

No. 24-7139

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

3Pak, LLC, et al.,

*Plaintiffs-Appellants,*

v.

City of Seattle,

*Defendant-Appellee,*

---

On Appeal from the United States District Court  
for the Western District of Washington  
Case No. 2:23-cv-00540-TSZ  
Hon. Thomas S. Zilly

---

---

**APPELLANTS' OPENING BRIEF**

---

ANGELO J. CALFO  
TYLER S. WEAVER  
Angeli & Calfo LLC  
701 Pike Street, Suite 1625  
Seattle, WA 98101  
Telephone: (206) 703-4810  
Email: [angelo@angelicalfo.com](mailto:angelo@angelicalfo.com)  
[tylerw@angelicalfo.com](mailto:tylerw@angelicalfo.com)

*Attorneys for Appellants 3Pak, LLC  
and Hugo Properties, LLC*

**DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1(a), Plaintiffs-Appellants 3Pak, LLC and Hugo Properties, LLC state that they have no parent corporation and no publicly held corporation owns 10% or more of their stock.

DATED: March 7, 2025

By: *s/Angelo J. Calfo* \_\_\_\_\_  
Angelo J. Calfo

*Of Attorneys for Appellants 3Pak, LLC and  
Hugo Properties, LLC*

## TABLE OF CONTENTS

DISCLOSURE STATEMENT .....	ii
TABLE OF AUTHORITIES .....	iv
I.    JURISDICTIONAL STATEMENT.....	1
II.   ISSUES PRESENTED FOR REVIEW .....	1
III.  STATEMENT OF THE CASE .....	3
A.   Factual Background .....	3
B.   Procedural Background.....	17
IV.  SUMMARY OF THE ARGUMENT.....	18
V.   STANDARD OF REVIEW .....	20
VI.  ARGUMENT .....	21
A.   Plaintiffs have plausibly alleged a state-created-danger claim.....	21
B.   Plaintiffs’ nuisance claim was filed within the statute of limitations.....	27
C.   Plaintiffs have plausibly alleged an unconstitutional taking.....	40
VII.  CONCLUSION .....	45
STATEMENT OF RELATED CASES.....	46
CERTIFICATE OF COMPLIANCE .....	47

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>American Pipe &amp; Construction Co. v. Utah</i> , 414 U.S. 538 (1974).....	<i>passim</i>
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	20
<i>Atl. Richfield Co. v. Christian</i> , 590 U.S. 1 (2020) (Gorsuch, J., concurring).....	38
<i>Ballinger v. City of Oakland</i> , 24 F.4th 1287 (9th Cir. 2022) .....	20
<i>Bradley v. American Smelting and Refining Co.</i> , 104 Wn. 2d 677 (1985) .....	29, 30, 31
<i>Campeau v. Yakima HMA LLC</i> , 26 Wn. App. 2d 481, 488-92 (2023).....	<i>passim</i>
<i>Cedar Point Nursery v. Hassid</i> , 594 U.S. 139 (2021).....	<i>passim</i>
<i>Chavez v. Our Lady of Lourdes Hosp. at Pasco</i> , 190 Wn.2d 507 (2018) .....	34
<i>Crown, Cork &amp; Seal Co., Inc. v. Parker</i> , 462 U.S. 345 (1983).....	32
<i>Fowler v. Guerin</i> , 197 Wn. 2d 46 (2021) .....	35, 36, 38
<i>Gravquick A/S v. Trimble Navigation Intern. Ltd.</i> , 323 F.3d 1219 (9th Cir. 2003) .....	29
<i>Hernandez v. City of San Jose</i> , 2019 WL 4450930 (N.D. Cal. Sept. 17, 2019).....	23
<i>Hernandez v. City of San Jose</i> , 897 F.3d 1125 (9th Cir. 2018) .....	<i>passim</i>

<i>Hunters Capital, LLC v. City of Seattle</i> , 2022 WL 1449387 (W.D. Wash., May 9, 2022).....	32, 39
<i>Hunters Capital, LLC v. City of Seattle</i> , 2023 WL 184208 (W.D. Wash., Jan. 13, 2023).....	<i>passim</i>
<i>Hunters Capital, LLC v. City of Seattle</i> , 650 F. Supp. 3d 1187 (2023) .....	37
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979).....	40
<i>Keiffer v. King Cnty.</i> , 89 Wn. 2d 369 (1977).....	43, 44
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	41
<i>Louie v. Exxon Mobil Oil Corp.</i> , 2011 WL 1475665 (W.D. Wash. Mar. 17, 2011).....	29
<i>Lucas v. S.C. Coastal Council</i> , 505 U.S. 1003 (1992).....	43
<i>Martinez v. City of Clovis</i> , 943 F.3d 1260 (9th Cir. 2019) .....	21
<i>Mayer v. City of Seattle</i> , 102 Wn. App. 66 (2000).....	30
<i>Moeller v. Farmers Ins. Co. of Washington</i> , 173 Wn. 2d 264 (2001).....	35
<i>Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.</i> , 15 F.4th 885 (9th Cir. 2021) .....	33
<i>Naruto v. Slater</i> , 888 F.3d 418 (9th Cir. 2018) .....	29
<i>Northstar Fin. Advisors, Inc. v. Schwab Invs.</i> , 904 F.3d 821 (9th Cir. 2018) .....	20
<i>Polanco v. Diaz</i> , 76 F.4th 918 (9th Cir. 2023) .....	<i>passim</i>
<i>Riblet v. Spokane-Portland Cement Co.</i> , 41 Wn.2d 249 (1952).....	30, 31

<i>Sheetz v. Cnty. of El Dorado, California</i> , 601 U.S. 267 (2024).....	41
<i>Sinclair v. City of Seattle</i> , 61 F.4th 674 (9th Cir. 2023) .....	<i>passim</i>
<i>Skokomish Indian Tribe v. United States</i> , 410 F.3d 506 (9th Cir. 2005) .....	2, 28, 29
<i>Stoyas v. Toshiba Corp.</i> , 896 F.3d 933 (9th Cir. 2018) .....	24
<i>Summers v. Sea Mar Cmty. Health Centers</i> , 29 Wn. App. 2d 476, 487 (2024) .....	34
<i>Wallace v. Lewis County</i> , 134 Wn. App. 1 (2006) .....	31
<i>Weller v. Snoqualmie Falls Lumber Co.</i> , 155 Wash. 526 (1930).....	30, 31
<i>White v. King County</i> , 103 Wash. 327 (1918).....	30
<i>Wood v. Ostrander</i> , 879 F.2d 583 (9th Cir. 1989) .....	22
<b>Statutes</b>	
28 U.S.C. § 1331.....	1
28 U.S.C. § 1343.....	1
28 U.S.C. § 1367(a) .....	1
42 U.S.C. § 1983.....	1
RCW 4.16.080(1).....	28, 29, 30
RCW 4.16.130 .....	28, 29
RCW 7.48.020 .....	39
<b>Other Authorities</b>	
Fed. R. App. P. 4(a)(1)(A) .....	1
Fed. R. App. Proc. 32(a)(7)(B) .....	47

Fed. R. App. Proc. 32(g)(1) .....	47
Fed. R. Civ. Proc. 12(b)(6) .....	20

## I. JURISDICTIONAL STATEMENT

Plaintiffs-Appellants 3Pak, LLC and Hugo Properties, LLC (“Plaintiffs”), assert claims under the United States Constitution, 42 U.S.C. §§ 1983, and Washington law. The district court had subject matter jurisdiction over those claims under 28 U.S.C. §§ 1331, 1343, and 1367(a).

This is an appeal from orders of the district court granting Defendant the City of Seattle’s (“the City’s”) motion to dismiss Plaintiffs’ complaint. ER-4-16, ER-17-27, ER-85-99. The district court entered its orders on August 29, 2023, January 17, 2024, and October 25, 2024. *Id.* The district court entered judgment on October 25, 2024. ER-3. Plaintiffs filed their notice of appeal on November 21, 2024. ER-229-30. This appeal is therefore timely under Fed. R. App. P. 4(a)(1)(A).

## II. ISSUES PRESENTED FOR REVIEW

1. Plaintiffs are two businesses who were subject to a hostile occupation of their Seattle neighborhood beginning in June 2020. They were within a readily identifiable group of businesses and properties affected by the occupation and were within the boundaries set by the City as an area in which the City would not provide police or fire services. In addition, the City’s affirmative acts supporting the occupation specifically targeted Plaintiffs and the intersection at which Plaintiffs were located, and Plaintiffs were in regular communication with City officials about what was happening to them. Were Plaintiffs therefore part of a “discrete and identifiable”

group such that the danger the City's actions placed them in was sufficiently particularized to give rise to a substantive-due-process claim for state-created danger under *Sinclair v. City of Seattle*, 61 F.4th 674, 683 (9th Cir. 2023), *Polanco v. Diaz*, 76 F.4th 918, 927 (9th Cir. 2023), and *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018)?

2. Plaintiffs stated a claim for nuisance under Washington law and filed their claims less than three years after the occupation of their neighborhood commenced. This Court has held that nuisance claims in Washington are subject to a three-year statute of limitations. *See Skokomish Indian Tribe v. United States*, 410 F.3d 506, 516 (9th Cir. 2005). Are Plaintiffs' nuisance claims timely?

3. Plaintiffs were part of a putative class in an earlier case stating the same claims against the City until class certification was denied in that matter nearly two years later. If Plaintiffs' nuisance claims are subject to a two-year statute of limitations, was that two-year period tolled during the pendency of that prior class action under either the tolling doctrine of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) or the equitable-tolling rules adopted in *Campeau v. Yakima HMA, LLC*, 3 Wn. 3d 339 (2024)?

4. Plaintiffs have alleged that because of the City's support and formal approval of the occupation of their neighborhood, the occupiers invaded Plaintiffs' property. Have Plaintiffs stated a *per se* takings claim?

5. Plaintiffs have also alleged that because of the City’s support and formal approval of the occupation of their neighborhood, access to their properties was blocked and hindered. Have Plaintiffs plausibly alleged a takings claim based on their right of access to public rights of way?

### **III. STATEMENT OF THE CASE**

#### **A. Factual Background**

##### **1. Plaintiffs are businesses located in the Capitol Hill neighborhood in 2020 and 2021.**

Plaintiff 3Pak, LLC, d/b/a Oma Bap (“Oma Bap”), is a fast-casual Korean food business that was, at all relevant times, located at 1640 Eleventh Avenue in the Capitol Hill neighborhood in Seattle, Washington. First Amended Consolidated Complaint (“FACC”) at ¶ 15,<sup>1</sup> ER-32. That location is at the corner of Eleventh and Olive, in the same building where Plaintiff Hugo Properties, LLC (“Hugo Properties”) owns and operates the 1111 East Olive Apartments. ¶¶ 15, 16, ER-32.

##### **2. In June 2020 Plaintiffs’ neighborhood was invaded by violent protesters.**

On June 8, 2020, in the face of large protests in Capitol Hill, the Seattle Police Department (“SPD”) abandoned the East Precinct (located a block from Plaintiffs’ location) and ceded control of the surrounding neighborhood and dozens of police barricades to protesters. ¶¶ 21-22, ER-33. Within hours, the protesters had blocked off

---

<sup>1</sup> All “¶” references are to the FACC unless otherwise noted.

public streets and sidewalks using the City's barricades and declared the area a police-free zone that was initially known the Capitol Hill Autonomous Zone, or "CHAZ" before being called the Capitol Hill Occupying Protest, or "CHOP." ¶¶ 22-24, ER-33. The area's boundaries were between East Denny Way and East Pike Street on the north and south, and Thirteenth Avenue and Broadway on the East and West. ¶ 25, ER-33. This included, almost in the exact center of that area, Plaintiffs' location at Eleventh and Olive. ¶¶ 15, 16, ER-32.

For the next 23 days, this area was invaded by thousands of protesters who took up residence on the streets and sidewalks, and especially in Cal Anderson Park, across the street from Plaintiffs' location. ¶¶ 15, 16, 28, ER-32, ER-34. The occupiers kept borders around the occupied neighborhood with improvised blockades, vehicles, and guards (and later, as described below, concrete blockades the City provided for that purpose). ¶ 27, ER-33-34. The occupiers carried guns, operated food dispensaries out of tents located on sidewalks, operated a "medical tent," committed widespread acts of vandalism, and set off fireworks at all hours. ¶¶ 30-34, ER-36.

The hub of the occupation was Cal Anderson Park (directly across the street from Plaintiffs' properties), which became – virtually overnight – a massive tent city as shown below:



¶¶ 36, 42, ER-36-38. As CHOP continued through June 2020 and the rest of the year, Cal Anderson became extremely violent and unsafe. ¶¶ 37, 42, ER-37-38.

**3. The City’s response was to abandon the neighborhood and actively assist the occupation.**

The City did not remove or arrest the people who had taken control of one of the City’s most vibrant neighborhoods. Instead, the City directed police and emergency responders to stay out of the area and took extraordinary steps to affirmatively *encourage* the continued occupation despite knowing the harm the occupation was causing Plaintiffs, as described below.

**a. The City adopted, at its highest levels, an official policy to not respond to crime or medical emergencies in the area.**

Beginning immediately after protesters declared the area to be a no-police zone, both the SPD and the Seattle Fire Department (“SFD”) declared the area off-limits to their personnel except in the most extreme circumstances. ¶¶ 43-46, 60, ER-38-39, ER-42. The SPD declared in a written, official policy that Plaintiffs’ location was

inside a “Red Zone” in which no officer would enter except for a “mass casualty event (e.g., active shooter, structural fire likely to endanger human lives, etc.).” ¶ 43, ER-38. This meant that vast majority of crimes were deemed unworthy of an in-person response from the police, including rape, kidnapping, felonies that did not endanger a significant number of lives, and assaults that did not involve weapons. ¶ 44, ER-38. And even when there were “mass casualty” events such as murder by an active shooter, officers did not respond immediately but instead gathered outside the Red Zone before entering it to respond to the event, resulting in massive delays in response to even the most serious crimes. ¶¶ 45, 47-58, ER-38-42.

The SFD similarly did not respond within the Red Zone because it would not enter it without the SPD. ¶ 60, ER-42. As a result, the SFD also did not respond to anything in the Red Zone other than a “mass casualty event” and even in those cases paramedics did not attend to medical emergencies such as shooting victims because the police response was delayed or non-existent. ¶¶ 50.j, 56, 60, ER-40-42.

**b. At the same time, the City affirmatively aided the occupation and encouraged its continued existence.**

Yet while it would not send police or paramedics into Plaintiff’s neighborhood, the City took affirmative steps to support the occupation and prolong its existence. As the City openly admitted – in writing – the City “facilitated” the occupation of Plaintiffs neighborhood by, among other things:

- (1) providing CHOP participants with public restrooms, wash stations, water, electricity, and garbage service,
- (2) “allowing” CHOP participants to “obstruct[] public parks, streets, and sidewalks,”
- (3) keeping police and fire out of the area by “modifying . . . response protocols,”
- (4) “modifying streets and pedestrian access routes,”
- (5) providing social services to CHOP participants, and
- (6) “modif[ying] city services delivery ....”

¶ 146, ER-73-74.

The City kept the lights on at Cal Anderson Park for people who declared the park their new home and provided them with daily garbage service and access to water. ¶¶ 121.c, 144.e, f, h, ER-61, ER-73. The City provided supplies such as fire extinguishers, tourniquets, and stretchers to the occupation’s “medical tent” that was erected in a restaurant parking lot. ¶ 119, ER-160-61. The City declared the area “local access” only, installed speed bumps, and told map companies to route drivers away from the area. ¶ 144.g, ER-73. The City even donated massive concrete blocks “that [could] be painted” with graffiti to the occupation because the concrete barriers were “safer and sturdier” and would “protect” the occupiers by “maintaining space” for them by blocking the streets that formed the boundary of the occupation. ¶¶ 139.d, 142, ER-66-67, ER-72.

In addition, the City and its mayor made numerous public statements in support of the occupation, suggesting it would be allowed to exist indefinitely. The mayor's statements included: stating in response to a question on CNN about how long the City would allow the occupation to continue, "I don't know. We could have the Summer of Love," ¶ 147b, ER-74; declaring on social media that the occupation was "not a lawless wasteland of anarchist insurrection – it is a peaceful expression of our community's collective grief ..." ¶ 148.a, ER-75; comparing the occupation on social media and in a press conference to a block party and a potluck, ¶ 148.b-.d, .f, ER-75-76; and explaining on social media there was no longer a state of emergency in the City because "demonstrations ... have been and continue to be largely peaceful." ¶ 148.j, ER-77.

**4. The City's policies directly targeted and harmed Plaintiffs and the City had full knowledge of the harm it was causing them.**

The City's actions were specifically directed at Plaintiffs and the intersection of Eleventh Avenue and Olive Street, where Plaintiffs were located, and the City was fully aware of what was happening to Plaintiffs as a result of its actions.

The occupation consistently blocked all traffic with barriers at Eleventh and Olive. ¶¶ 66, 69, ER-43, ER-45. One of the City's first surveys of CHOP's barriers, performed on June 10 (less than 48 hours into the occupation) reported a barrier across Eleventh at Olive:



¶ 68, ER-44. The exact nature of this barrier varied, but at times included vehicles, signs, and dumpsters, as shown in the following photo taken from Plaintiffs' property on June 20:

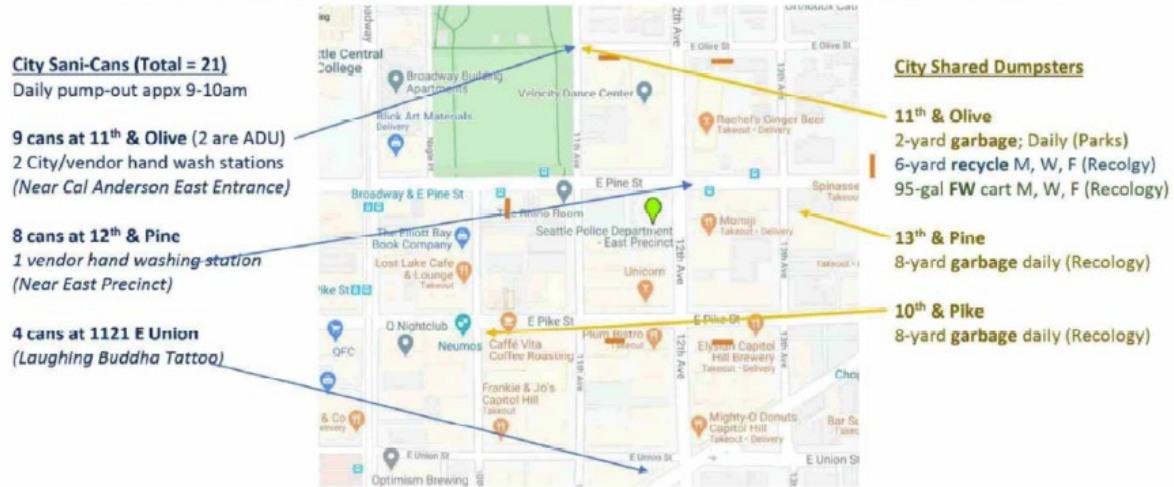


¶¶ 67, 77, ER-43, ER-46-47.

This problem was exacerbated by the fact that the City chose Plaintiff's intersection of Eleventh and Olive as its hub for providing City services to the occupation and especially the hundreds of people living in Cal Anderson Park. ¶ 73, ER-45. That included the City's daily servicing of two dumpsters, nine Sani-Cans, two hand-washing stations and other receptacles it decided to place at Eleventh and Olive during the occupation:

### City Hygiene near East Precinct (June 12, 2020)

*Current Zone Barricades in Orange - Recommended access hours 7am-10am - Recommended access via 12<sup>th</sup> & Pike*



¶¶ 75, 76, ER-45-46. In addition to the dumpsters, which were at some point replaced with larger dumpsters, there were routinely 25 to 45 additional bags of garbage piled up near the dumpsters at Eleventh and Olive that the City also collected every day. ¶¶ 78, 79, ER-47.

The City also allowed, supported, and endorsed a large and illegal garden that the occupiers dug out of the turf at Cal Anderson Park. ¶ 80, ER-47-48. These gardens appeared almost immediately during the occupation and were supported by City water supplies and received a visit from the mayor, who called them “community gardens” and posted her support of them on social media. ¶ 148.g, ER-77. These gardens further increased the impact on Plaintiffs, as demonstrated by this photograph that shows the gardens and Plaintiffs’ location at Eleventh and Olive in the background:



¶¶ 80, 81, ER-47-48.

This caused significant harm to Plaintiffs. They suffered reduced access to and use of their properties. ¶ 87, ER-49-50. Customers and suppliers of Oma Bap could not access the restaurant. *Id.* Oma Bap was vandalized numerous times. ¶ 90, ER-50. Hugo Properties' apartment building was also vandalized, and its tenants could not access the building or its parking garage. ¶ 87.d, ER-49-50. The result was a significant loss in profits for both businesses. ¶¶ 83-86, 88-90, ER-48-50.

The City was fully aware of what was happening to Plaintiffs, in real time, as it was happening. Oma Bap's owner repeatedly spoke to City officers about the

problems the business was suffering because of the occupation in terms of lost access and lost business. ¶¶ 93-96, ER-50-52. A member of the City's office of economic development memorialized this in a June 20, 2020, email that copied members of the City's mayor's office:

I just got off the phone with [the] owner of Oma Bap at the corner of 11<sup>th</sup> and Olive. ... His vendors will not deliver to him or anywhere near the CHOP. Dumpsters have been moved in front of his location by protestors as a barrier after last night[']s shooting. [H]is June business ... was a fraction of normal business revenue. ... He tells me that he cannot open, not only because of the vendor issue, he cannot ask his employees to come to the Zone.

¶ 95, ER-51-52. This was followed by additional communications from Oma Bap to the City. ¶ 96, ER-52.

Hugo Properties was also in direct contact with City about the problems it was having due to the occupation. Hugo Properties, the company managing the apartment building at Eleventh and Olive, and tenants of that building wrote at least 8 emails to the City between June 10 and 23, 2020. Those emails described, in great detail, the problems the occupation created for the building, its tenants, and its business. ¶¶ 98-105, ER-52-57. The problems included the tenants' fear of the occupation, inability to get in and out of the building and the garage, blocked streets and sidewalks, a complete lack of police, extensive vandalism, constant noise, repeated gunshots, and a massive loss of residency in the building. *Id.* But despite knowing exactly what was happening to Plaintiffs, the City was deliberately indifferent to their situation.

**5. The City was deliberately indifferent to Plaintiffs' plight.**

The City was indifferent to the harm that the occupation, and the City's actions supporting it, had on Plaintiffs. The City knew that it was not safe to live or work in the area during the time of the occupation. The City kept its employees out of the area as much as possible, for the safety of those employees, yet left Plaintiffs to fend for themselves in a dangerous and unpredictable neighborhood without any public-safety response. ¶ 141.b, ER-72. And at the same time Plaintiffs were informing the City about what was happening to them, the City was actively supporting the occupation by providing daily service of dumpsters, Sani-cans, and hand-washing stations at Plaintiffs' intersection, providing the occupation with barriers to ensure the occupation could continue, and repeatedly stating in press conferences and in social media that it believed the occupation was nothing to be concerned about. ¶¶ 75, 76, 139, 147, ER-45-46, ER-65-70, ER-74-75. This was also despite the fact senior City officials had been in the area repeatedly since the start of the occupation and had admitted almost immediately that there were serious safety problems caused by the occupation. ¶ 139, ER-65-70. Then-police chief Carmen Best aptly described the level of the City's indifference in a press conference she gave during the height of the occupation demonstrating the City's full awareness of the problem and her disgust at the City's lack of action:

They certainly can demonstrate, you know, and peacefully any place, but they can't hostilely take over a neighborhood

and cause the crime levels to go up like this. Two men are dead. Two men are dead. And a child, a 14-year-old, is hospitalized and we don't know what is gonna happen to that kid.

...

You know, at this point, the East Precinct, while important to us, what's much more important is that this neighborhood is not under siege and that there are not people being victimized. You know, the precinct is a building. The precinct is a building. But people dying, rapes, robbery, assault – that is what we need to deal with. *That's* what we need to deal with.

...

As an African American woman, with uncles and brothers and stuff, I wouldn't want them to be in this area. We've had two men killed. And we have a child that's injured from gunfire. So this is a real problem. And I would question why we would continue to allow this to happen.

...

[T]his situation as you reporters are walking around, you can see that it can be dangerous and unacceptable, and so we're gonna have to work through this. This is not safe for anybody. Not anybody. ... [A]s you can see, this is not an acceptable situation.

...

There are people who live here, there are multiple people who are being injured and hurt, and we need to do something about it. It is absolutely irresponsible for this to continue.

¶ 139.h, i, ER-68-70. She then added, when the City finally issued an order to clear the area: “[W]hat has happened here on these streets over the last two weeks – few

weeks, that is – is lawless and it’s brutal and bottom line it is simply unacceptable.” ¶ 139.j, ER-70.

**6. The City deleted evidence of their wrongdoing.**

The City’s deliberate indifference is further demonstrated by the fact that key evidence of what its highest officers were saying to each other about the occupation and what the City was doing has been irretrievably destroyed. The cellphones of the mayor, the chief of police, and the fire chief were wiped clear of all text messages that each of them received and sent during June 2020, the height of the occupation. ¶¶ 150-151, ER-78. As a result, any texts between or among those officials during the key time period in this case are forever lost. ¶ 153, ER-78.

In related litigation, this destruction of evidence led the district court to conclude the City had intentionally deprived Plaintiffs of evidence that was highly likely to support their case. ¶ 153, ER-78. As a result, the district court imposed serious sanctions on the City, including a jury instruction to presume that the deleted evidence was unfavorable to the City and allowing the presentation of evidence about the deletion at trial. ¶ 154, ER-79. *See also generally Hunters Capital, LLC v. City of Seattle*, 2023 WL 184208 (W.D. Wash., Jan. 13, 2023). While this case has not yet progressed to similar proceedings, the cloud of spoliation hangs heavily over this matter. The evidence of the City’s wrongdoing and liability is extensive, but it would almost certainly have been even starker if the City’s three top officials in this matter

had not all conveniently and almost immediately lost their text messages to and from each other.

**B. Procedural Background**

Oma Bap filed its complaint against the City on April 6, 2023. ER-137. The City moved to dismiss that complaint, and the district granted the motion in part with leave to amend on August 29, 2023. ER-85.

While the motion was pending, Hugo Properties filed its complaint against the City on June 7, 2023. ER-102.

On August 14, 2023, the district court consolidated the Oma Bap and Hugo Properties matters, as well as the complaint of a third plaintiff, Molly Moon's Handmade Ice Cream LLC (which has not appealed the judgment dismissing its claims). ER-100-01.

Plaintiffs filed their First Amended Consolidated Complaint on October 6, 2023. The City moved to dismiss that complaint and the district court granted that motion in part on January 17, 2024. ER-28. The district court postponed ruling on the motion to dismiss Plaintiffs' nuisance claim until a decision of the Washington Supreme Court in the then-pending case of *Campeau v. Yakima HMA, LLC*, 3 Wn. 3d 339 (2024). ER-17. The Washington Supreme Court issued its decision in *Campeau* on July 11, 2024, and after supplemental briefing by the parties, on October 25, 2024, the district court dismissed Plaintiffs' nuisance claim and entered judgment against

Plaintiffs. ER-4. Plaintiffs filed their notice of appeal on November 21, 2024. ER-229-30.

#### IV. SUMMARY OF THE ARGUMENT

When Plaintiffs' neighborhood was overtaken by an invasion of protesters for several weeks, the City's response was to encourage and materially support that occupation, despite knowing its actions would harm – and were harming – businesses such as Plaintiffs. The City's callous indifference gave rise to three claims on appeal in this case: state-created danger under the Due Process Clause, nuisance, and takings. The district court improperly dismissed each of these claims on a motion to dismiss.

*First*, as to the state-created danger claim, the district court dismissed Plaintiffs' claim on the basis that Plaintiffs and the harm caused to them were insufficiently "particularized" to state such a claim because there were other businesses similarly harmed. However, as this Court has made clear, all that is required is that Plaintiffs were part of a "discrete and identifiable" group that was placed in danger by the City's actions. *See, e.g., Polanco v. Diaz*, 76 F.4th 918, 927 (9th Cir. 2023), *quoting Sinclair v. City of Seattle*, 61 F.4th 674, 683 (9th Cir. 2023). Plaintiffs clearly were part of such a group. They were within the area of the occupation as defined by the City, they were located across the street from the occupation's core, the City targeted their intersection with its support of the occupation, and the City was in regular communication with Plaintiffs about exactly what was happening to them as it was happening.

*Second*, the district court erroneously dismissed Plaintiffs' nuisance claim on the basis that a two-year statute of limitation applies to that claim, and it was not subject to tolling due to a prior putative class action that included Plaintiffs. However, this Court has held that a three-year statute of limitations applies to nuisance claims under Washington law, and that decision is consistent with Washington cases. Plaintiffs' claims are timely because they were brought less than three years before the occupation. Further, even if a two-year statute of limitations applied to Plaintiffs' nuisance claims, it would be tolled under either *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) or the equitable-tolling rules adopted in *Campeau v. Yakima HMA, LLC*, 3 Wn. 3d 339 (2024).

*Third*, Plaintiffs have stated a taking claim under two different theories. Plaintiffs have plausibly alleged a *per se* claim under *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) by pleading that their property was invaded because of an official City policy. They have also alleged that access to their properties was impeded by the occupation and the City's actions, and Washington has specifically designated the question of whether that impediment was substantial as a question of fact to be decided later in this, not a question of law to be decided on a motion to dismiss.

The Court should reverse the district court's holdings as to each of these three claims.

## V. STANDARD OF REVIEW

This is an appeal of a district court's orders granting a motion to dismiss a complaint under Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim. ER-4, ER-17, ER-85. As such, this Court's review is *de novo*. *Sinclair*, 61 F.4th at 678. Thus, in reviewing the district court's orders and Plaintiffs' complaint, the Court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to [the plaintiff]." *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 904 F.3d 821, 828 (9th Cir. 2018). While the Court should review the claims to determine whether they are plausible, that standard is met whenever "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Ballinger v. City of Oakland*, 24 F.4th 1287, 1292 (9th Cir. 2022), quoting *Mendiondo v. Centinela Hosp. Med Center*, 523 F.3d 1097, 1104 (9th Cir. 2008).

Plaintiffs have satisfied this standard on their claims for state-created danger, nuisance, and takings.

## VI. ARGUMENT

### A. Plaintiffs have plausibly alleged a state-created-danger claim.

Plaintiffs stated a claim for violation of their substantive due process rights pursuant to the state-created-danger theory. ¶¶ 157-64, ER-79-80. Under that theory, a state actor is liable for state-created danger when a state actor “affirmatively place[s] the plaintiff in a position of danger, that is, where [its] actions create or expose an individual to a danger which he or she would not have otherwise faced.” *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018), quoting *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006).

The district court dismissed this claim on the basis that Plaintiffs had not established that they had been subjected to a particularized danger of harm. ER-22-25, ER-89-93. But Plaintiffs have pleaded that they were part of a small, definable group of businesses who could be (and were) easily identified by the City, both by their geographical location and by what the City knew about and heard from Plaintiffs specifically. Under extensive precedent from this Court, including prior case law involving this same occupation, Plaintiffs’ allegations are more than sufficient to demonstrate the particularity required for a claim of state-created danger.

In determining whether the City’s actions created an actual, particularized danger, the question is whether the City put Plaintiff “in a situation that was more dangerous” than the one that would have existed absent the City’s actions. *Martinez*

v. *City of Clovis*, 943 F.3d 1260, 1271 (9th Cir. 2019). This does not require that Plaintiff was the *only* entity that the City placed in a more dangerous situation; all that is required is that there is something that differentiated Plaintiff “from the general public.” *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989). “[A] danger can be ‘particularized’ even if it is directed toward a group rather than an individual.” *Polanco*, 76 F.4th at 927, citing *Hernandez*, 897 F.3d at 1133. All that is required is that the group be “discrete and identifiable.” *Sinclair*, 61 F.4th at 683. And in making that determination, it is relevant to the analysis whether the state actor interacted with the plaintiff, directed any actions to the plaintiff, and was aware of the plaintiff’s existence prior to the alleged harm. *Id.*

The state-created danger in this case was particularized because Plaintiffs were two of a discrete and easily identified group of businesses and property owners who were within the geographic area delineated by the City and its police department as the “Red Zone.” ¶ 43 ER-38. They were, further, part of an even smaller group of businesses and properties directly across the street from the Cal Anderson Park, the hub of the occupation’s hundreds of residents, its illegal gardens and fireworks, its noise pollution, and its violence. ¶¶ 6, 15, 16, 35-39, 42, 80, 81, ER-29-30 ER-32, ER-36-38, ER-47-48. And Plaintiffs were part of an even smaller, miniscule number of businesses and properties located at the same street corner as the City’s garbage services, Sani-cans, and hand-washing stations that facilitated the occupation. ¶¶ 74-

76, ER-45-46. Further, even if Plaintiffs were not readily identifiable as parties who would suffer particularized harm from the occupation and the City's active support of that occupation, the City's leadership knew, as the City continued to pursue its policies to support CHOP, that Plaintiffs in particular were being harmed because Plaintiffs repeatedly called, met with, and emailed them to tell them exactly what was happening. ¶¶ 91-105, ER-50-57.

This is more than adequate under this Court's precedent to allege the particularity required by a claim of state-created danger. For example, in *Hernandez*, the plaintiffs were among thousands of people<sup>2</sup> who attended a Trump rally at the San Jose Convention Center that had attracted a large crowd of extremely hostile and violent counter-protesters outside the rally. 897 F.3d at 1129-30. After the rally concluded, officers required rally attendees to exit the facility via doors that would require them to walk through the violent protesters, rather than through alternative exits. *Id.* As a result, some rally attendees were severely injured as they attempted to leave. *Id.* Although officers could not have known exactly who among the thousands of rally attendees would be injured, or how, or by whom, this Court ruled that this was an adequately particularized increased risk of harm to support a claim of state-created danger. *Id.* at 1133-34. *Hernandez* demonstrates that even in cases where state officials

---

<sup>2</sup> The size of the rally has been estimated to be at least 3,000 people. *Hernandez v. City of San Jose*, 2019 WL 4450930, \*18 (N.D. Cal. Sept. 17, 2019).

have directed a group of thousands to take a potentially dangerous route, there is sufficient particularity of danger to give rise to a claim for anyone injured while taking that route. Here, the danger was even more particularized. Plaintiffs are two easily and readily identifiable businesses who were not only within the City’s “Red Zone,” they were across the street from the encampments the City encouraged and materially supported with daily services provided by the City at the intersection outside Plaintiffs’ front doors. And moreover, the City knew exactly what harm its actions were causing because Plaintiffs told the City while the City was acting and continued to act in ways that caused Plaintiffs harm.

Similarly, in *Polanco*, this Court addressed a situation that occurred in May 2020, when the California Department of Corrections transferred a group of medically sensitive inmates to San Quentin Prison to lessen their exposure to COVID. 76 F.4th at 923. The botched transfer resulted in COVID infections coursing through San Quentin and the death of a prison guard. *Id.* at 924. The guard’s family sued. Even though the group of “prison guards and inmates at San Quentin” was about 4,000 people,<sup>3</sup> that group was sufficiently “particularized” because it was “a ‘discrete and identifiable group.’” *Id.* at 927, quoting *Sinclair*, 61 F.4th at 683. Here, as in *Polanco*,

---

<sup>3</sup> See <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/05/Tpop1d200527.pdf> (last visited Feb. 24, 2025), showing the California Department of Corrections and Rehabilitation’s report on the population of San Quentin as of May 27, 2020. Plaintiffs request that the Court take judicial notice of this public information on a government website. *See, e.g., Stoyas v. Toshiba Corp.*, 896 F.3d 933, 946 n.17 (9th Cir. 2018).

Plaintiffs were part of a discrete group stuck inside well-defined boundaries. In *Polanco*, it was a prison; in Plaintiffs' case, it was a geographic box that the City abandoned to a hostile occupation with the City's blessings and material support.

And if *Hernandez* and *Polanco* are not enough on their own to demonstrate the particularity of the state-created danger Plaintiffs were exposed to, this Court has also previously considered the facts of CHOP and concluded that a group of all businesses and property owners affected by the occupation was likely particularized enough to support a claim of state-created danger. In *Sinclair*, the plaintiff was the mother of a non-resident of Capitol Hill who came to the area after the creation of CHOP and was murdered. 61 F.4th at 676-78. The victim's mother brought a claim of state-created danger and alleged many of the same City actions as Plaintiffs allege here. *Id.* The Court described the mother's complaint as follows:

Accepting Sinclair's allegations as true, Sinclair shows that the City affirmatively created the actual danger .... *Most relevant, ... the City (1) left behind barriers the CHOP occupiers used to block streets off from general traffic and emergency responders; (2) provided portable toilets, lighting, and other support to the occupiers that allowed the lawless violence to persist; and (3) lured visitors to CHOP with promises of safety and a block-party atmosphere.* Construing these allegations in the light most favorable to Sinclair, it is plausible that these actions, combined with the City's withdrawal of law enforcement from CHOP, incubated a more lawless and violent environment compared to the status quo.

*Id.* at 681 (emphasis added).

That, of course, is part of what Plaintiffs rely on here to demonstrate the particularity of the danger created by the City's actions. In *Sinclair*, the Court ruled against Sinclair on the basis that her son was a member of the general public who had come to CHOP, and thus the harm was not sufficiently particularized. *Sinclair*, 61 F.4th at 682-83. But the Court indicated it likely would have ruled otherwise if the *Sinclair* plaintiff had been in a situation similar to that of Plaintiffs. The Court explained:

That distinguishes this case from *Hunters Capital LLC v. City of Seattle*, another CHOP case in which the district court held that plaintiffs could state a state-created danger claim. 499 F. Supp. 3d 888, 902 (W.D. Wash. 2020). Both parties point out that *Hunters Capital* involved plaintiffs who lived or owned businesses within the CHOP zone, significantly narrowing the class of persons exposed to the alleged state-created danger. See *id.* at 895–99. Those facts are more like *Hernandez*, where officers directed a discrete and identifiable group of protestors toward a dangerous mob, than like *Johnson*, where plaintiffs were among many who had attended a dangerous Mardi Gras festival voluntarily. While we offer no opinion on *Hunters Capital*, its facts are appreciably closer to meeting the particularity standard that our precedent requires than are *Sinclair's* allegations.

*Id.* at 683 (emphasis added).

Thus, while the Court did not directly rule that businesses such as Plaintiffs are sufficiently particular to support a claim of state-created danger, the Court strongly suggested that they are. And the *Sinclair* Court was considering the *Hunters Capital* matter which included as many as 16 named-plaintiff businesses and individuals

spread throughout the neighborhood affected by the occupation and a putative class of thousands. ER-173, ER-177-81. The *Sinclair* court was not considering even more particularized allegations like those here: two Plaintiffs located across the street from the hub of the occupation and at the epicenter of the City's support of the occupation, who were in direct communication with the City during the entirety of the occupation about what they were experiencing due to the City's action and inaction. The *Sinclair* Court was ready to find particularized danger for all the *Hunters Capital* plaintiffs, and Plaintiffs here have alleged an even more particularized set of circumstances, and a smaller identifiable group, in this case. The Court should follow *Sinclair*, *Hernandez*, and *Polanco* and reverse the rulings of the district court dismissing Plaintiffs' claim of state-created danger.<sup>4</sup>

**B. Plaintiffs' nuisance claim was filed within the statute of limitations.**

This district court concluded that Plaintiffs' nuisance claims were untimely because a two-year statute of limitations applied to those claims, and that statute was

---

<sup>4</sup> Plaintiffs note that the City argued below, at least initially, that Plaintiffs' state-created danger claims should also be dismissed on the basis that Plaintiffs did not adequately allege that City acted with deliberate difference. ER-90. The district court did not analyze that issue in its orders. If the City chooses to argue the issue in its responsive brief, Plaintiffs will address it in detail in their reply. However, Plaintiffs note that the Court has already ruled in the *Sinclair* case, based on similar but sparser allegations, that it was plausible that the City had acted with deliberate indifference to the CHOP occupation. *Sinclair*, 61 F.4th at 681. *See also* sections III.A.5 and A.6, above.

not tolled by the existence of a prior class action that included Plaintiffs in the putative class. The district court erred on both points.

**1. The applicable statute of limitation is three years.**

Plaintiffs' nuisance claim concerns the effects the City's affirmative, intentional actions had on their real property and their enjoyment of that property. As such, it falls under Washington's three-year statute of limitations for "an action for waste or trespass upon real property." RCW 4.16.080(1). Indeed, this Court has previously ruled that under Washington law, the "statute[] of limitations for ... nuisance ... [is] three years." *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 516 (9th Cir. 2005) *citing* RCW 4.16.080.

Oma Bap filed its nuisance claim on April 6, 2023, ER-171, and Hugo Properties filed its claim on June 7, 2023, ER-135, both less than three years prior to the City's abandonment of the East Precinct on June 8, 2020. ER-29. They are therefore timely filed.

The district court nonetheless concluded Plaintiffs' nuisance claims were untimely because they are not covered by RCW 4.16.080(1) but instead come within Washington's two-year "catch-all" statute of limitations in RCW 4.16.130. ER-25-26. The district court ignored this Court's ruling in *Skokomish*, as well as other cases finding that nuisance claims under Washington law have a three-year statute of

limitation. *See, e.g., Louie v. Exxon Mobil Oil Corp.*, 2011 WL 1475665, \*5 (W.D. Wash. Mar. 17, 2011).

The district court's analysis was incorrect. The ruling of the panel in *Skokomish* is the binding law of this Court. *See, e.g., Naruto v. Slater*, 888 F.3d 418, 421 (9th Cir. 2018) ("We are ... bound by the precedent set in [a panel decision] until and unless overruled by an en banc panel or the Supreme Court.") The district court erred by not following that precedent.

Second, to the extent that the Court's ruling in *Skykomish* does not resolve this issue, a federal court sitting in diversity has a duty to determine how a state's highest court would decide the issue. *See, e.g., Gravquick A/S v. Trimble Navigation Intern. Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003). And in this case, the Washington Supreme Court's decisions indicate *Skykomish* is correct and that Washington would apply a three-year statute of limitations.

Washington courts have held that whether a claim for nuisance or trespass is subject to the three-year limitation in RCW 4.16.080(1) or the two-year period in RCW 4.16.130 turns on whether the allegations are based on a theory of negligence or intent. In *Bradley v. American Smelting and Refining Co.*, 104 Wn. 2d 677, 679 (1985), the court was presented with a series of certified questions, including the difference (if any) between a claim of nuisance and a claim of trespass, and what the applicable statute of limitations was for a claim of intentional trespass. The court first

noted that in the instance of trespass and nuisance claims, especially when they are based on a defendant's intentional conduct, there is little difference between the claims:

The first and most important proposition about trespass and nuisance principles is that they are largely coextensive. Both concepts are often discussed in the same cases without differentiation between the elements of recovery....

*Id.* at 684 (citation omitted).

The court then held that in cases of intentional trespass, “the 3-year statute of limitations applies” because of the intentional nature of that tort. *Id.* at 693. On that point, the *Bradley* decision *overruled* its earlier decisions in both *Riblet v. Spokane-Portland Cement Co.*, 41 Wn.2d 249 (1952) and *Weller v. Snoqualmie Falls Lumber Co.*, 155 Wash. 526 (1930). *See Bradley*, 104 Wn. 2d at 693. In those overruled cases, the court had previously applied a two-year statute of limitation to nuisance claims that were based on a defendant's intentional acts that caused harm to the plaintiff's property. *See* 41 Wn.2d at 257-58 (*Riblet*) and 115 Wash at 531 (*Weller*). *Bradley* thus ruled that those cases – involving nuisance – conflicted with its ruling on the applicability of the three-year statute of limitations.

Thus, the law in Washington is that claims of nuisance and trespass are subject to the three-year statute of limitation in RCW 4.16.080(1) if they are based on a defendant's intentional acts and are subject to the two-year limitation if they are not. *See also, e.g., White v. King County*, 103 Wash. 327, 329 (1918) (claim of negligent harm to real property subject to two-year statute of limitations); *Mayer v. City of*

*Seattle*, 102 Wn. App. 66, 75 (2000) (two-year statute applied because claim was based on negligence). And Plaintiffs' claims in this case are based on the City's affirmative, intentional acts.

The district court's reliance on *Wallace v. Lewis County*, 134 Wn. App. 1, 19 (2006) to apply a two-year statute of limitations to Plaintiffs' claims was misplaced. *Wallace* is not only not a Washington Supreme Court decision, it erroneously based its ruling on the overruled *Riblet* decision, as well as the *Bradley* court's discussion of *Weller*, even though *Bradley* also overruled that case. *See Wallace*, 134 Wn. App. at 19.

Thus, the three-year statute of limitations applies to Plaintiffs' claims, because those claims are based on the City's affirmative acts. Indeed, Plaintiffs specifically disavowed that their nuisance claims are based on the City's negligence in its briefing of the motions to dismiss, as the district court recognized. ER-98.

Plaintiffs' nuisance claims are timely and the Court should reverse the district court's dismissal of those claims.

**2. Even if the statute of limitation is two years, it was tolled.**

However, even if the applicable statute of limitation were two years, Plaintiffs' nuisance claims would still be timely because the pendency of a prior class action tolled the statute for nearly two years. The Washington Supreme Court would either adopt class-action tolling pursuant to *American Pipe & Construction Co. v. Utah*, 414

U.S. 538 (1974), or find that the statute of limitation was tolled pursuant to Washington's doctrine of equitable tolling.

**a. American Pipe tolling applies to Plaintiffs' nuisance claims.**

Pursuant to *American Pipe*, the statute of limitations applicable to the claims of members of pending, putative class actions are tolled until class certification is denied. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983). This tolling has direct application here because Plaintiffs were absent members of a class in the *Hunters Capital* litigation, where the plaintiffs sought to certify the claims of a class of businesses within a geographic area that included Plaintiffs' locations, and stated state-law nuisance claims on behalf of that putative class based on the same theories as Plaintiffs' claims in this case. ¶¶ 151-59, 167-74 (*Hunters Capital* complaint), ER-ER 222-23; ¶¶ 181-87 (FACC), ER-83. The *Hunters Capital* case was filed on June 24, 2020, ER-173, and class certification was not denied until nearly two years later, on May 9, 2022. *See Hunters Capital, LLC v. City of Seattle*, 2022 WL 1449387 (W.D. Wash., May 9, 2022). Therefore, if Plaintiffs' nuisance claims were tolled during that time period, they are timely even if the applicable statute of limitations was two years.

The Washington Supreme Court has not ruled on whether *American Pipe* tolling is available for Washington causes of action. However, as discussed below, that court has signaled it would adopt *American Pipe* in the appropriate case. This Court should find that it would do so and apply *American Pipe* tolling to Plaintiffs' nuisance claims.

*See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021) (federal court sitting in diversity “must determine what result [a state’s highest court] would reach”).

In *Campeau v. Yakima HMA, LLC*, 3 Wn. 3d 339 (2024), the Washington Supreme Court strongly indicated that it would apply *American Pipe* tolling in the appropriate case. *Campeau* concerned whether a suit brought by a union in its representative capacity tolled the statute of limitation on claims later brought by union members. *Id.* at 341-43. Because the facts did not involve a class action, the court concluded it was not appropriate to decide on the facts of that case whether Washington would adopt *American Pipe* tolling, although the parties had argued the issue and the Court of Appeals had reached the issue. *Id.* at 344, 345. But the court then ruled that the union’s representative suit nonetheless tolled claims for individual members under a separate doctrine because such tolling “advances the goals of adjudicative efficiency and justice”:

Without ... tolling, members would be forced to file individually to preserve their claims in the event a court later found the association lacked standing. These individual filings would burden our courts with a multiplicity of litigation .... In pursuing their individual claims, members would face higher litigation costs. Where the financial costs and the potential for retaliation are too high, some members may choose to abandon their claims entirely. Tolling helps avoid these consequences.

*Id.* at 347.

These policy concerns underlying the extension of tolling in *Campeau* are the exact same policy that led the United States Supreme Court to adopt *American Pipe* tolling. As explained in that case, it was necessary to toll individual class members' claims pending resolution of class certification because:

A contrary rule ... would deprive Rule 23 class actions of the efficiency and economy of litigation .... Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable.

*American Pipe*, 414 U.S. at 553–54.

It could scarcely be clearer that given a case such as this one, where class members filed individual claims after a denial of class certification, the Washington Supreme Court would follow its reasoning in *Campeau* and adopt *American Pipe* tolling. That would also be consistent with the fact that in class actions, “Washington courts have long looked to federal authority” because of the substantial similarity between CR 23 and Fed. R. Civ. Proc. 23. *Summers v. Sea Mar Cmty. Health Centers*, 29 Wn. App. 2d 476, 487 (2024).

The adoption of *American Pipe* tolling would further comport with Washington's policy favoring the aggregation of small claims to promote efficiency, and to ensure access to justice. *See Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 515 (2018) (citing *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318-19, (2002)). To that end, CR 23 is liberally construed in favor of class treatment.

*See Moeller v. Farmers Ins. Co. of Washington*, 173 Wn. 2d 264, 278 (2001). Without *American Pipe* tolling during the pendency of a putative class action filing, would-be class members in Washington would have to race to the courthouse with copycat filings in order to preserve their claims, defeating the very efficiencies class actions are designed to achieve. Such a result cannot be squared with the purpose of CR 23, nor *Campeau*'s adoption of nearly identical tolling for representative actions.

The district court nonetheless held that Washington would not adopt *American Pipe* tolling because the Washington Supreme Court had not expressly vacated the Court of Appeals' holding in *Campeau* that Washington had not adopted and would not adopt *American Pipe* tolling. ER-9-10. *See also Campeau v. Yakima HMA LLC*, 26 Wn. App. 2d 481, 488-92 (2023). However, the Washington Supreme Court reversed the Court of Appeals' decision *and* expressly held that *Campeau* was not the proper case to consider whether to adopt *American Pipe* tolling. 3 Wn. 3d at 344. The district court therefore relied on a Court of Appeals decision that reached an issue the Supreme Court held that it was inappropriate to reach in that case.

In addition, the Court of Appeals decision in *Campeau* was based on its understanding of Washington's equitable tolling doctrine, and whether it was consistent with *American Pipe* tolling. *See* 26 Wn. App. 2d at 487-91 (concluding that under *Fowler v. Guerin*, 197 Wn. 2d 46 (2021), equitable tolling was not available on the facts of *Campeau*). But the Washington Supreme Court expressly broadened its

doctrine of equitable tolling, stating that the *Campeau* plaintiff was entitled to equitable tolling even though he would not have been under the stricter rules in *Fowler*. See 3 Wn. 3d at 345. The Washington Supreme Court limited *Fowler* to its facts because “*Fowler* did not consider cases like *American Pipe* or cases” with facts like those in *Campeau*. *Id.* at 347. Thus, the basis for the Court of Appeals decision in *Campeau* was completely undermined, and it was error for the district court to have followed a decision that the higher court reversed in its entirety. *Id.* at 349.

*American Pipe* tolling applies to Plaintiffs’ nuisance claims, if those claims would be untimely without tolling. Those claims are therefore timely for this additional reason.

**b. Washington’s equitable-tolling doctrine would also toll the nuisance claims.**

In addition, even if a two-year statute of limitations applied and *American Pipe* tolling was not available, Plaintiffs’ nuisance claims would be timely under the equitable-tolling doctrine adopted in *Campeau*. In that case, the Washington Supreme Court also held equitable tolling is available based on the filing of a prior case if it is consistent with the purpose of the statute providing the cause of action and tolling would “protect against (1) litigating stale claims, (2) loss of evidence and (3) fading memories.” 3 Wn. 3d at 346. These factors are easily satisfied here. The *Hunters Capital* litigation went through years of discovery and resolved only after summary judgment proceedings; there has already been extensive documentary and testimonial

evidence collected that both sides will draw on from in this litigation. *See, e.g., Hunters Capital, LLC v. City of Seattle*, 2023 WL 184208 (W.D. Wash., Jan. 13, 2023) (ruling on spoliation of evidence by City officers); *Hunters Capital, LLC v. City of Seattle*, 650 F. Supp. 3d 1187 (2023) (ruling on summary judgment).

Furthermore, as in *Campeau*, “applying equitable tolling here advances the goals of adjudicative efficiency and justice.” 3 Wn. 3d at 347. While the Supreme Court noted in *Campeau* that failing to extend equitable tolling in these circumstances would undermine the value of associational standing, the same reasoning applies to class actions. For example, failing to recognize equitable tolling here would “disincentivize members from relying on [class representatives],” and a bar on equitable tolling in the case of class action lawsuits “would burden our courts with a multiplicity of litigation and would cut against the benefits of” class representation. *Id.* at 347, 348. In pursuing individual cases in the face of a pending class action, class “members would face higher litigation costs” and “some members may choose to abandon their claims entirely.” *Id.* at 348. These policy interests set forth in *Campeau* were best served in this case by waiting to see whether a class was certified and allowing discovery to be conducted in *Hunters Capital* without adding an additional party and additional costs to complicate the process.

But the district court held that equitable tolling does not apply here because the equitable tolling set forth in *Campeau* is limited to cases involving associational

standing, and that in all other cases the rules set forth in *Fowler* (which requires a showing of bad faith by the defendant) applies. ER-13-14. That finding turns *Campeau* on its head. In *Campeau* the Washington Supreme Court limited *Fowler* to its facts because that decision did not account for situations like this one where tolling might be properly based on prior litigation. 3 Wn. 3d at 347. It did not hold that equitable tolling was available only on the facts presented by *Campeau*.

The district court also held that *Campeau* holds that a claim for nuisance cannot be tolled because the legislature has not declared a purpose for that statute apart from the statute defining a nuisance. ER-14. *Campeau* does not make any such declaration; *Campeau* indicates that a court should consider whether tolling would be consistent with the purposes underlying the cause of action. *See* 3 Wn. 3d at 346-47. And nuisance is a common-law concept that has pervaded the law for centuries. *See, e.g. Atl. Richfield Co. v. Christian*, 590 U.S. 1, 36 (2020) (Gorsuch, J., concurring) (“States have long allowed landowners to seek redress ... through ancient common law causes of action like nuisance and trespass”); *Animal Legal Defense Fund v. Olympic Game Farm, Inc.*, 1 Wn. 3d 925, 938 (2023) (Gonzalez, J. concurring) (“[N]uisance’ still retains at least one important feature it has had since the days of Plantagenet kings, the Cocom Dynasty, and Genghis Khan: nuisances are injuries for which the law gives a remedy.”) Washington’s nuisance law was originally codified in 1854 for the express purpose of allowing property owners to recover damages for the sort of harm caused

to Plaintiffs by the City. *See* RCW 7.48.020. Tolling of the statute of limitations for a nuisance claim would be consistent with the time-honored principle that injured property owners should be compensated for nuisances.

Finally, the district court also concluded that Plaintiffs were not entitled to tolling because there was no trial in *Hunters Capital*, and the *Hunters Capital* plaintiffs included the term “Oma Bap” in their requested discovery search terms. ER-14-15. According to the district court, Plaintiffs were sleeping on their rights when they did not file their own additional lawsuits during the pendency of *Hunters Capital* rather than wait to see what happened at class certification or at any trial. But that is *exactly* the type of behavior that led the *Campeau* court to allow tolling; “[w]ithout ... tolling, members would be forced to file individually to preserve their claims in the event a court later found the association lacked standing. These individual filings would burden our courts with a multiplicity of litigation.” 3 Wn. 3d at 347. Plaintiffs were not sleeping on their rights; the worst that could be speculated even under the district court’s speculation is that Plaintiffs were waiting for the district court to issue a class-certification ruling, which took nearly two years and was finally issued less than a month before Plaintiffs’ nuisance claims expired under a two-year statute of limitation. *See Hunters Capital*, 2022 WL 1449387 (decided May 9, 2022). The most Plaintiffs could be accused is exercising restraint in the interests of judicial efficiency.

The same rationales the Washington Supreme Court relied on to toll the statute of limitations in *Campeau* apply equally to this case. Equitable tolling applies to Plaintiffs' nuisance claims if they would otherwise be untimely.

**C. Plaintiffs have plausibly alleged an unconstitutional taking.**

The district court also erred in dismissing Plaintiffs' takings claim. Plaintiffs have both pled a *per se* taking and a taking based on their right to access to public rights of way.

**1. Plaintiffs have stated a *per se* takings claim because the city effectively destroyed Plaintiffs' right to exclude third parties.**

Plaintiffs have alleged the City's actions in ceding their neighborhood to the CHOP occupation and actively supporting that occupation is a *per se* taking.

As the Court recognized in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), the "right to exclude is one of the most treasured" rights of property ownership, and "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 149-50 (citations omitted). *See also Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (the right to exclude is a "fundamental element of the property right").

As a result, there is a *per se* taking whenever the government "has restricted a property owner's ability to use his own property" such that "a physical appropriation of property" has taken place. *Cedar Point*, 594 U.S. at 149. Such a taking can occur when the government has not appropriated all the property and has not invaded the

property itself; all that is required is that the government has granted temporary access to private property to a third party. *See id.* All that is required to “trigger[]” “the right to compensation is [that a government actor] interfere[s] with an owner’s right to exclude others from it.” *Sheetz v. Cnty. of El Dorado, California*, 601 U.S. 267, 274 (2024).

Thus, in *Cedar Point*, the Court held that a *per se* taking occurred where California had passed legislation allowing labor organizers to access agricultural properties to speak to the workers for up to 3 hours a day during designated periods in a calendar year. *See* 594 U.S. at 144, 149-152. As the Court explained, even a temporary grant of access to a third party, no matter the means of that grant, is a taking. *See id.* at 152, 153-54. *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (*per se* taking where regulation permitted cable companies to access apartment buildings).

That is exactly what Plaintiffs have alleged here. Pursuant to official City pronouncements, the City (a) ceded Plaintiffs’ neighborhood to third parties, (b) encouraged and allowed those occupiers to live in and wander the neighborhood with impunity, and (c) did so with full knowledge, at the highest levels of City administration, that their official actions and words had resulted in invasion of the Plaintiffs’ properties with people, tents, barriers, garbage, and vandalism. ¶¶ 43-46,

64-85, 87.e & .f, 91-107, 137-47, ER-38-39, ER-43-58, ER-64-75. This was a City-authorized invasion of Plaintiffs' property, and therefore a *per se* taking.

The district court disagreed, on the basis that the City did not grant a “formal entitlement” to the occupation. ER-94. However, *Cedars Point* specifically disavows that the method by which an invasion is sanctioned is relevant to the analysis:

the essential question is not ... whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else – by whatever means – or has restricted a property owner's ability to use his own property.

*Id.* at 149. And in any event, there were formal entitlements given to the occupation, by the City's mayor herself. The mayor issued a pronouncement a few days into the occupation that:

The City is committed to maintaining space for community to come together, protest, and exercise their first amendment rights. [We] will implement safer and harder barriers to protect individuals in the area.

¶ 147.d, ER-120-21. These barriers were large, concrete barriers with plywood “sheaths” specifically designed to be vandalized with graffiti. ¶¶ 117-18, 139.d, 185, ER-60, ER-66, ER-83. There were formal announcements about the policy of a police-free zone, ¶¶ 60, 147.e, ER-42, ER-75, tweets, media interviews, and press conferences indicating the mayor's and City's support for an indefinite invasion, ¶ 147, ER-74-75, and formal acknowledgments that the City had facilitated the

invasion. ¶ 146, ER-73-74. These were formal actions that communicated to everyone that the occupiers were entitled to invade the property of anyone in the area, including Plaintiffs. Plaintiffs have stated a *per se* takings claim.

## 2. Plaintiffs have stated a lack of access takings claim.

Plaintiffs have also stated a takings claim based on an infringement to their right to access their properties. Specifically, Plaintiffs have alleged because of actions taken by the City that all reasonable access to their properties was denied as a result of the City-sponsored invasion of their neighborhood. The City's barriers and dumpsters were used to block access to Plaintiffs' properties, including Hugo Properties' parking garage. ¶¶ 87, 167, 168, ER-49-50, ER-81. Vendors could not access Oma Bap to make deliveries or pick up to-go orders, customers could not access the restaurant, and Hugo Properties' owners and tenants could not access their homes or enter or exit to park. *Id.* & ¶¶ 99, 100, 102, 103, 105, ER-53-57.

These allegations are sufficient to establish a violation of the Takings Clause, which looks to “an independent source such as state law . . . [to] define the range of interests that qualify for protection . . .” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (citation omitted). In Washington, “[t]he right of access of an abutting property owner to a public right-of-way is a property right which if taken or damaged for a public use requires compensation . . .” *Keiffer v. King Cnty.*, 89 Wn. 2d 369, 372 (1977) (citations omitted). Once it has been established that the right of access has

been damaged, the question of liability turns to whether the impairment of access was “substantial.” *Id.* at 373. And the question of whether the impairment was substantial is a question of fact, not law. *Id.* at 374.

The district court concluded Plaintiffs had not adequately pled that the alleged access was substantial enough because, in its view, the alleged lack of access was akin to the inconvenience of having to travel a further distance to work, or inconveniences caused by road construction. ER-94-95. This is incorrect on two levels.

First, Plaintiffs have pleaded that the City’s actions impeded the right to access the public rights of way, as discussed at length above. The question to be decided is therefore whether the reduction in access was “substantial.” Although that is an issue of fact, *Keiffer*, 89 Wn.2d at 374, the district court ruled on it as an issue of law. The district court should be reversed for that reason alone.

Second, the district court was incorrect that the access impairment here was akin to road repair that would cause minor disruption for the public in general. As explained above, Plaintiffs have alleged that access to their buildings was blocked as a direct result of the City’s policies, and that this closure had a direct impact on their revenues and profits. Vendors, customers, employees, and tenants could not access the building or the parking garage. ¶ 87, ER-49-50. Plaintiffs have plausibly alleged a serious impairment to access caused by City’s policies, and that is enough to survive a motion to dismiss. While Plaintiffs have also alleged the impairment was substantial,

whether it was is an issue of fact that should not be decided at this stage of the litigation.

## VII. CONCLUSION

For the foregoing reasons, the Court should reverse the district court's orders dismissing Plaintiffs' state-created danger, nuisance, and takings claims.

DATED: March 7, 2025

Respectfully submitted,

By: s/Angelo J. Calfo  
Angelo J. Calfo

*Attorneys for Plaintiffs-Appellants 3Pak, LLC  
and Hugo Properties, LLC*

**STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs state that they are not aware of any case pending in this Court that is related to this case.

DATED: March 7, 2025

By: *s/Angelo J. Calfo*  
Angelo J. Calfo

*Attorneys for Plaintiffs-Appellants 3Pak,  
LLC and Hugo Properties, LLC*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. Proc. 32(g)(1), Plaintiffs state that this brief contains fewer than 13,000 words in compliance with Fed. R. App. Proc. 32(a)(7)(B).

DATED: March 7, 2025

By: *s/Angelo J. Calfo*  
Angelo J. Calfo

*Attorneys for Plaintiffs-Appellants 3Pak,  
LLC and Hugo Properties, LLC*

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 7, 2025.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: March 7, 2025

By: *s/Courtney Burford*  
Legal Assistant

*Of Attorneys for Plaintiffs-Appellants 3Pak,  
LLC and Hugo Properties, LLC*