Program").

2. Respondent is the Superior Court of Alameda County, the Honorable Frank Roesch.

3. Real Parties in Interest Alliance of Californians for Community Empowerment Action ("ACCE") and Strategic Actions for a Just Economy ("SAJE") (collectively "Real Parties") are organizations dedicated to advocating for tenants' rights. ACCE and SAJE are petitioners in Alameda County Superior Court case number 22CV012263.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

I. CALIFORNIA ADOPTS LEGISLATION AUTHORIZING HCD TO IMPLEMENT AND ADMINISTER EMERGENCY RENTAL ASSISTANCE PROGRAM

4. The federal government created ERAP to assist individuals facing evictions and rental debt arising from the COVID-19 pandemic. (15 U.S.C. § 9058a.) The U.S. Department of the Treasury allocated funds to states and grantees in two rounds, under Section 501 of Subtitle A of Title V of Division N of the Consolidated Appropriations Act, 2021 ("Consolidated Appropriations Act"), and Section 3201 of Subtitle B of Title III of the American Rescue Plan Act of 2021 ("American Rescue Plan"). (15 U.S.C. §§ 9058a(b)(1); 9058c(a)(1).) These two rounds represent a *limited* amount of federal funding that was appropriated to states based on each state's proportion of the

national population. (15 U.S.C. §§ 9058a(b)(1)(A) [italics added].) The amount of federal funding was not tied to California's actual demand and did not purport to cover all of California's rental assistance needs. (*Ibid.*)

5. On January 29, 2021, the Governor signed Senate Bill 91 ("SB 91"), which established California's program for administering and distributing ERA funds. (S.B. No. 91 (2020-2021 Reg. Sess.), Stats. 2021, ch. 2, § 24.) SB 91 added Chapter 17 (commencing with Section 50897) to Part 2 of Division 31 of the Health and Safety Code, creating the State Rental Assistance Program. The goal of the State Rental Assistance Program is to prevent evictions and housing instability due to or during the COVID-19 pandemic. (2 Tab 17, p. 276.)

II. ERAP IS A TEMPORARY ASSISTANCE PROGRAM BASED ON FEDERAL FUNDING AND A CASH FLOW LOAN

6. ERAP is an emergency, temporary assistance program intended to prevent evictions and housing instability due to or during the COVID-19 pandemic. (2 Tab 17, p. 276.) The program has provided rental assistance to eligible households using funding initially allocated to California by the U.S. Department of the Treasury in two rounds of funding for a total allocation of approximately $5.2 billion. (2 Tab 17, p. 271.)

7. After spending funds from the two rounds of federal funding, HCD requested an additional $1.9 billion from Treasury on November 30, 2021. (2 Tab 17, p. 354.) On January 7, 2022, the Treasury informed HCD that the state-administered program would receive only $62.5 million from federally reallocated funds. (2 Tab 17, p. 369.)

8. HCD applied again to the Treasury for additional funding on January 21, 2022, requesting approximately $1.89 billion in direct assistance plus administrative funds. (2 Tab 17, p. 369.) In response to HCD's January 2022 request, the Treasury reallocated $136 million to HCD in March 2022. (2 Tab 17, p. 414.)

9. Based on HCD's January 2022 application to the Treasury, and the Treasury's failure to timely provide the requested funds, the Legislature passed Senate Bill 115 ("SB 115") on February 9, 2022, authorizing HCD to borrow money from the state general fund to continue to fund ERAP for applications received on or before March 31, 2022. (S.B. No. 115 (2021-2022 Reg. Sess.), Stats. 2022, ch. 2, § 3.; 2 Tab 17, pp. 385-386.)

10. Consistent with SB 115's limitations to only provide funding for applications submitted on or before March 31, 2022, HCD closed ERAP to new applications on that day. (2 Tab 17, p. 385.) HCD received more than 635,000 unique applications for rental assistance between March 2021 and March 2022. (Hayes Decl., ¶ 7.)

11. On October 13, 2022, the U.S. Treasury notified California that it will receive an additional $52.1 million from the first round of ERA 2 reallocations. As administrative funding from this reallocation is capped at 15 percent, HCD will receive an additional $7.8 million in administrative funding. (Hayes Decl., ¶ 3)

12. On November 1, 2022, the U.S. Treasury notified California that it will receive an additional $60.1 million from

reallocated ERA 1 funds. As administrative funding from this reallocation is capped at 10 percent, HCD will receive an additional $6.65 million in administrative funding. (Hayes Decl., ¶ 2.)

13. The two federal allocations of Emergency Rental Assistance (ERA) funding as well as the cash flow loan funding from SB 115 all limited the amount of funding that could be used for program administration. (4, Tab 38, 872.) The first federal allocation, ERA1, allowed for up to 10 percent of program funds to be used for program administration. (*Ibid.*) The second federal allocation, ERA2, allowed for up to 15 percent, but the Cash Flow Loan allowed only up to 10 percent of funds to be used for program administration. (*Ibid.*) All ERAP funding, including the Cash Flow Loan, was shared with local jurisdictions. (*Ibid.*)

III. HCD'S IMPLEMENTATION OF ERAP

A. ERAP's Application Process

14. The Legislature granted HCD broad discretion over the implementation of ERAP. (Health & Safety Code § 50897.1, subd. (k)(1) and (2).) The Legislature authorized HCD to adopt, amend, and repeal rules, guidelines, or procedures necessary to carry out ERAP, and exempted HCD from the rulemaking provisions of the Administrative Procedures Act with respect to the Program. (*Ibid.*)

15. Immediately following the enactment of the Consolidated Appropriations Act, HCD moved rapidly to implement ERAP under the criteria set forth below. (2 Tab 17, p. 310.)

16. HCD entered into a standard agreement with Horne LLP ("Horne") to provide services in support of ERAP. (4 Tab 42, p. 962.) The contract has been amended four times to address changes in program conditions. (*Ibid.*) The fourth amendment, dated April 1, 2022, added additional administrative funding and further extended the term of the contract to March 2023. (*Ibid.*) It planned for a wind-down plan starting in July 2022 to reduce staff as the number of outstanding applications decreased. (4, Tab 42, pp. 962-963; 5 Tab 46, pp. 1103-1104.)

17. Only "eligible households" can receive rental assistance through ERAP. (2 Tab 17, p. 291.) A tenant is considered an "eligible household" if the household meets three criteria: (1) the household income is 80 percent or less of the area median income, (2) the household has qualified for unemployment or experienced a reduction in household income, incurred significant costs, or experienced other financial hardship during or due to the COVID-19 outbreak, and (3) one or more members of the household can demonstrate a risk of experiencing homelessness or housing instability. (*Ibid.*)

18. In administering the program, HCD is obligated to prevent fraud, waste, or abuse. (Health & Safety Code § 50897.4, subd. (c).) This requires HCD to implement a process to prevent households from receiving payments from multiple sources for the same incurred expenses, either unintentionally or fraudulently. (*Ibid.*)

19. To prove eligibility, HCD requires applicants to submit documents showing proof of identity, rent and utility arrears,

income, and unemployment or financial hardship during or due to COVID-19. (2, Tab 17, pp. 294-297.)

20. Because some applicants may not have formal documents such as a lease, utility bills in their name, or paystubs, HCD allows applicants to submit written attestations, declarations, or affidavits instead. (*Ibid.*)

21. In reviewing applications, HCD works to keep documentation requirements as simple as possible to maximize the number of tenants eligible for rental assistance while also catching potential duplication of benefits and addressing risks of fraud. (2 Tab 17, p. 295.)

22. 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. (*Ibid.*)

23. HCD staff estimates that approximately 1.4 percent of the total funds disbursed by the program involve fraudulent claims. Separate from that amount, approximately $1.96 billion in undisbursed requested rental assistance appears to be fraudulent. (4 Tab 38, p. 870.)

B. HCD's Processes Regarding Denials and Appeals

24. Prior to issuance of the preliminary injunction, HCD sent applicants denial notices that informed the applicant what section of their application was deficient and needed to be addressed on appeal. (2 Tab 18. P. 422.)

25. Due to HCD's obligation to prevent fraud and protect privacy, HCD does not provide applicants with any third-party documents that HCD may rely on in its review of the application, i.e., explicitly identifying a particular document as having been identified as fraudulent creates material risk that fraudsters will share that information with others to aid evasion of fraud detection methods HCD utilized, as reflected by social media posts referenced above. (4, Tab 38, pp. 866-867, 870.) This includes information furnished by landlords or rental property managers and a property ownership database, though applicants have access to all of the documents they themselves submitted in support of their application. (*Ibid.*)

26. A tenant whose application is denied has 30 days to appeal the decision. (2 Tab 18, 419.) Tenants must appeal the decision directly through the online portal, where they can submit additional documentation in support of their application. (*Ibid.*) A call center is also available for applicants wishing to obtain more information about their denial determinations and how to proceed with an appeal. (*Ibid.*)

27. As noted, HCD has proposed material modifications to the process to provide more particular notice and information to tenants whose applications are denied. Those proposed changes are discussed below in paragraphs 49-53.

IV. THIS LAWSUIT

A. Real Parties' Petition

28. On June 6, 2022, Real Parties filed their petition in Alameda Superior Court. (1 Tab 1, p. 13.) Real Parties allege to

be organizations dedicated to assisting tenants "who have been denied ERAP benefits in appealing denial decisions." (1 Tab 1, p. 4.)

29. Real Parties allege that "HCD is violating the Due Process Clause of Article 1, Section 7 of the California Constitution" because ERAP denial notices do not provide tenants with the specific reason for denial, HCD denies tenants the opportunity to confront the evidence HCD used in making the denial decision, and HCD fails to offer any opportunity for hearing. (1 Tab 1, p. 13.)

30. Real Parties sought a "writ of mandate and preliminary and permanent injunctive relief prohibiting Respondents from denying rental assistance to tenants without providing pre-denial notice sufficient to permit tenants to understand the basis for denial and how they can remedy any defects in the application; access to all documents HCD considered in making the initial denial; and an opportunity for tenants to give oral testimony to those officials deciding their appeals." (1 Tab 1, p. 21.)

31. A merits hearing in this matter was scheduled for January 13, 2023, but on November 17, 2022, the trial court indicated it would continue the hearing until at least February 10, 2022, if not later, so that the parties would have sufficient time for discovery.

B. Real Parties' Application for Preliminary Injunction

32. On June 22, 2022, Real Parties filed a Motion for a Preliminary Injunction. (1 Tab 2.) In their motion, Real Parties

sought an injunction enjoining HCD from issuing denials of emergency rental assistance until the Department implements "an appeal process that meets constitutional due process standards." (1 Tab 2, p. 3.) Specifically, Petitioners argued that HCD's denials based on an applicant's "inconsistent or unverifiable information" or non-responsiveness do not provide applicants with enough information regarding what information or documentation must be submitted on appeal. (1 Tab 3, p. 10.)

33. On July 7, 2022, the trial court (the Honorable Frank Roesch) granted Real Parties' motion. (1, Tab 21, p. 474.) The Court did not issue a written ruling. (*Ibid.*) At the hearing, the Court stated: "I see no harm on the side of the agency. I do see significant harm on the other side. The probability of success is maybe a closer issue, but when we read those all together, the Court is going to grant the preliminary injunction." (2 Tab 20, 467.)

34. On July 14, 2022, the court enjoined HCD from (1) issuing any denials of rental assistance to applicants who timely submitted their applications and are awaiting an initial determination, (2) affirming a denial in any pending appeals, and (3) letting unappealed denials from which the 30-day time period to appeal has not yet elapsed as of July 7, 2022, become "final denials" after the 30-day time period. (2 Tab 21, p. 474.)

C. The Administrative Funding Necessary to Operate the Program Will Soon Run Out

35. Currently, there are approximately 104,000 outstanding applications that need a final determination. (4 Tab 42, pp. 963-964.)

36. Due to the ongoing injunction, HCD and Horne were unable to start the wind-down process in July 2022 as planned. (5 Tab 46, pp. 1103-1104, 1118-1119.) The wind-down process contemplated reducing staff as the number of outstanding applications decreased. (*Ibid.*)

37. Since HCD was unable to issue denials and the number of outstanding applications remained stagnant, HCD and Horne kept its full staff through September, incurring extra administrative costs that had not been anticipated by HCD and Horne when entering into the contract. (*Ibid.*)

38. As a result of the unanticipated extra administrative costs, funding for the contract with Horne ran out in October 2022, instead of March 2023, as expected. (4 Tab 45, 1016-1017.)

39. In late September, HCD performed an analysis of its budget and determined that it had $54.5 million remaining in administrative funding for the Program. (4 Tab 38, pp. 872-873; 5 Tab 46, pp. 1105-1106.)

40. With the recent notifications that California will receive an additional ERA 2 reallocation from the Department of the Treasury, as well as the last ERA 1 allocation, HCD expects to receive an additional $11 million in administrative funding, bringing HCD's total amount of administrative funding to approximately $65 million. (5 Tab 46, p. 1079; Hayes Decl. ¶ 4.)

41. Due to the federal and state cap on the percentage of funding that can be used for administrative costs, HCD cannot reallocate any funding to be used for administrative purposes. (4, Tab 38, 872.)

42. The administrative funding is used for case management, call center support, funds disbursement, and program administration. (4 Tab 38, p. 873.)

43. In early September, Horne employed 1,229 staffers. (3 Tab 26, p. 644.) Due to dwindling administrative funds, Horne laid off approximately 800 ERAP case managers and call center staff in early October 2022. (5 Tab 46, pp. 1125-1126; 5 Tab 47, p. 1139.) The Program now employs approximately 460 staffers to run the Program. (5 Tab 47, p. 1140.) Even with the heavily decreased workforce, HCD will spend approximately $6-7 million each month to continue operating the Program. (Hayes Decl., ¶ 5.)

44. Because of the depletion of administrative funding, HCD now will never be able to re-hire and re-train all the staff it once had, even if it can at some point resume issuing denials. (4 Tab 38, p. 874.) Hiring and training approximately 1,000 staff members to process the remaining applications over a six-month period is estimated to cost a total of approximately $102 million ($17 million per month), far exceeding available funds. (3, Tab 26, pp. 644-645; 4 Tab 38, p. 873.)

45. HCD will need to renegotiate a new contract with Horne to continue operating the Program with the remaining

approximately $65 million of administrative funding. (5 Tab 47, p. 1140; Hayes Dec., ¶ 4.)

46. Once the Program runs out of administrative funding, Horne will shut down the Program, as it has already informed HCD that it will not continue to operate ERAP without additional funding. (5 Tab 46, pp. 1127-1128.)

47. If the Program shuts down, due to lack of administrative funds, all pending applicants will be denied rental assistance, and any remaining rental assistance funds will either be returned to the State's general fund, or to the U.S. Treasury, depending on the funding source. (5 Tab 46, pp. 1105-1106.)

D. Petitioners' Motion to Dissolve or Modify Preliminary Injunction

48. On September 13, 2022, Petitioners filed a motion to dissolve and/or modify the preliminary injunction based on material changes in facts and to serve the ends of justice. (2 Tab 23, pp. 494-515.)

49. The material changes in facts were that HCD proposed amended review procedures and a revised denial notice that HCD would issue to provide more detail to an applicant about the reasons for their denial. (2 Tab 23, pp. 503-505, 507-509; 3 Tab 25, pp. 627-632.)

50. HCD proposed amendments to its application review and denials procedures that specifically address the two bases of denials that Real Parties and the trial court were most concerned about—applications deemed "nonresponsive" and those with "inconsistent or unverifiable" information. HCD would no longer

deny applicants on those bases without first sending applicants a request for information ("RFI") to cure the problematic section of their application and giving applicants 30 days to respond. The RFI informs tenants that additional information or documentation is needed to determine their eligibility for rental assistance, specifies the particular section(s) of the application that is deficient, and lists the specific types of documents needed from the applicant to establish eligibility. (3 Tab 25, pp. 627-629.)[2]

51. Only if an applicant fails to respond to the RFI within 30 days or HCD is unable to establish eligibility based on the document(s) submitted in response to the RFI does HCD propose to issue the applicant its amended denial notice. That notice provides specific, fact-based reasons for the denial, including, among other things, that the subject property is not located in California, the household earns an income above the eligible Area Median Income range for the listed family size, the household has not suffered a COVID-19 related financial hardship, the requested rental assistance is outside the eligibility period of

[2] For example, if an applicant's residency has not been established, they will be expressly informed of that deficiency in their application and asked to provide one or more of six types of documents, including a current signed lease agreement or a utility/bank/credit card statement with the applicant's name and address. Similarly, if HCD is unable to determine that an applicant's income qualifies them for assistance, the applicant will be informed of that and asked to provide additional proof of income, such as paystubs or an attestation that the applicant is a resident of subsidized housing.

April 1, 2020, through March 31, 2022, and the applicant already received rental assistance from ERAP or another program (the name of the program and the specific months for which assistance was received will be listed). (3 Tab 25, pp. 631-632.)

52. In order to address one of the primary due process concerns raised by Real Parties in their motion for preliminary injunction—that denials based on inconsistent or unverifiable information submitted by applicants did not provide them with sufficient detail or information—the proposed denial notice contains a box stating that the applicant failed to provide the additional information requested in the RFI, and that the application is being denied because of one of the following: (1) the applicant did not respond to the RFI with requested information to support applicant eligibility, (2) HCD was unable to independently verify the accuracy and/or authenticity of the documents submitted in response to the RFI, or (3) the information submitted was not the information requested or was unreadable, and the applicant failed to respond to outreach attempts to cure the submission. As to the first and third categories, there is no further "factual basis" HCD could provide for the denial. As to the second category, because the applicants will know what information they submitted in response to the RFI and the specific section(s) of the application at issue (which will be specified on the denial notice and which applicants can go back and review), they will know which document or documents HCD was unable to verify the accuracy or authenticity of.

53. Though the proposed denial notice may not detail HCD's exact analysis for why the previously-submitted document(s) did not satisfy a given eligibility requirement (in light of the material risks that such detail would enable future fraud), the notice provides all information required by due process, including which requirement for eligibility was not satisfied, which section of their application was deficient, and why any response to the RFI failed to demonstrate eligibility. (3 Tab 26, pp. 646-647.) That is precisely the information that an applicant needs to meaningfully appeal the denial. Applicants have thirty days after receiving the denial notice to submit new documents and information to HCD through the appeal process, giving applicants another opportunity to prove their eligibility.

54. Further, the ends of justice would be served by modifying the overbroad injunction to allow HCD to issue denial notices that identify the specific basis for why an application does not meet ERAP's eligibility standards. (2 Tab 23, pp. 509-510.)

55. Since the injunction was issued, HCD continued to attempt outreach to applicants requesting specific information or documents that HCD needs to resolve outstanding issues and approve applications. (4 Tab 38, pp. 868-869.) However, at this point, the bulk of the remaining applications consist of non-responsive applicants, applications where there is no pathway for approval due to suspected fraud or clear ineligibility, and applicants who provided inconsistent information. (4 Tab 38, pp. 844-847.)

56. Evidence presented to the trial court showed that due to dwindling administrative funds, HCD may not have the funding necessary to process the remaining applications if the injunction remains in place. (4 Tab 38, p. 874; 5 Tab 46, pp. 1105-1106, 1116-1117.)

57. Both applicants and landlords are increasingly frustrated by the lack of direction HCD is able to provide regarding pending applications. (4 Tab 26, pp. 645-646.) The state of limbo created by the injunction is causing applicants and landlords to take out their frustration and anger on HCD staff and contractors. (*Ibid.*)

58. Since the preliminary injunction was ordered, there has been an alarming increase in hostility towards HCD staff due to their inability to provide applicants with clear guidance on the status of their application, including threats of legal action, threats of self-harm, and stalking. (3 Tab. 26, p. 646.) This has left ERAP staffers feeling unsafe and exposed. (*Ibid.*)

59. Many small, "mom-and-pop" landlords are being harmed by the ongoing injunction. These landlords previously worked with HCD regarding ERAP in good faith and are hesitant to make decisions regarding their tenant's rental obligation, such as negotiating payment of back rent, before a decision is rendered on their tenant's ERAP application. (3 Tab 26, pp. 645-646.) Yet they are incurring significant unpaid mortgage debt while rental assistance determinations are in limbo and are desperately in need of assistance with their mortgage payments to avoid foreclosure. (*Ibid.*)

60. After hearing oral argument on October 20, 2022, the trial court summarily denied Petitioners' motion to dissolve or modify the preliminary injunction, stating that the financial condition of the program did not justify dissolving or modifying the preliminary injunction. (5 Tab 47, pp. 1139, 1141.) The trial court did not issue a written ruling and ordered counsel for Petitioners to submit a proposed order. (5 Tab 47, p. 1141.)

61. The trial court determined that due process is never constitutionally sufficient unless an applicant is provided all third-party documents or information used in a government agency's determination on eligibility. (5 Tab 47, pp. 1132-1133.)

ISSUES PRESENTED

62. The issues presented by this petition are:

a. Did the trial court err in failing to apply the correct legal standing when determining that HCD's proposed new processes and denial notice do not comport with due process?

b. Did the trial court err in basing its decision on clearly erroneous factual findings?

c. Did the trial court abuse its discretion in failing to modify its overbroad preliminary injunction to allow HCD to issue denials on bases that provide detailed explanations?

d. Did the trial court abuse its discretion by failing to consider whether extending the preliminary injunction was warranted by the balance of harms to HCD and applicants?

APPEAL IS AN INADEQUATE REMEDY

63. Writ relief is necessary because this case involves issues of "great public importance and require[s] prompt resolution." (*People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 494.) The trial court's failure to dissolve or modify the injunction based on constitutional due process concerns affects the future of the Emergency Rental Assistance Program and over 100,000 applicants requesting rental assistance.

64. By precluding HCD from being able to move over 100,000 applications forward toward finalization and wind down the Program, the injunction is causing significant depletion of the Program's limited administrative funding on fixed staffing costs *without* the ability to substantially reduce the number of outstanding applications requiring resolution. HCD and its Program contractor, Horne LLP, had planned to implement a wind-down process beginning in July 2022, which contemplated reducing staffing *as the number of outstanding applications also decreased*. (5 Tab 46, 110-1104, 1118-1119.) However, the number of outstanding applications remained largely stagnant due to HCD's inability to issue denials, resulting in HCD and Horne keeping its full staff from July to September and thus incurring unanticipated administrative costs. (*Ibid.*) Despite cutting its ERAP staffing by two-thirds in October, HCD expends significant administrative funding every day that the injunction remains in place. Approximately $65 million in administrative funding remains at this time. (Hayes Decl., ¶ 4.)

65. Immediate writ relief is necessary because the longer the injunction remains in place, the less administrative funding HCD has available to process all remaining applications once the injunction is lifted. Once spent, those funds are permanently lost and cannot be replaced. Due to the federal and state cap on the percentage of total funding that can be spent on program administration, HCD cannot reallocate rental assistance funds to administration. (4 Tab, p. 872.) Once all of the administrative funding is spent, the Program will be shut down. (5 Tab 46, pp. 1127-1128.)

66. Without issuance of a writ by the Court of Appeal, HCD's limited remaining administrative funding will be severely depleted before the appeal can be heard. (See 4 Tab 38, p. 874; 5 Tab 46, p. 1116 [stating admin funding running out].) Based on HCD's current budget and rate of monthly spending, only half of HCD's administrative funding will remain by April 2023, and HCD will run out of administrative funding to operate the program by August 2023, regardless of whether all eligible applicants have been assisted or not. Therefore, an emergency writ petition is necessary so that the issues can be decided before the Program closes and applicants are denied due to lack of administrative funding. (*See, e.g., People ex rel Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 494 [holding that, although judgment was appealable, writ review was warranted because the issue was of great public importance and required prompt resolution]; *Lee Law Corp. v. Superior Court* (2012) 204 Cal.App.4th 1375, 1383 [despite appealability, circumstances

required expedited appellate review, making appeal an inadequate remedy]; *Robbins v. Superior Court (County of Sacramento)* (1985) 38 Cal.3d 199, 205.)

BENEFICIAL INTEREST

67. As the named respondents in the underlying case, HCD and Gustavo Velasquez have a beneficial interest in this matter.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully pray that this Court:

1. Issue a peremptory or alternative writ of mandate or other appropriate writ directing respondent superior court to vacate its October 20, 2022 ruling and enter an order modifying the preliminary injunction.

2. Alternatively, if a peremptory writ does not issue in the first instance, and in addition to or in lieu of any alternative writ, issue an order directing respondent superior court to show cause why its October 20, 2022 order should not be vacated and an order modifying the preliminary injunction be entered.

3. Award Petitioners their costs in this action.

4. Award such other relief as may be just and proper.

Dated: November 18, 2022

Respectfully submitted,

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Attorney General of California
Daniel A. Olivas
Senior Assistant Attorney General
David Pai

Supervising Deputy Attorney General

/s/ Jackie K. Vu

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Deputy Attorney General
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STANDARD OF REVIEW

A decision granting, dissolving, or modifying an injunction is reviewed for an abuse of discretion. (*People ex rel Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 22.) The trial court's factual findings are reviewed under the substantial evidence standard. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.)

Appellate review of the trial court's due process analysis is de novo. "The existence of a duty allegedly arising from the constitutional guarantee of due process is a question of law decided de novo on appeal." (*Bergeron v. Department of Health Services* (1999) 71 Cal.App.4th 17, 22.) On appeal, the "determination of whether administrative proceedings were fundamentally fair is a question of law." (*Rosenbilt v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443.) When "the issue is one of law, [appellate courts] exercise de novo review." (*Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility Disc.* (2007) 149 Cal.App.4th 1384, 1392, as modified on denial of reh'g (May 8, 2007).)

II. ARGUMENT

A. The Trial Court's Determination That Additional Process Was Due Under the California Constitution Failed to Apply the Correct Legal Standard

The trial court denied HCD's motion to dissolve the preliminary injunction on the basis of vague due process concerns,

but failed at the threshold to identify or apply the correct legal standard.

"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." (*Bergeron v. Dept. of Health Servs.* (1999) 71 Cal.App.4th 17, 24.) "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." (*Ryan, supra*, 94 Cal.App.4th at p. 1072.) Assuming that due process applies even where the Legislature has given HCD broad discretion to fashion rules for distributing a limited amount of emergency aid, the test for determining what process is due in a particular set of circumstances is set forth in *People v. Ramirez* (1979) 25 Cal.3d. 260. In *Ramirez*, the Supreme Court explained that four factors must be considered to determine the requirements of due process: "(1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible government official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Id.* at p. 269.)

In denying HCD's motion, the trial court neither identified the *Ramirez* test nor engaged in the required analysis. That failure was a serious abuse of discretion that in itself warrants vacatur of the trial court's decision. (See *Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420-421 [abuse of discretion occurs when trial court fails to apply the correct legal standard].) It further resulted in the court's clearly erroneous legal conclusion that HCD's proposed revised procedures were not consistent with due process requirements.

1. The Trial Court Failed to Analyze the Risk of an Erroneous Deprivation Through HCD's Procedures

As the Supreme Court discussed in *Ramirez*, a core purpose of the due process clause is "promoting accuracy and reasonable predictability in governmental decision making when individuals are subject to deprivatory action." (*Supra*, 25 Cal.3d at p. 267.) Thus, "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. (*Ibid.*)

The trial court failed to undertake this critical analysis. The 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 afforded by HCD to applicants to cure deficiencies and present evidence of eligibility—over and above anything required under the statute—were insufficient to avoid erroneous

deprivation of rental assistance. The court simply *assumed* that due process required disclosure of all documents obtained from third parties that were used as part of HCD's review process. But, as noted above, Petitioners have failed to establish that current procedures have resulted in any applicants being erroneously deprived of rental assistance after exhausting their administrative appeal, and similarly no evidence regarding the value of the additional disclosure required by the court. In other words, there was no evidence that the additional procedures that the trial court determined to be necessary actually reduced the risk of erroneous deprivation. That, in turn, should have proven fatal to the trial court's determination that additional procedures were necessary.

Marquez v. State Dep't of Health Care Servs. (2015) 240 Cal.App.4th 87, is instructive in this regard. In *Marquez,* the Court of Appeal determined that California's due process principles do not require the Department of Health Care Services ("Department") to provide a hearing or notice whenever it assigns a new or different health coverage code. In analyzing the second factor of the *Ramirez* test, the *Marquez* court found that the Department's coding event did not violate Medi-Cal recipients' due process rights, in part because petitioners failed to show that a high risk of Medi-Cal beneficiaries would be adversely effected by any particular coding event. The Court of Appeal explained that petitioners have not included anything in the record that actually quantifies the alleged risk of erroneous deprivation of benefits, including evidence of the percentage of erroneous coding

events or the number or percentage of Medi-Cal beneficiaries affected by erroneous coding events.

Similarly here, Real Parties have failed to produce any evidence actually quantifying the risk of erroneous deprivation of rental assistance to tenants. Notably, they have failed to show the number or percentage of applicants affected by HCD's alleged due process violations, or even that a significant number of applicants were adversely affected by HCD's denial and appeal process. Despite filing ten declarations by low-income applicants or advocates assisting applicants in this matter, Petitioners have failed to establish that any of the over 635,000 applicants has been erroneously deprived rental assistance after exhausting the process afforded to them under the Program, much less establish a high risk of erroneous deprivation of benefits as a result of HCD's procedures. (Hayes Decl., ¶ 8.)

2. The Trial Court Failed to Consider the Governmental Interest and Fiscal and Administrative Burdens

The trial court further ignored the fourth *Ramirez* factor—the governmental interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

HCD has a statutory obligation to safeguard public funds by preventing fraud. (See Health & Safety Code, § 50897.4, subd. (c).) In order to meet this obligation, HCD must avoid providing information in its denial notices about its detection of fraud that would enable fraudsters to bypass the Program's fraud prevention protections. 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. (*Ibid.*) Identifying why exactly HCD believes a document is fraudulent will only strengthen scammers' ability to commit fraud.

The proposed RFI and denial notices identify what section of the application is deficient and why the applicant does not meet ERAP eligibility while not specifying what documents or information HCD determined to be fraudulent, which is necessary to protect the confidentiality of ERAP's fraud prevention measures. If an applicant submits a lease for which HCD cannot verify the authenticity—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 that is owed. The applicant does not need to know that it was specifically the submitted lease that HCD cannot authenticate to know what documents could be submitted to cure the application, just that their previously-submitted documents in support of this section were determined to be insufficient.

The risk and harm of disclosing HCD's fraud detection mechanisms by requiring HCD to identify and explain why it believes certain documents are fraudulent are substantial. HCD staff estimates that approximately 1.4 percent of the total funds

disbursed by the program involve fraudulent claims, and an additional $1,959,084,026.71 of suspected fraud claims have been detected during the application review process. (4 Tab 38, p. 870.) Disbursement to fraudsters takes limited rental assistance funding away from legitimate applicants.

Further, the trial court erred in failing to take into account the broad discretion the Legislature granted HCD to administer the Program. (Health & Safety Code § 50897.1, subd. (k)(1) and (2).) The Legislature authorized HCD to adopt, amend, and repeal procedures necessary to carry out ERAP, and exempted HCD from the rulemaking provisions of the Administrative Procedures Act with respect to the Program. (*Ibid.*) This was because ERAP is not a statutory entitlement program that guarantees payment of rental assistance to applicants. Rather, the Legislature created ERAP as an emergency, temporary assistance program that is contingent on the availability of funds. In denying HCD's motion to dissolve the injunction, the trial court failed to consider the governmental interest and balance that interest against the other *Ramirez* factors—a clear abuse of its discretion.

3. The Trial Court's Determination That Due Process Requires HCD to Provide Applicants with Third-Party Documentation or Information Is Not Consistent with Established Authorities

The trial court's determination that due process is never constitutionally sufficient unless an applicant is provided all third-party documents or information used in a government

agency's determination on eligibility is further inconsistent with established authorities. (5 Tab 47, pp. 1132-1133.)

Contrary to the trial court's finding, case law does not hold that an agency, in order to comply with due process requirements, is obligated to provide applicants for government assistance with the documents the agency relied on in denying that assistance, much less that an agency is required to do so where *the applicants themselves previously submitted those documents* to the agency. For example, in *Gresher v. Anderson* (2005) 127 Cal.App.4th 88, the court did not hold that the Department of Social Services was required to provide the employees and applicants at issue with any actual documents. Instead, the court found that "balancing the *Ramirez* factors leads us to conclude that due process requires the Department to *tell* individuals what convictions they must address to obtain an exemption." (*Id.* at p. 110, emphasis added; see also *id.* at p. 109 ["A Department employee must review a person's criminal record before sending out the 'exemption needed' notice. *The entire 'rap sheet' need not be transcribed*; simply including the nature and date of the disqualifying conviction or convictions in the notice sent to the individual would not be a crippling administrative burden." (emphasis added)].) HCD's proposed process complies with this standard, in that the denial notice lists the specific grounds for denial based on the documents specified in the RFI that were either not submitted or deemed inadequate to establish eligibility.

The trial court erred in refusing to modify the preliminary injunction on the grounds due process requires that HCD provide applicants with documentation or information from a third-party source. It does not. HCD's proposed processes provides applicants with the opportunity to be heard at a meaningful time and in a meaningful manner, which clearly satisfies due process requirements.

B. The Trial Court Based Its Decision on Clearly Erroneous Factual Findings

The primary reason the trial court concluded that HCD's proposed processes lack due process was because it believed that, even under HCD's proposed review and denial process, an applicant (1) could be denied based on documents or information that HCD obtained from a third party, and (2) would not be told the reason they are being denied. (4 Tab, p. 1121.) Neither factual premise is correct, and the trial court's legal conclusions based on these factual errors therefore amount to an abuse of discretion.

There are only two instances where HCD uses a third-party source to review an applicant's eligibility. (4 Tab 38, pp. 866-867.) The first is when HCD uses DataTree, a property ownership database, to confirm the owner of the property for which rental assistance has been applied, because in most cases the rental assistance funds will be paid directly to the landlord. (*Ibid.*) The trial court believed that, under HCD's proposed process, HCD would simply deny applicants if DataTree did not corroborate the owner of the property in question, without ever telling applicants the reason for the denial. This is incorrect. If the information from DataTree showed that the individual the applicant

identified as their landlord is not the property owner, the applicant would not be denied based on that inconsistency. Rather, the lack of third-party corroboration would merely trigger a more thorough review, which would include notifying the applicant of a problem in verifying their landlord and an opportunity for the applicant to supply additional information on who the landlord is. (*Ibid.*.)

If the inconsistency were remedied, the case manager would send the rental assistance funds to the correct landlord. If, after working with the applicant, the case manager could not reconcile that inconsistency but the applicant still met all the other eligibility requirements and demonstrated rental assistance need, then the rental assistance would be paid directly to the applicant instead of the unverified landlord. (*Ibid.*) The applicant would be given multiple opportunities to work with their case manager to fix the inconsistency and only if the applicant failed to do so would they be denied. Contrary to what the trial court presumed, they would never be denied based solely on information provided by DataTree.

The only other time where HCD uses a third-party source to review an applicant's eligibility is when an applicant's landlord submits documentation declaring under penalty of perjury that the applicant does not actually owe the landlord any rent. (4 Tab. 28, 866.) In this situation, there is no reason for HCD to send the landlord rental assistance funds on behalf of the applicant. (*Ibid.*) More significantly from a due process perspective, the proposed denial notice provides the applicant with adequate notice of the

basis for their denial, by notifying them that they are being denied because: "You do not have any documented need for rental and/or utility assistance for the eligible period and do not have any unpaid rents and/or utilities for the period starting April 1, 2020 through March 31, 2022." (3 Tab 25, p. 632.)

Contrary to the trial court's findings, this denial basis tells the applicant "the reasons that they're being disqualified." (5 Tab 47, p. 1132.) It is not merely a "statement that your application isn't good enough." (*Ibid.*) The applicant would know they are being denied because either their own application requested rental assistance outside of the eligible time period, or their landlord indicated that they don't have any rental assistance need within the eligible period. There may be reasons why the landlord is wrong, or the landlord simply could be confused regarding the identity of the tenants. Even so, if the applicant were given notice that they are being denied because they "don't have any documented need for rent" or "unpaid rents" for the eligible time period, that would inform the applicant that they need to show they do have unpaid rent on appeal. This could be demonstrated with evidence of an eviction notice, a rent due statement, or even emails or texts showing a claim for rent.

There are no other instances where third-party documents are used when reviewing an applicant's eligibility. All other documentation is supplied solely by the applicant, which they have online access to. (4 Tab 38, p. 865.)

By basing its denial of HCD's motion to dissolve or modify the preliminary injunction on clearly erroneous factual findings

about HCD's process regarding third-party documents, the trial court further abused its discretion.

C. The Trial Court Abused Its Discretion by Refusing to Modify the Overbroad Preliminary Injunction to Allow HCD to Issue Denials on Bases That Provide Detailed Explanations

An injunction should be "tailored to eliminate only the specific harm alleged. An overbroad injunction is an abuse of discretion." (*E. & J. Gallo Winery v. Gallo Cattle Co.* (1992) 967 F.2d 1280, 1297.) An injunction is overbroad where it "ignores the question of actual injury" and is framed in a way that encompasses conduct that causes no "substantial injury." (*Thompson v. Kraft Cheese Co.* (1930) 210 Cal. 171, 176.)

In its oral ruling, the trial court determined that HCD's proposed denial notices lacked due process because "absent either a detailed explanation or a copy of the data that is the basis of the denial of an administrative application, …the standard of due process hasn't been satisfied." (5 Tab 47, p. 1133.) The trial court focused on denials based on instances where the applicant failed to provide HCD with additional information requested in response to HCD's RFI, and where HCD would not provide the applicant with the documents the denial is based upon. Regardless of whether that one basis for denial lacks due process, it's clear that the remaining bases for denial meet the trial court's standard of providing applicants with "a detailed explanation" of the reason for their denial, for which no additional information or documentation is needed for the applicant to appeal the denial. (3 Tab 25, pp. 631-632.) As such, the trial court at a minimum

should have modified the overbroad preliminary injunction to allow HCD to issue denial notices on the bases that unquestionably provide adequate due process. Failure to do so constituted a clear abuse of discretion.

The Court of Appeal's analysis in *People v. Mason* (1980) 124 Cal.App.3d, 348, is instructive. The trial court found that defendants, a restaurant and bar, had created sufficient noise to constitute a nuisance and permanently enjoined them from permitting music and related noise to be audible anywhere in the surrounding subdivision, or in any place beyond the boundaries of their property, except public streets and roads. The Court of Appeal reversed the judgment with directions to the trial court to modify the terms of the injunction. It found that the injunction was overbroad, since it ignored the question of the actual injury and was framed to cover even the slightest musical or related sound heard beyond the defendants' property. The Court of Appeal ordered the trial court to modify and limit the scope of the overbroad injunction, imposing only those measures intended to address acts which were calculated to cause injury to the residents of the subdivision.

Here, the injunction is overbroad because it prohibits HCD from issuing any denials on any basis, not just the bases for denials that Petitioners alleged lacked due process. Some of the bases for denials—the property is not located in California, the applicant is not a resident of the rental unit, the applicant's household earns an income above the eligible Area Median Income, the applicant has already received California COVID-19

rental assistance from another source, the applicant does not have a documented need for rent and/or utility assistance, and scores of other reasons—clearly provide the applicant sufficient notice of the reason for the denial and enough information for the applicant to appeal the decision. (3 Tab 25, pp. 631-632.) The injunction blocks HCD from issuing denials even in cases where the basis of the denial is uncontested by an applicant or where applicants have failed to complete the required elements of a valid application.

Thus, even though the trial court took issue with the one denial basis that Real Parties alleged lacked due process (that is, denials based on an applicant's failure to provide additional information in response to an RFI), the remaining bases for denial clearly comport with due process and do not cause "substantial injury," rendering the preliminary injunction overbroad. Indeed, even under the theory of Real Parties, there is no due process violation when the denial notice provides applicants with the specific reason they are being denied.

The trial court could have easily modified the injunction to allow HCD to issue its proposed denial notice except for the one basis that the trial deemed to be at issue, though even that basis is adequately remedied by HCD's proposed review and denial process. Instead, the trial court erred in not modifying and tailoring the overbroad injunction to address only the actual injury alleged. Allowing an overbroad injunction to continue, especially in light of the clear irreparable harm to HCD and the

applicants caused by the preliminary injunction itself, amounts to an abuse of discretion.

D. The Trial Court Abused Its Discretion by Failing to Consider Whether Extending the Preliminary Injunction Was Warranted by the Balance of Harms to HCD and to Applicants

At the October 20 hearing, the trial court failed to consider whether the continuation of the preliminary injunction was warranted by the balance of harms. While acknowledging that continuing the injunction was "not good in terms of finances of this program," it noted simply that "the financial difficulties of a program don't trump constitutional rights," and declined to revisit the injunction. (4 Tab 24, pp. 1127-1128.)

The court's failure to consider the balance of harms constituted yet a further abuse of its discretion. The court simplistically and incorrectly dismissed the harm to the State as merely one of "finances." In doing so, the court ignored the significant ongoing harm to the State 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 State 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. In the four months since the

injunction was issued, ERAP staffers have attempted to engage pending applicants through targeted emails, phone calls, and text messages requesting specific documents and information to render the applicant eligible for rental assistance. (4 Tab 38, pp. 868-869.) At this point, however, the remaining applications consist largely of non-responsive applicants, applications where there is no pathway for approval, and applicants who provided inconsistent information. (4 Tab 37, pp. 844-847.) Because denial notices are the only way to re-engage applicants or finalize outstanding applications, there is nothing else HCD can currently do to further process these remaining applications.

Blocking HCD from processing pending applications towards denial determinations, in turn, is causing HCD to expend $6-7 million each month from its limited administrative funding without being able to make any progress towards winding down the Program.[3] (Hayes Decl., ¶ 5.) The funds spent on administrative costs while the Program languishes in place can never be recovered. This is important because HCD only has approximately $65 million remaining in administrative funding to operate the Program, including for case management, call

[3] In early September, Horne employed 1,229 staffers. (3 Tab 26, p. 644.) Once Horne had largely exhausted the work that could be done while HCD was subject to the preliminary injunction, Horne laid off approximately 800 ERAP case managers and call center staff in early October. (5 Tab 46, pp. 1125-1126; 5 Tab 47, p. 1139.) The Program now employs approximately 460 staffers to keep the Program running. (5 Tab 47, p. 1140.) Even with the heavily decreased workforce, the Program expends significant administrative funding every day.

center support, funds disbursement, and program administration. (4 Tab 38, pp. 872-873.) HCD cannot re-allocate funding from rental assistance funds to program administration. (4 Tab 38, p. 872.)

Once HCD is able to issue denials again, a significant amount of work will remain to resolve the over 100,000 outstanding applications. HCD will need to send out and respond to RFIs, issue denials, process appeals, and assist applicants throughout the process via the call center. But HCD will not have the funding available to re-hire and re-train a full staff necessary to timely process the remaining applications. (4 Tab 38, p. 874.) HCD estimates that hiring and training approximately 1,000 staff members will cost a total of approximately $102 million ($17 million per month) for six months to hire and train new staff and process the remaining applications. (3 Tab 26, p. 645.) As HCD does not have the budget to hire and train new staff once it is able to resume issuing denials, it must process the remaining applications with only the remaining one-third of its prior workforce. There will therefore be significant delays in processing the pending 104,000 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.

Further, 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, HCD must shut down the Program as Horne will not operate the Program without sufficient funding. (5 Tab 46, p. 1117.) If the Program shuts down due to lack of administrative funds, all pending applicants will be denied rental assistance, and any remaining rental assistance funds will be returned to the State or Department of the Treasury, contrary to what Congress and the Legislature intended. (5 Tab 46, pp. 1116-1117.)

Also ignored by the trial court is the harm to the many small, "mom-and-pop" landlords. These landlords previously worked with HCD regarding ERAP in good faith and may be hesitant to make decisions regarding their tenant's rental obligation, such as negotiating payment of back rent, before a decision is rendered on their tenant's ERAP application. (3 Tab 26, pp. 645-646.) Yet they are incurring significant unpaid mortgage debt while rental assistance determinations are in limbo and are desperately in need of assistance with their mortgage payments to avoid foreclosure. (*Ibid.*)[4]

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[4] Both applicants and landlords are increasingly frustrated by the lack of direction HCD is able to provide regarding pending applications. The state of limbo created by the injunction is causing applicants and landlords to take out their frustration and anger on HCD staff and contractors. Since the preliminary injunction was ordered, there has been an alarming increase in hostility towards HCD staff due to their inability to provide applicants with clear guidance on the status of their application, including threats of legal action, threats of self-harm, and

(continued…)

Against these significant and irreparable harms to the State and applicants (and those to whom the applicants owe money), there are no significant or irreparable harms to applicants if the injunction were dissolved. As noted above, Petitioners have failed to establish that a single applicant has been erroneously deprived rental assistance after exhausting their administrative appeal. (Hayes Decl., ¶ 8.) The relative harms that the trial court completely ignored tip the scales overwhelmingly in favor of dissolving the preliminary injunction, and the court abused its discretion by not doing so.

(…continued)
stalking. (3 Tab. 26, p. 646.) This has left ERAP staffers feeling unsafe and exposed. (*Ibid.*) The trial court gave no regard to the irreparable reputational harm and loss of goodwill to HCD and ERAP staffers that has been caused by the ongoing injunction. (See *Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach* (2014) 232 Cal.4th 1171, 1184 [the court found that the erosion of customer goodwill established irreparable harm]; *Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.,* (9th Cir. 1991) 944 F.2d 597, 603 [intangible injuries such as damage to goodwill qualify as irreparable harm].)

CONCLUSION

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

Dated: November 18, 2022

Respectfully submitted,

Rob Bonta
Attorney General of California
Daniel A. Olivas
Senior Assistant Attorney General
David Pai
Supervising Deputy Attorney General

/s/ Jackie K. Vu

Jackie K. Vu
Deputy Attorney General
Attorneys for Petitioners California Department of Housing and Community Development and Gustavo Velasquez

CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR EXTRAORDINARY WRIT OF MANDATE, PROHIBITION, OR CERTIORARI; MEMORANDUM OF POINTS AND AUTHORITIES** uses a 13-point Century Schoolbook font and contains 12,212 words.

Dated: November 18, 2022

Respectfully submitted,

Rob Bonta
Attorney General of California
Daniel A. Olivas
Senior Assistant Attorney General
David Pai
Supervising Deputy Attorney General

/s/ Jackie K. Vu

Jackie K. Vu
Deputy Attorney General
Attorneys for Petitioners California Department of Housing and Community Development and Gustavo Velasquez

DECLARATION OF JESSICA HAYES

I, Jessica Hayes, declare as follows:

1. I am the Federal Recovery Branch Chief for the California Department of Housing and Community Development ("HCD"). I have worked for HCD since November 19, 2018.

2. On November 1, 2022, the U.S. Treasury notified California that it will receive an additional $60,652,703.11 from reallocated ERA 1 funds. As administrative funding from this reallocation is capped at 10 percent, HCD will receive an additional $6.65 million in administrative funding.

3. On October 15, 2022, the U.S. Treasury notified California that it will receive an additional $52,063,406.21 from reallocated ERA 2 funds. As administrative funding from this reallocation is capped at 15 percent, HCD will receive an additional $7.8 million in administrative funding.

4. With the additional funding, HCD has approximately $68.8 million remaining in administrative funding to operate ERAP, with about $65 million available for operational contracts.

5. If the injunction remains in place, I anticipate that HCD will spend approximately $6-7 million per month to continue operating the Program with its current staffing levels of approximately 460 staffers. At the current levels, HCD anticipates running out of operational funding by August of 2023.

6. At current staffing levels HCD anticipates at least six months of work remains to complete the program.

7. HCD has received more than 635,000 unique applications to the ERAP between March 15, 2021 and March 31, 2022.

8. HCD reviewed the applications of the 10 applicants identified by name in the various declarations submitted by Real Parties in support of the relief they have sought. Of those 10 applicants, which were hand-picked by Petitioners and in no way provide a statistically representative sample of the applicant pool, four in fact 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. HCD is currently reviewing these files in more depth to ensure that all actions taken were appropriate and correct. (Declaration of Jessica Hayes ("Hayes Decl."), ¶ 8.)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 18th day of November, 2022, at Sacramento, California.

/s/ Jessica Hayes
Jessica Hayes

(signed per CRC 8.75(a))

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.:

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 November 18, 2022, I served the attached document:

1. **PETITION FOR EXTRAORDINARY WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JESSICA HAYES**
2. **PETITIONER'S APPENDIX – VOLUME 1**
3. **PETITIONER'S APPENDIX – VOLUME 2**
4. **PETITIONER'S APPENDIX – VOLUME 3**
5. **PETITIONER'S APPENDIX – VOLUME 4**
6. **PETITIONER'S APPENDIX – VOLUME 5**

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

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Superior Court of California
Alameda Courthouse
The Honorable Frank Roesch dept17@alameda.courts.ca.gov
Respondent

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 November 18, 2022, at Los Angeles, California.

Linda Zamora
Declarant

Signature

LA2022601962