

**No. 24-7139**

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

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3PAK LLC d/b/a OMA BAP, HUGO PROPERTIES, LLC, and MOLLY  
MOON'S HOMEMADE ICE CREAM, LLC

*Plaintiff-Appellants,*

vs.

CITY OF SEATTLE,

*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Western District of Washington

No. 2:23-cv-00540-TSC

Hon. Thomas S. Zilly

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**APPELLEE'S ANSWERING BRIEF**

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## I. INTRODUCTION

In the summer of 2020, the City of Seattle was facing twin crises. The first crisis came in the form of the once-in-a-century pandemic that strained systems and resources and shuttered businesses and schools. The second crisis began after the murder of George Floyd, which ignited a period of unrest not seen since the Newark and Detroit riots that occurred during the long, hot summer of 1967. Thousands of Seattleites took to the streets to demonstrate against the use of excessive force by police officers and demand systemic change.

After more than a week of destructive and violent protests, confrontations between demonstrators and police escalated, especially in Seattle's Capitol Hill neighborhood. There, facing immense pressure, Seattle police temporarily vacated a precinct in an attempt to de-escalate tensions with protestors. Seeing this occur, some individuals declared several Seattle blocks around the precinct and in that neighborhood to be autonomous from City governance, designating it the Capitol Hill Autonomous Zone (CHAZ), and later, the Capitol Hill Organized Protest (CHOP). It was against this backdrop that Seattle officials had to make decisions that balanced the First Amendment

rights of protesters against the need to respond to rapidly unfolding events. Those are the decisions that are at the heart of this matter.

Though they were not located within CHOP, Appellants 3Pak, LLC (Oma Bap) and Hugo Properties, LLC (Hugo Properties) (together, Appellants) allege that CHOP participants caused significant damage in the Capitol Hill neighborhood and that the City's response to CHOP was inadequate, focusing in particular on the City's decision to provide dumpsters, Sani-cans, and hand-washing stations to members of the public participating in the protests during those early days of the pandemic. Appellants also seek to hold the City responsible for the activities of third parties during that period. But the District Court dismissed their complaint under Rule 12(b)(6) for two main reasons: (1) Appellants cannot connect their alleged harms to City officials' actions beyond their insufficient allegations that Seattle officials "encouraged" or "facilitated" CHOP; and (2) their nuisance claim is time-barred.

Undeterred, they appeal to this Court. But nothing has changed. Due Process did not impose "an affirmative obligation" on the City to prevent harm to Appellants by third parties. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

Appellants' nuisance claim is still belated. And they cannot state a claim for a taking. Accepting any of Appellants' arguments would work a substantial expansion of the state-created danger exception, require the adoption of multiple tolling doctrines that are unavailable under Washington law, or contravene established takings jurisprudence.

This Court should affirm the District Court.

## **II. JURISDICTIONAL STATEMENT**

The Court has jurisdiction to review the dismissal of Appellants' complaint under 28 U.S.C. § 1291.

## **III. ISSUES PRESENTED**

1. Appellants broadly claim that they were subject to the hostile occupation of their neighborhood and sued the City for violating their substantive-due-process rights by allegedly facilitating CHOP through the provision of dumpsters, portable toilets, handwashing stations, lights, and eco-blocks to separate pedestrians from vehicular traffic. Did the District Court properly conclude that Appellants failed to state a claim under the narrow "state-created danger" exception to the general rule that there is no constitutional right to police protections against third parties?

2. In Washington, the statute of limitations for nuisance is two years. *See Wallace v. Lewis Cnty.*, 134 Wash. App. 1, 19, 137 P.3d 101, 110 (2006), *as corrected* (Aug. 15, 2006); Wash. Rev. Code § 4.16.130. Appellants’ nuisance claim was filed more than two years after the alleged events occurred. Is Appellants’ nuisance claim subject to the two-year limitations period? If so, was that period tolled under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1973)—which is not available under Washington law—or under Washington’s limited equitable tolling doctrine?

3. Appellants claim that the City effected a taking of their properties. Though Appellants cannot identify any formal authorization by City officials of the third-party protesters’ actions, they claim the City effected a *per se* taking under *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 156 (2021). And though Washington state law does not recognize temporary interference with property as a constitutional taking, Appellants claim a right-of-access taking regardless. Did the District Court properly conclude that Appellants failed to state a taking claim?

#### IV. STATEMENT OF THE CASE<sup>1</sup>

Appellants are two businesses located in the Capitol Hill neighborhood of Seattle. Their complaint focuses on the activities of CHOP participants in that neighborhood. ER 28 (Compl. ¶ 1). At bottom, Appellants claim that the City’s response to CHOP violated their constitutional rights, was tortious, and effectuated a taking of their properties.

##### A. CHOP forms after clashes between police and protestors.

George Floyd was murdered in police custody on May 25, 2020, sparking protests from Monroe, Washington to Miami, Florida. In Seattle, anti-police protests centered around Cal Anderson Park and the Seattle Police Department’s (SPD) East Precinct, both located in the Capitol Hill neighborhood. ER 33 (Compl. ¶ 21–25); *see also Hunters Cap., LLC v. City of Seattle*, 650 F. Supp. 3d 1187, 1192 (W.D. Wash.

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<sup>1</sup> When the Excerpts of Record are cited they are in the form “ER [page number].” References to Appellants’ Opening Brief are in the form “AOB at [page number].”

2023).<sup>2</sup> On June 8, 2020, as tensions between police and protesters escalated, SPD withdrew from the East Precinct, leaving behind several barriers that had been used to separate police and protesters. ER 29, 33 (Compl. ¶¶ 3, 22). Appellants do not challenge the legality of SPD’s decision to withdraw from the precinct or allege that this decision violated their legal rights.

Instead, Appellants allege that after SPD withdrew from the precinct, several individuals “took control” of the barriers. ER 29 (Compl. ¶¶ 3–4). These individuals then used the barriers to block off streets within a one-block radius of the precinct, forming CHOP. ER 33 (Compl. ¶ 23). Appellants’ businesses were not located in this zone. ER 29, 32 (Compl. ¶¶ 3, 15–17). In the days that followed, CHOP participants allegedly “occupied the public streets, sidewalks, and parks in the area at all hours of the day and night.” ER 29 (Compl. ¶ 5).

According to the amended complaint (the operative complaint), the City placed Appellants in greater danger than they otherwise would

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<sup>2</sup> Appellants’ complaint is substantially similar to the complaint filed in *Hunters Capital, LLC v. City of Seattle*, Wash. W.D. Case No. 2:20-CV-00983. *See generally* ER 173–228.

have been in by providing materials and services in the CHOP area. ER 79 (Compl. ¶ 159). These materials and services included providing portable toilets and wash stations, lights, concrete traffic control devices, medical equipment, a hose bib, speed bumps, and garbage services. ER 72–74 (Compl. ¶¶ 144–46). Appellants also allege that City support for the Black Lives Matter movement and the City’s efforts to find a peaceful resolution to the CHOP amounted to an endorsement of criminal and other activity. ER 31 (Compl. ¶ 10). According to Appellants, the City compounded the problems posed by CHOP by modifying SPD and Seattle Fire Department (SFD) response protocols inside CHOP. ER 38–39, 42 (Compl. ¶¶ 43–47, 60).

Appellants admit that the direct harms they suffered—including vandalism, broken windows, and graffiti—all arose from the actions of third parties and were not unique to them. Rather, Appellants acknowledge that these issues affected all business and residents in the neighborhood generally—a sixteen block area. *See* ER 29–32 (Compl. ¶¶ 2–14); *see also Hunters Capital*, 650 F. Supp. 3d at 1192 (“Plaintiffs have not provided any evidence showing that they were specifically targeted by the City’s conduct in response to CHOP . . . . [they] do not

dispute that thousands of people live in the CHOP area in 2020 . . . . [and] some plaintiffs . . . claim damages for buildings several blocks away from the CHOP area.”).

Moreover, Appellants’ amended complaint makes clear that their businesses were not in the area initially blocked by protesters. ER 29, 32 (Compl. ¶¶ 3, 15–17). And by June 16, 2020—just one week after the formation of CHOP—the City had ensured at least one-way access to Oma Bap and Hugo Properties. ER 72 (Compl. ¶ 142). A diagram of the barriers in Appellants’ amended complaint demonstrates that there was no blockage on Olive Street, which Hugo Properties fronts and to which Oma Bap is adjacent. ER 44 (Compl. ¶ 68).<sup>3</sup>

Appellants nonetheless sued the City, seeking damages for lost revenue, lack of access to their properties, an inability to receive deliveries, and property damage. *See* ER 79–83 (Compl. ¶¶ 157–187). Appellants concede that the City cleared CHOP on July 1, 2020, and

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<sup>3</sup> Appellants are located at the southeast corner of East Olive Street and 11th Avenue. The drawings and diagrams that they included in their amended complaint (ER 44, 46) and in their opening brief (AOB at 9, 11) clearly show that no barriers (which are depicted on the diagrams by orange lines) were placed across Olive Street, which was always open to traffic.

restored normal City services to the neighborhood. ER 31 (Compl. ¶ 11–12).

**B. Appellants appeal the District Court’s dismissal of their amended complaint.**

This is not the first case like this to be litigated. On June 24, 2020, a group of businesses and individuals sued the City, alleging claims that are substantively identical to Appellants’ claims in this suit. *See generally* ER 173–228 (Complaint for *Hunters Cap., LLC v. City of Seattle*, Wash. W.D. Case No. 2:20-CV-00983 (filed June 24, 2020)). Appellants’ counsel in this action also represented the plaintiffs in *Hunters Capital*. On May 9, 2022, the court in *Hunters Capital* denied those plaintiffs’ motion for class certification. *Hunters Cap., LLC v. City of Seattle*, No. C20-983 TSZ, 2022 WL 1449387 (W.D. Wash. May 9, 2022).<sup>4</sup> And on January 13, 2023, the *Hunters Capital* court dismissed the plaintiffs’ procedural due process, substantive due process, negligence, and *per se* takings claims. *Hunters Capital*, 650 F. Supp. 3d at 1211. The City filed a notice of settlement on February 15, 2023, and

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<sup>4</sup> Oma Bap’s owner, Peter Pak, submitted a declaration in support of the *Hunters Capital* plaintiffs’ motion for class certification. *Hunters Capital*, 2022 WL 1449387, at \*13.

the following day, the court dismissed the case with prejudice.

On April 6, 2023—eleven months after the district court in *Hunters Capital* had denied class certification and more than a month after it had dismissed that case—Oma Bap filed its complaint against the City. *See generally* ER 137–172. The City moved to dismiss Oma Bap’s complaint and the District Court granted the motion in part. *See generally* ER 85–99. On June 7, 2023, while the City’s motion to dismiss Oma Bap’s claims was pending, Hugo Properties filed a complaint against the City. ER 102.

The District Court consolidated the Oma Bap and Hugo Properties matters, along with another matter, and Appellants filed their first amended consolidated complaint on October 6, 2023.<sup>5</sup> ER 28. The amended complaint raised substantive due process, takings, nuisance, and negligence claims. ER 79–83 (Compl. ¶¶ 157–187). The City moved to dismiss Appellants’ amended complaint and the District Court granted the motion as to all claims except Appellants’ nuisance claim.

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<sup>5</sup> The third plaintiff in the underlying case, Molly Moon’s Homemade Ice Cream, did not appeal the District Court’s order of dismissal.

ER 27 (Order 11:7–16). The District Court postponed ruling on the nuisance claim until the Washington Supreme Court issued a decision in *Campeau v. Yakima HMA, LLC*, 551 P.3d 1037 (Wash. 2024). ER 27 (Order 11:11–12). That opinion issued on July 11, 2024, and the parties submitted supplemental briefing on the effects of the *Campeau* decision on Appellants’ time-barred nuisance claim. The District Court subsequently dismissed Appellants’ nuisance claim on October 25, 2024. ER 16 (Order 13:6–7).

Appellants filed their notice of appeal on November 21, 2024. ER 229.

## V. SUMMARY OF THE ARGUMENT

Appellants wish to hold the City liable for the actions of third parties during a time of crisis. Each of their arguments is without merit.

First, the Due Process Clause does not impose an affirmative duty on government to protect individuals from private violence or disorder except under narrow circumstances like state-created danger. Those circumstances are not present here where the actions complained of were: (1) neither targeted to Appellants nor placed them in more danger

than they would have otherwise encountered; and (2) made in a rapidly evolving climate and were intended to ensure the health and safety of Seattleites.

Second, Appellants' nuisance claim must fail. There is a two-year statute of limitations for nuisance under Washington law, yet Appellants filed their claims after that period ran. Because no tolling doctrine applies, their claim is time-barred.

And finally, Appellants cannot make out a claim that the City effected a taking. With regard to their *per se* taking theory, Appellants cannot meet the first pre-requisite: demonstrating that the City granted the third-party protestors an entitlement to invade Appellants' properties. It is undisputed that CHOP was formed by private individuals acting independently of the City. Moreover, Washington law does not recognize temporary interference with property as a taking so Appellants' right-of-access theory also was correctly dismissed.

In short, the law, the facts, and the passage of time, all support affirming the District Court.

## **VI. STANDARD OF REVIEW**

This Court "review[s] an order granting a motion to dismiss de

novo,” accepting all “nonconclusory factual allegations in the complaint as true.” *D’Augusta v. Am. Petroleum Inst.*, 117 F.4th 1094, 1100 (9th Cir. 2024). However, “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). And this court will not accept as true “unreasonable inferences or . . . legal conclusions cast in the form of factual allegations.” *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003).

This court may affirm the dismissal of a complaint “upon any basis fairly supported by the record.” *Burgert v. Lokelani Bernice Pauahi Bishop Tr.*, 200 F.3d 661, 663 (9th Cir. 2000) (citing *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998)).

## VII. ARGUMENT

The City advances its arguments in the same order Appellants did in their opening brief. The City first addresses Appellants’ arguments regarding the sufficiency of their substantive due process claim. Second, the City addresses Appellants’ time-barred nuisance claim. The City addresses the insufficiency of Appellants’ takings claim last.

**A. Appellants’ amended complaint failed to support a substantive due process claim.**

Appellants’ first argument is that the District Court erred in dismissing their substantive due process claim because, in their telling, they meet the narrow state-created danger exception. *See generally* AOB at 21–26. To invoke the state-created danger exception, Appellants were required to allege that: (1) the City’s affirmative actions placed them in “actual, particularized danger that [they] would not have otherwise faced”; (2) the resulting harm was foreseeable; and (3) the City acted with “deliberate indifference” to the “known or obvious danger.” *Martinez v. City of Clovis*, 943 F.3d 1260, 1271 (9th Cir. 2019).

The District Court correctly dismissed Appellants’ substantive due process claim because their allegations could not get them past the post. Appellants failed to allege they “were subjected to a particularized danger” as required to meet the narrow state-created danger exception. ER 23 (Order 7:9–10). Even assuming the truth of the allegations in Appellants’ amended complaint, it still only “merely develops how the **broader Capitol Hill community** was subjected to potential harms by the City’s actions to support CHOP.” ER 23 (Order 7:10–12) (emphasis

added). A particularized danger must be “directed at a specific victim.” *Sinclair v. City of Seattle*, 61 F.4th 674, 682 (9th Cir. 2023).

**1. The state-created danger doctrine is a narrow exception.**

The Due Process Clause is not “a guarantee of certain minimal levels of safety and security.” *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989). For this reason, “a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.” *Id.* at 197.

*DeShaney* introduced the state-created danger doctrine Appellants invoke and is therefore illustrative. In that case, county officials received reports over a period of nearly two years that two-year-old Joshua DeShaney was being physically abused by his father. *Id.* at 192-93. The county briefly took Joshua into protective custody but soon released him back to his father’s home. *Id.* at 192. When Joshua was four, his father abused him so severely that Joshua suffered life-altering brain damage that would likely require him to receive institutional care for the rest of his life. *Id.* at 193.

The Supreme Court rejected Joshua DeShaney’s substantive due process claim, holding that the Fourteenth Amendment was intended

“to protect the people from the State, not to ensure that the State protected them from each other.” *Id.* at 196. In doing so, *DeShaney* explicitly and impliedly recognized two exceptions to the general rule. The first, the special relationship exception, Appellants do not raise. The second exception was the state-created danger exception: “While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.” *Id.* at 201.

The state-created danger exception applies only in “narrow circumstances.” *Murguia v. Langdon*, 61 F.4th 1096, 1108 (9th Cir. 2023). It did not apply in *DeShaney* because Joshua was not in the county’s custody when he was abused and because the Court concluded that returning him to his father placed Joshua “in no worse position than that in which he would have been had [the State] not acted at all.” *DeShaney*, 489 U.S. at 201.

**2. Appellants failed to allege that they suffered an actual, particularized danger.**

To meet the “particularized danger” element of a state-created danger claim, the government must engage in some “affirmative conduct” that “plac[es] the plaintiff in danger.” *Patel v. Kent Sch. Dist.*,

648 F.3d 965, 974 (9th Cir. 2011). That is, the state action must “create[ ] or expose[ ] an individual to a danger which he or she would not have otherwise faced.” *Johnson v. City of Seattle*, 474 F.3d 634, 639 (9th Cir. 2007). In their amended complaint, Appellants failed to allege facts that would meet this threshold.

Two of this Court’s more recent cases make the point.<sup>6</sup> First, in *Sinclair*, this Court addressed the “particularized danger” element specifically in the context of CHOP. In that case, the mother of an individual killed while in the vicinity of Cal Anderson Park during CHOP brought a substantive due process claim against the City. 61 F.4th at 677. Affirming the district court’s dismissal of her claim, this

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<sup>6</sup> *White v. City of Minneapolis*, another case arising from the Summer 2020 protests, is also on point and instructive. No. 21-cv-0371, 2021 WL 5964554 (D. Minn. Dec. 16, 2021). After protests led to vandalism, property destruction, and unrest in Minneapolis’s Third Precinct, several business owners and residents sued. There too, the district court dismissed the property-owner-plaintiffs’ claims at the pleading stage because they failed to allege facts showing that they were members of a “limited, precisely defined group.” *Id.* at \*6. Specifically, the court concluded the plaintiffs alleged they were “members of an affected group that include[d], at least, all residents and business owners in the Third Precinct, if not an affected group that consist[ed] of any member of the public within Minneapolis”— groups that could be “fairly understood to be the general public.” *Id.*

Court confirmed that a “‘particularized’ danger, naturally, contrasts with a general one” and held that “any danger the City created or contributed to by enabling the CHOP zone affected all CHOP visitors equally” such that the “City did not create a danger that posed a specific risk to [the victim].”<sup>7</sup> *Id.* at 682.

The second case, arising out of the Summer 2020 protests in Portland, was *Hall v. City of Portland*, No. 22-35705, 2023 WL 5527854, at \*1 (9th Cir. Aug. 28, 2023). In *Hall*, the plaintiff alleged that he had been injured during a confrontation with protesters in Portland and brought suit against that city. *Id.* Although the plaintiff alleged “‘city-wide’ danger ‘on a grand and unprecedented scale,’” he could not explain how “‘he *in particular* was endangered differently than the public at large.” *Id.* The Ninth Circuit affirmed the district court’s dismissal of the *Hall* plaintiff’s complaint as well. *Id.* at \*2.

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<sup>7</sup> Appellants cite dicta from *Sinclair* to suggest that the panel that heard that matter would have found particularized danger under the facts alleged in *Hunters Capital*. AOB at 26. But the *Sinclair* Court was clear that it was expressing “no opinion” on whether the allegations in *Hunters Capital* met the particularity standard. 61 F.4th at 682. In fact, had the Ninth Circuit believed that businesses and residents around CHOP *actually* met the particularity standard, it could have said so. It did not.

Like the plaintiffs in *Sinclair* and *Hall*, Appellants merely allege generalized dangers to an entire neighborhood and do not explain how they in particular were harmed by the City’s alleged acts. ER 32

(Compl. ¶ 14). As Appellants conceded in their complaint:

[T]his lawsuit is about Plaintiffs’ constitutional and other legal rights of which were overrun by the City of Seattle’s decision **to abandon and close off an entire city neighborhood**, leaving it unchecked by the police, unserved by fire and emergency health services, and inaccessible to the public at large, and then materially support and encourage a hostile occupation of that neighborhood. **The City’s decision subjected businesses, employees, and residents of that neighborhood to extensive property damage, public safety dangers, and an inability to use and access their properties.**

ER 29 (Compl. ¶ 2) (emphasis added).

The complaint further makes clear that any harms suffered affected Capitol Hill residents broadly, not just them. For example, Appellants allege that the entire Capitol Hill neighborhood suffered harms like graffiti, property damage, and economic loss. *See* ER 30–31 (Compl. ¶¶ 8 (public safety), 9 (graffiti), 10 (property damage and economic loss)). And they frame the case as being one “about the City’s active, knowing endorsement and support of a destructive occupation of a neighborhood.” ER 32 (Compl. ¶ 14). Appellants also repeatedly allege

that the City’s actions came “at the expense of individuals living and working in the neighborhood.” ER 72 (Compl. ¶ 141(a)); *see also* ER 72 (Compl. ¶¶ 141(b), 142); ER 80 (Compl. ¶ 162). All of these harms are generalized and not specific to Oma Bap or Hugo Properties.

Moreover, Appellants concede that they had no direct involvement in the City’s decision to place portable toilets and trash receptacles at the corner of Eleventh and Olive Avenues—which Appellants allege was the “epicenter of its public-sanitation support of CHOP” and had a “particularized” effect on Appellants.<sup>8</sup> *See* ER 45, 72 (Compl. ¶¶ 73, 142 (noting that collection site was established “without providing Plaintiffs notice or an opportunity to comment”). Affirmative acts that satisfy the state-created danger test “typically” involve law enforcement being “engaged in direct contact with the victim.” *Hall*, 2023 WL 5527854, at \*1. That is why in *Martinez* the actions of an officer who responded to a

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<sup>8</sup> Molly Moon’s Homemade Ice Cream, which is not participating in this appeal, was located several blocks from Plaintiffs’ businesses. ER 32 (Compl. ¶¶ 15–17). Yet, Appellants alleged in the amended complaint that these same public sanitation facilities “particularly affected” businesses like Molly Moon’s, located blocks away. These allegations further emphasize the generalized nature of the harms Appellants allege.

domestic violence call satisfied the first prong of the state-created danger doctrine where the officer interacted with the victim and the abuser. 943 F.3d at 1272. Similarly, in *Hernandez v. City of San Jose*, the officers directly interacted with the Trump rally attendees, whom they affirmatively directed to leave the rally through a mob of counter-protesters. 897 F.3d 1125, 1135 (9th Cir. 2018). And in *Munger v. City of Glasgow Police Dep't*, the officers “affirmatively ejected” plaintiff “from a bar late at night when the outside temperatures were subfreezing.” 227 F.3d 1082, 1087 (9th Cir. 2000). Here, though, there was no such direct interaction between Appellants and the City.<sup>9</sup>

Appellants’ claims of a particularized harm are further undermined by their diagram showing the locations of trash receptacles

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<sup>9</sup> To the extent Appellants believe that their correspondence with the City regarding other CHOP-related issues supports a state-created-danger claim, that belief is mistaken. The City’s mere awareness of a potential danger is not sufficient to state a claim. *Martinez*, 943 F.3d at 1271. Instead, a plaintiff must demonstrate that the state actor took some action that left “the person in a situation that was more dangerous than the one in which they found” them. *Id.* Appellants have not pointed to any statements or actions by the City in response to their communications that placed them in any worse situation than already existed; the correspondence simply described alleged harms that were purportedly already occurring.

and toilets. *See* ER 45–46 (Compl. ¶ 75); AOB at 11. The diagram shows that the City placed toilets and trash receptacles at various spots around the neighborhood, not just at the corner of Eleventh and Olive. *Id.*

Recognizing the deficiency of their allegations, Appellants attempt to analogize this Court’s opinions in *Hernandez* and *Polanco v. Diaz*, 76 F.4th 918 (9th Cir. 2023). *See* AOB at 23–25. Their attempts are futile, however. In both *Hernandez* and *Polanco*, the government’s affirmative acts were directed specifically at the plaintiffs, placing them in a more dangerous position.

In *Hernandez*, plaintiffs were among a specific, defined group of people—in that case, Trump rally attendees—and the city’s police officers affirmatively directed those attendees through a group of anti-Trump protesters that the officers knew were violent. 897 F.3d at 1130, 1133. The officers also “actively prevented the attendees from leaving safely through alternative exits.” *Id.* at 1133 (cleaned up). This conduct constituted “affirmative acts” that placed plaintiffs “in a more dangerous position than the one in which they found themselves.” *Id.*

Similarly, in *Polanco*, a group of inmates were moved from a prison with a COVID-19 outbreak to a prison—San Quentin—that had not experienced any COVID cases. 76 F.4th 918, 923 (9th Cir. 2023). Although some inmates exhibited COVID symptoms while being transferred, the government defendants did not quarantine the transferred inmates or otherwise take preventive measures against COVID. *Id.* at 923–34. Over the next three weeks, confirmed cases of COVID in San Quentin rose from zero to nearly five hundred, eventually leading to the deaths of twenty-six inmates and one guard. *Id.* at 924. This Court found that the danger was “particularized” because “the transfer exposed a ‘discrete and identifiable group’—prison guards and inmates at San Quentin—to the dangers of COVID-19.” *Id.* at 927.

But unlike in *Hernandez* and *Polanco*, no particularized conduct is alleged in this case. The acts complained of here, including providing lights, handwashing stations, and portable toilets, were not targeted toward Appellants. Instead, these actions—intended to protect the health and safety of the public—allegedly exposed a broad and non-discrete swath of the public (residents and visitors of Capitol Hill) to the

same alleged dangers. *See Polanco*, 76 F.4th at 927 (“Affirmative state action that exposes a broad swath of the public to ‘generalized dangers’ cannot support a state-created-danger claim.”). Nor did the City’s actions place Appellants in greater danger than they otherwise would have been without City involvement. Excessive noise and traffic blockages, violence and vandalism occurred before the formation of CHOP in June 2020. Clashes between protestors and police are what led SPD to evacuate the East Precinct in the first instance. ER 29, 33 (Compl. ¶¶ 3, 22). In fact, protests began in May 2020. *See Hunters Capital*, 650 F. Supp. at 1192. And on May 30, 2020—at least more than a week before CHOP formed—the City, in response to the size of the protests, declared a state of civil emergency due to the “unacceptable high risk of serious injury to innocent people including lawful protestors and police, as well as significant property damage.” *Id.*

Because the City’s actions were not specifically directed at Appellants, they cannot meet the state-created danger exception.

**3. Even if Appellants alleged particularized harm, those harms are still insufficient to state a claim under the state-created danger exception.**

Even if Appellants had alleged particularized harm, the harms

they allegedly suffered would not be enough to meet the state-created danger exception.

First, a state-created danger claim may not be borne from solely economic harm. In *Polanco*, this Court recognized that “not any risk will” suffice to sustain a state-created danger claim. 76 F.4th at 927. Rather, the “level of harm . . . must be severe enough to constitute a ‘danger.’” *Id.* A valid “danger” includes “assault, battery, kidnapping, and rape,” “murder,” “serious illness leading to death,” “assault and battery resulting in serious injuries,” “physical and sexual violence,” and “exposure to COVID-19, at least in a pre-vaccine world.” *Id.* The decisions that addressed the requisite “danger” *all* “involved risks of bodily harm to individuals.” *Railroad 1900, LLC v. City of Sacramento*, 604 F. Supp. 3d 968, 976 (E.D. Cal. 2022) (collecting cases). This rule is true even for *Polanco* and *Hernandez*, which involved group harm rather than individual harm.

That a state-created claim may not be grounded in purely economic harms makes sense considering the origins of the doctrine in *DeShaney*. That case involved the infliction of bodily harm on a child rather than the purely economic harms that Appellants—both corporate

entities—allege they suffered. *See Railroad 1900, LLC*, 604 F. Supp. 3d at 976 (“[I]t is not clear that the term ‘danger’ may, within the meaning of the state-created danger doctrine, be validly construed to include risks of purely economic injury to a corporation.”). A narrow state-created danger doctrine is consistent with the Supreme Court’s “reluctan[ce] to expand the concept of substantive due process.” *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *see also Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 239 (2022) (admonishing jurists to “guard against the natural human tendency to confuse what [the Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy”).

Appellants seek to remedy lost profits, property damage, and other economic harms. None of these harms constitute a “danger” as that term is defined in the state-created danger context. Although the District Court did not analyze this issue, the Court may uphold the dismissal of Appellants’ substantive due process claim for this reason as well. *Burgert*, 200 F.3d at 663.

And second, the alleged length of the danger reinforces that Appellants’ claim was properly dismissed. In *Sinclair*, the Court

recognized that the particularized harm alleged must be “immediate” and “of limited range or duration.” 61 F.4th at 684. Appellants allege that the harms caused by the City’s treatment of CHOP occurred over a six-month period from June to December 2020. ER 29–32 (Compl. ¶¶ 3–12). This prolonged period was not the type of immediate risk that gives rise to a state-created danger claim. *Sinclair*, 61 F.4th at 683–94; *see also Patel*, 648 F.3d at 975.

**4. Appellants cannot demonstrate that the City acted with deliberate indifference.**

But even assuming Appellants could allege particularized harm, they would still hit a snag. They do not allege facts necessary to satisfy the third element of the state-created danger exception: deliberate indifference.<sup>10</sup>

To meet their burden on the deliberate indifference requirement, Appellants must allege facts showing that the City was “deliberately indifferent to the known danger” to which the City’s affirmative acts exposed them. *Sinclair*, 61 F.4th at 680. The City’s particularized,

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<sup>10</sup> The District Court premised dismissal on different grounds but, again, this Court may affirm on any basis supported by the record. *See Burgert*, 200 F.3d at 663.

affirmative acts directed at Appellants must have been the “but for” cause of risk incurred by Plaintiffs in order to satisfy this element. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1071–72 (9th Cir. 2006). Deliberate indifference is “a stringent standard of fault” that is “even higher than gross negligence.” *Patel*, 648 F.3d at 974 (citation omitted). Specifically, in order to state a claim, a plaintiff must prove that the “state actor” not only “recognize[d] an unreasonable risk” but “actually intend[ed] to expose the plaintiff to such risks without regard to the consequences to the plaintiff”; merely alleging that the state actor missed an obvious risk or exercised poor judgment is insufficient. *Martinez*, 943 F.3d at 1274 (citations omitted). Instead, “the state actor must have known that something was going to happen, but ‘ignored the risk and exposed the [plaintiff] to it anyway.’” *Id.*

In a footnote, Appellants note that the *Sinclair* court concluded that the plaintiff there adequately alleged deliberate indifference. *See AOB* at 27, n. 4; *see also Sinclair*, 61 F.4th at 681 (concluding the *Sinclair* plaintiff adequately alleged “deliberate indifference” by the City in “knowingly expos[ing] the public to a danger”). At the same time, the Ninth Circuit also made clear that the City did not act with

deliberate indifference in response to the decedent's injuries or care. *Id.* Whatever application that conclusion has here—and it is not clear that it should have any—*Sinclair* did not change Appellants' basic pleading obligations. They were required to plead facts showing that the City's particularized acts *directed at them*, rather than those aimed at the public, were undertaken with deliberate indifference. *See Kennedy*, 439 F.3d at 1071–72. They have not done so.

Instead, the facts repeatedly demonstrate that City officials went to great lengths to mitigate CHOP's effects on the neighborhood while balancing considerations like protestors' First Amendment rights, ER 28, 32, 66, 74–75 (Compl. at ¶¶1, 14, 139(d), 147(d)), and the City's limited ability to clear CHOP without the significant use of police force, *see Black Lives Matter Seattle-King Cnty. v. City of Seattle, Seattle Police Dep't*, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (enjoining SPD from certain non-lethal crowd control actions during the relevant period).

For example, Appellants acknowledge in their complaint that the City provided toilets and dumpsters to mitigate against public health and safety concerns like “[t]rash, feces, and other refuse build up in the

park, affecting the whole area.” ER 38 (Compl. ¶42). The City’s provision of these facilities, especially in light of the pre-vaccine COVID-19 pandemic health risks in early 2020, undercuts, rather than supports, Plaintiffs’ claim. *See Polanco*, 76 F.4th at 928 (allegations that state took measures to mitigate risks associated with allegedly dangerous acts would undercut allegations of deliberate indifference); *Sinclair*, 61 F.4th at 681 (allegations that City’s delayed response to 911 call stemmed from miscommunication undercut inference that City acted with deliberate indifference because “had the City been deliberately indifferent to Anderson’s particular plight, they would have ignored CHOP participants’ pleas for help altogether. They did no such thing.”).

The City also opened streets and ensured they were marked with “local access” signs to ease access and allow businesses to manage deliveries; provided garbage, recycling, and sanitation facilities and services daily during CHOP in order to minimize the risks of public health crises in the early stages of the pandemic; and provided plywood sheathing on the traffic barriers in hopes that graffitiing would be

focused there, rather than on other public and private property. ER 45–46, 60, 74–75 (Compl. ¶¶ 70, 75–76, 117, 147(d)).

Yes, the City provided heavy barricades to modify traffic near Appellants’ businesses. *See, e.g.*, ER 44 at (Compl. ¶ 68). But it did so to “protect individuals in this area, allow traffic to move throughout the Capitol Hill neighborhood, ease access for residents of apartment building[s] in the surrounding areas, and help local businesses manage deliveries and logistics.” ER 66–67 at (Compl. ¶139(d)).<sup>11</sup> These steps resulted in “freeing up alley access” and “opened streets.” *Id.* Appellants specifically concede that the provision of these sturdier barriers provided “limited one-way access on Eleventh and Twelfth Avenue.” ER 72 (Compl. ¶142).

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<sup>11</sup> The danger City officials sought to protect residents from was not abstract. For example, the night before police withdrew from the East Precinct—i.e., one night before CHOP came about—an armed man drove his car into a crowd of protesters outside the precinct and shot a 27-year-old man. *See Daniel Beekman, et al., Man shot on Capitol Hill in Seattle after gunman drives car into George Floyd protest*, SEATTLE TIMES (June 7, 2020, at 11:10 PM), <https://www.seattletimes.com/seattle-news/law-justice/man-shot-after-gunman-drives-car-into-capitol-hill-protesters/>.

Finally, the City also ensured that high-ranking City officials were on-site daily meeting with protestors, businesses, and members of the public to try to maintain access and safety in the neighborhood; designated a City department to liaise with affected businesses; and modified the police department's response protocols throughout the Capitol Hill neighborhood in order to protect its officers' and the public's safety, while also providing a means for crimes to be reported and investigated. ER 38–39, 50–51, 64–65 (Compl. ¶¶ 44–46, 92–93, 138).

These are not the actions of a deliberately indifferent entity. Instead, they are the actions of officials aiming to cool down tensions after they had boiled over. The City's actions, as alleged in Plaintiffs' own complaint, cannot support a claim under the state-created danger exception. *See Collins*, 503 U.S. at 128 (stating a state actor does not act with deliberate indifference where a decision is “based on a rational decision making process that takes account of competing social, political, and economic forces”).

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The City's actions in response to CHOP did not expose Appellants to any particularized harm and because those same actions were not

directed to them. Moreover, Appellants did not adequately plead that the City through its actions was deliberately indifferent toward them. Appellants therefore cannot meet the state-created danger exception and thus fail to state a claim for substantive due process.

**B. Appellants’ nuisance claim is time-barred.**

Appellants next argue that their nuisance claim was timely. *See generally* AOB at 27–40. Not so. The District Court correctly concluded that Appellants’ nuisance claim was untimely because a two-year statute of limitations applies to the claim under Washington law and the existence of a prior class action did not toll the statute of limitations. ER 25–26; *see also Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980) (complaint should be dismissed when it is time-barred and “the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled”).

We begin with the statute of limitations before addressing tolling.

**1. The statute of limitations for a nuisance claim is two years under Washington law.**

The statute of limitations for a nuisance claim under Washington law is two years because that claim falls under Washington’s “catch-all”

statute. Wash. Rev. Code § 4.16.130. Appellants' claim—brought in April and June 2023—was therefore tardy whether that claim began accruing in June 2020 or December 2020. *See* ER 135.

Appellants nonetheless argue that Washington nuisance claims are subject to a three-year statute of limitations. *See* AOB 27–31. They are off the mark. In Washington, state law is clear that “[p]laintiffs have two years from the time a nuisance action accrues to file a lawsuit.” *Wallace*, 137 P.3d at 110 (citing *Bradley v. Am. Smelting & Refining Co.*, 709 P.2d 782 (Wash. 1985)); *see also* 29 David K. DeWolf, Wash. Prac., *Wash. Elements of an Action* § 23:7 (2024) (“Nuisance actions are governed by a two-year statute of limitations.”).

But, in an attempt to sidestep this caselaw, Appellants claim that *Wallace* is wrong and that *Bradley*—the case *Wallace* cites—introduced a new rule that nuisance claims are subject to a three-year statute of limitations if they are based on intentional acts and otherwise are subject to a two-year statute of limitations. They are off the mark—again. “[N]uisance[] and trespass are distinct causes of action. Accordingly, different statutes of limitation apply.” *Wallace*, 137 P.3d at 107 n.8. In fact, courts routinely cite *Bradley* and *Wallace* when

applying a two-year statute of limitations to nuisance claims. *See, e.g., King Cnty. v. Express Scripts, Inc.*, No. 24-CV-49-BJR, 2025 WL 1082130, at \*3 (W.D. Wash. Apr. 10, 2025); *Slate v. Pierce Cnty.*, No. C14-5161 KLS, 2015 WL 8731996, at \*3 (W.D. Wash. Dec. 14, 2015); *Van Zanten v. City of Olympia*, No. C10-5216-JCC, 2011 WL 5299492, at \*8 (W.D. Wash. Nov. 2, 2011); *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164, 1170 (E.D. Wash. 2006);

In any event, to understand Appellants' error, it is helpful to understand what the *Bradley* Court did. In *Bradley*, the Washington Supreme Court answered several certified questions, including the extent to which a nuisance claim is coextensive with a trespass claim in the context of air pollution. 709 P.2d at 786. The *Bradley* Court held that a plaintiff may bring a trespass claim for invasions that previously were considered to be only nuisances. *Id.* at 790. If a plaintiff brings a trespass claim and meets the elements of such a claim, the three-year statute of limitations applies. *Id.* at 791.

But, and contrary to Appellants' contention, nothing in *Bradley* states that intentional torts shall be construed as trespasses and unintentional torts as nuisances. Instead, *Bradley* focuses on the extent

to which airborne particles “quickly dissipate” rather than “accumulate[ ] on the land” without “pass[ing] away.” 709 P.2d at 791. The former case is considered a nuisance and the latter case a trespass. Following this framework, the *Bradley* Court overruled the Washington Supreme Court’s decisions in *Riblet v. Spokane-Portland Cement Co.*, 248 P.2d 380 (Wash. 1952) and *Weller v. Snoqualmie Falls Lumber Co.*, 285 P. 446 (Wash. 1930) to the extent they did not apply the elements of trespass to similar situations. *See Bradley*, 709 P.2d at 791.

At issue in *Riblet* was dust emanating from a nearby cement factory that allegedly made plaintiffs’ home “practically useless except as a shelter from the elements”—a complaint that should have been considered a trespass according to *Bradley*. 348 P.2d at 382. In *Weller*, the trespass involved “cinders, soot, ashes, sawdust, and charred material . . . cast in large quantities” on plaintiffs’ farm from two nearby sawmills. 285 P. at 446. Both situations were more akin to the trespass claims that *Bradley* identified. *See Bradley*, 709 P.2d at 791.

In sum, *Bradley* did not change the statute of limitations for nuisance in Washington and the two-year statute of limitations for nuisance claims applies to Appellants’ claims.

**a. This Court’s precedent did not change the applicable statute of limitations.**

To bolster their argument for a three-year limitations period, Appellants cite an opinion—*Skokomish Indian Tribe v. United States*, 410 F.3d 506, 518 (9th Cir. 2005)—in which a panel of this Court mistakenly listed nuisance as among the claims subject to a three-year statute of limitations under Washington law. *See* AOB at 28–29. Appellants argue that this Court is duty bound to follow *Skokomish* and may not deviate unless and until it is overruled by an en banc panel. AOB at 29. But not all dicta becomes law of the Circuit. Only “[w]ell-reasoned dicta is the law of the circuit.” *Li v. Holder*, 738 F.3d 1160, 1165 n.2 (9th Cir. 2013). To become law of the circuit, the panel must be confronting “an issue germane to the eventual resolution of the case,” and resolve “it after reasoned consideration in a published opinion.” *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019). A panel is not, however, “bound by a prior panel’s comments ‘made casually and without analysis’” or “uttered in passing without due consideration of the alternatives.” *Id.*

In *Skokomish*, the plaintiff did not file its complaint until more than ten years after its cause of action accrued. 410 F.3d at 518.

Without discussion, the *Skokomish* panel listed six causes of action subject to the three-year statute of limitations in Washington Revised Code section 16.080, mistakenly including nuisance despite that cause of action not being mentioned in the cited provision. *Id.* at 516. This dictum is exactly the type of “casual” comment that *McAdory* described and this Court is not bound by the panel’s scrivener’s error.

For further support, appellants cite an opinion from the Western District of Washington—*Louie v. Exxon Mobil Oil Corp.*, No. 09-48RJ, 2011 WL 1475665 (W.D. Wash. Mar. 17, 2011)—an opinion that is of course not binding on this Court. *See* AOB at 28–29. In any event, there too the court lumped nuisance with negligence and trespass, citing a Washington Court of Appeals case in which the parties agreed that all three claims were subject to a three-year statute of limitations. *See* 2011 WL 1475665, at \*5; *Pac. Sound Resources v. Burlington Northern Santa Fe Ry. Corp.*, 125 P.3d 981, 989 (Wash. Ct. App. 2005). But that same Washington Court of Appeals case cited in *Louie* observed that “nuisance has a two-year statute of limitations”). *Pac. Sound Resources*, 125 P.3d at 989 n.23 (citing *Mayer v. City of Seattle*, 10 P.3d 408, 413 (Wash. Ct. App. 2000) (nuisance claims are “subject to the two-year

catchall period”)).

The takeaway is that a two-year statute of limitations applies to Appellants’ nuisance claim. Because their claim accrued at the latest in December 2020 and they did not file suit until mid-2023, their nuisance claim is time-barred. *See* ER 135–136.

## **2. Appellants’ nuisance claim was not tolled.**

Absent some basis for tolling the limitation period, Appellants’ nuisance claim is time-barred. So, naturally, Appellants next argue that if the applicable statute of limitations is two years, their nuisance claims would be timely because the *Hunters Capital* class action tolled the limitations period. AOB at 31–32. But neither the class-action tolling doctrine articulated in *American Pipe* nor Washington’s equitable tolling doctrine can save Appellants’ claim.

### **a. *American Pipe* only applies to federal question class actions brought in federal courts.**

First, as the District Court correctly recognized, *American Pipe* tolling “is not binding on state law claims, which are governed by state law statutes of limitation and state law tolling principles.” ER 8 (Order 5:11–12). And so, a federal court may not “import the doctrine [of *American Pipe* tolling] into state law where it did not previously exist.”

ER 26 (Order 10:19–21). Because the Washington Supreme Court has not adopted *American Pipe*, the tolling doctrine remains unavailable to Appellants and could not have tolled their state law claim.

In *American Pipe*, a putative class sued defendants for price rigging, claiming violations of the Sherman Act. 414 U.S. at 540. The district court ruled that the class was not so numerous that joinder was impracticable and declined to certify a class. *Id.* at 542–43. Members of the original putative class filed motions to intervene, which the district court denied because the applicable limitations period had run. *Id.* at 544. The Supreme Court held that “at least where class action status has been denied solely because of failure to demonstrate that ‘the class is so numerous that joinder of all members is impracticable,’ the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.” *Id.* at 552–53.

*American Pipe*, however, applies only to federal question class actions brought in federal court. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008). Here, Appellants are seeking to toll the

statute of limitations on their state law nuisance claim. But *Clemens* made clear that *American Pipe* does not mandate tolling of state law claims based on a class action filed in another jurisdiction, unless the state recognizes “cross-jurisdictional tolling as matter of state procedure.” *Id.* at 1025; *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1187 (9th Cir. 2009) (recognizing that *American Pipe* did not apply to toll state law claims brought in federal court because “California has not adopted such *American Pipe* tolling where the class action was filed in a foreign jurisdiction”).<sup>12</sup>

The District Court recognized that “the Washington Supreme Court has not adopted cross-jurisdictional tolling.” ER 6 (Order 3:20–21). Appellants do not argue in their opening brief that Washington has adopted cross-jurisdictional tolling and do not challenge the District Court’s conclusion. Nor do they argue that Washington is likely to adopt cross-jurisdictional tolling. They have therefore forfeited any argument

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<sup>12</sup> See also *In re Ford Motor Co. DPS6 Powershift Transmission Prods. Liab. Lit.*, No. CV1706656ABFFMX, 2019 WL 6998668, at \*4 (C.D. Cal. Sept. 5, 2019) (concluding *American Pipe* does not mandate cross-jurisdictional tolling for state law claims); *Centaur Classic Convertible Arbitrage Fund Ltd. v. Countrywide Fin. Corp.*, 878 F. Supp. 2d 1009, 1017 (C.D. Cal. 2011) (same).

regarding cross-jurisdictional tolling and this Court may affirm on that basis alone. *See Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018) (“The usual rule is that arguments raised for the first time on appeal or omitted from the opening brief are deemed forfeited.”).

**b. *American Pipe* tolling is unavailable to Appellants.**

The Washington Supreme Court recently had the opportunity to adopt *American Pipe* tolling in Washington and declined to do so in *Campeau*. Nonetheless, Appellants—dressing rank speculation as certainty—argue that Washington’s highest court would adopt *American Pipe* tolling “in the appropriate case.” AOB at 33. That is not at all clear, particularly given that it had the opportunity to do so in *Campeau* and opted to not do so.

When attempting to predict what the Washington Supreme Court would do in the absence of an opinion from that court, this Court “must determine what result the court would reach based on state appellate court opinions, statutes and treatises.” *Mudpie, Inc. v. Travelers Casualty Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021). Because the Washington Supreme Court did not opine on the applicability of *American Pipe* tolling, this Court may “accept the decision of an

intermediate appellate court as the controlling interpretation of state law.” *Mudpie*, 15 F.4th at 889. A decision of an intermediate court is squarely on point here. Before *Campeau* was considered by the Washington Supreme Court, the Washington Court of Appeals held that *American Pipe* tolling is unavailable in Washington. See *Campeau v. Yakima HMA, LLC*, 528 P.3d 855, 859–60 (Wash. Ct. App. 2023), *rev’d on other grounds*, 551 P.3d 1037 (Wash. 2024).

Here is the context. In *Campeau*, an association of nurses brought suit against Yakima HMA on behalf of 28 nurses whose wages allegedly were withheld. 551 P.3d at 1039; See generally *Washington State Nurses Ass’n v. Yakima HMA, LLC*, 469 P.3d 300 (Wash. 2020), *as amended* (Nov. 9, 2020). Although the trial court found that there was associational standing, the Supreme Court reversed years later, after the statute of limitations had run. *Campeau*, 551 P.3d at 1039. In response, one of the nurses (*Campeau*) filed a class action alleging materially identical wage and hour claims. *Id.* Though the three-year statute of limitations period had run, *Campeau* argued that the statute of limitations should be equitably tolled. *Id.* The trial court agreed, and defendant appealed. *Id.*

While the case was pending in the Court of Appeals, the Washington Supreme Court decided *Fowler v. Guerin*, 515 P.3d 502 (Wash. 2022) and held that equitable tolling required, in part, a showing of bad faith interference preventing a plaintiff's timely filing. *Campeau*, 551 P.3d at 1039–40. Presumably recognizing that he could not meet the bad faith requirement, Campeau asked the Court of Appeals to apply *American Pipe* tolling to his suit. *Id.* at 1040. The Court of Appeals rejected Campeau's request, holding that *American Pipe* tolling is unavailable in Washington because the doctrine "does not require a plaintiff to show that the defendant engaged in conduct that interfered with the plaintiff's timely filing." *Campeau*, 528 P.3d at 560.

Reviewing *Campeau*, the Washington Supreme Court first addressed *American Pipe* and held that "the question of whether *American Pipe* tolling is available in Washington [did] not arise under these facts." *Campeau*, 551 P.3d at 1040. As a result, the Court "decline[d] to determine whether *American Pipe* tolling is available in Washington," instead electing to "await a case that more squarely confronts that question." *Id.*

Here, Appellants offer no evidence that the Washington Supreme

Court would not follow the reasoning of the Court of Appeals in *Campeau*. Because the Washington Supreme Court declined to answer this question, this Court should not presume that *American Pipe* tolling would be adopted in Washington and instead should follow the Court of Appeals decision in *Campeau*, which affirmatively found that *American Pipe* tolling is unavailable in Washington. *See Campeau*, 528 P.3d at 560; *see also Martin v. Washington State Dep't of Corr.*, No 20-00311-LK, 2023 WL 3902363, at \*6 (W.D. Wash. May 1, 2023) (“Washington courts have not applied American Pipe to state law claims.”); *Embree v. Ocwen Loan Servicing, LLC*, No. 2:17-cv-00156-JLQ, 2017 WL 5632666, at \*6 (W.D. Wash. Nov. 22, 2017) (same); *Hogan v. BMW of North Am. LLC*, No. C20-0089-RAJ-MAT, 2020 WL 5664946, at \*6 (W.D. Wash. Aug. 31, 2020) (same); *Mix v. Ocwen Loan Servicing, LLC*, No. C17-0699JLR, 2017 WL 5549795, at \*5 (W.D. Wash. Nov. 17. 2017) (same).

Even if this Court were interested in attempting to augur what the Washington Supreme Court might do if faced with these facts, the evidence points in a direction not at all favorable to Appellants. In *Campeau*, the Washington Supreme Court did not overturn *Fowler*, which requires in the class action context a showing that the defendant

interfered with plaintiff's timely filing. *Fowler*, 515 P.3d at 506; *see also Millay v. Cam*, 955 P.2d 791, 797 (Wash. 1998) (“The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.”). Rather, with respect to a case involving associational standing, the Washington Supreme Court in *Campeau* declined to require a showing of bad faith on the part of defendants because a different result would “undermine[ ] the value of associational standing and disincentivize[ ] members from relying on their unions and employee associations.” 551 P.3d at 1041.

There is no reason therefore to think that the Washington Supreme Court would reject its longstanding “predicates” for equitable tolling as articulated in *Millay* and *Fowler* in the class action context.

**c. Equitable tolling does not apply to Appellants' claims.**

Appellants also argue that the limitations period for their nuisance claim was eligible for equitable tolling. *See* AOB at 36–40. In the main, they argue that *Campeau* introduced a new standard for equitable tolling in Washington, overturning *Fowler* and its predecessor cases. That's wrong. The *Campeau* court's holding was narrow. It held only that “equitable tolling *may* be appropriate, even in the absence of

bad faith, where associational standing fails, an association's member files a follow-on class action, and all of the other elements of equitable tolling have been met." 551 P.3d at 1042 (emphasis added). Even in cases involving suits following on dismissals for lack of associational standing, *Fowler's* bad faith requirement still has some applicability. *Campeau* certainly does not eradicate a core requirement of Washington's equitable tolling doctrine. In any event, this case does not involve associational standing or a follow-on class action, so Appellants must demonstrate that the City engaged in bad faith actions that interfered with the timely filing of their nuisance claim. They do not even attempt to do so because that evidence does not exist.<sup>13</sup>

Even if there was bad faith, the circumstances in *Campeau* are vastly different from the ones in this case. There, loosening of the bad

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<sup>13</sup> Appellants claim generally that "spoliation hangs heavy over this matter," see AOB at 16, but they do not (and could not) claim that City officials' failure to preserve information in *Hunters Capital* interfered with their ability to timely file this case. Further, even accepting that the *Hunters Capital* court found some spoliation had occurred, that court nonetheless granted the City's motion for summary judgment on the same substantive due process and *per se* takings claims Appellants allege here. *Hunters Capital*, 650 F. Supp. 3d at 1202, 1205.

faith requirement was warranted because the follow-on plaintiff actively participated in the initial lawsuit, the case was tried for nine days and resulted in a judgment against the defendants who raised the statute of limitations issue. *See Campeau*, 551 P.3d at 1039–40. And when the Washington Supreme Court dismissed the initial case for lack of associational standing, it reasoned that plaintiffs would have other avenues for relief, including a class action. *See Washington State Nurses Ass’n*, 469 P.3d at 308.

Here, by contrast, Appellants slept on their rights. Appellants acknowledge that they had nearly a month after class certification was denied to file a follow-on lawsuit, and they had much longer to move to intervene before dismissal was entered more than nine months later. *See AOB* at 39. Yet they waited nearly a year to file their suit, despite the fact that the plaintiffs in the two cases shared the same counsel who were undoubtedly aware of the facts in both suits and the timing of the District Court’s decisions. Their counsel was also undoubtedly aware that Appellants might have claims they wished to press. As the District Court noted, Oma Bap and Molly Moon’s—two of the three named plaintiffs in this matter—were included in discovery terms proffered by

counsel in *Hunters Capital* to the City. ER 15. And Oma Bap’s owner offered a declaration in support of the plaintiffs’ motion for class certification in early 2022. So, *Campeau* is meaningful distinguishable.

Extending *Campeau* to this case would undermine Washington’s admonition that equitable tolling “is an extraordinary form of relief.” *Fowler*, 515 P.3d at 506. “Such a departure from the general rules governing our legal system must be rare in order for those general rules to have their intended effect.” *Id.* Accordingly, equitable tolling is to be applied “sparingly.” *Id.* There is no justification for departing from *Fowler* here.

Appellants cannot meet the other predicates for equitable tolling either. They cannot meet the second and fourth conditions—a demonstration of the exercise of diligence by the plaintiff and that justice requires the tolling of the limitations period here. As already explained, Plaintiffs were not diligent and instead slept on their rights. *See supra* at 46–47; *Fowler*, 515 P.3d at 113. Moreover, unlike in *Campeau*, there is no risk of a windfall to the City in barring Appellant’s nuisance claim. There is no judgment against the City because *Hunters Capital* settled before adjudication of the nuisance

claim. *See Campeau*, 551 P.3d at 1039–40.

As for the third condition—proof that “tolling is consistent with [two requirements] (a) the purpose of the underlying statute and (b) the purpose of the statute of limitations”—there was ample evidence in *Campeau* that tolling was consistent with Washington’s labor law and the legislature’s intent in enacting it. *See Fowler*, 515 P.3d at 503; *Campeau* 551 P.3d at 1041. Appellants have not provided any evidence that equitable tolling is “consistent with the legislative purposes” underlying Washington’s nuisance law. *See Campeau*, 551 P.3d at 1041. In the absence of such evidence, they cannot meet this requirement.

\* \* \*

*Campeau* does not alter the fact that Washington has not adopted neither *American Pipe* nor cross-jurisdictional tolling. Nor did that case alter Washington’s equitable tolling doctrine. Because Appellants’ nuisance claim was brought after the two-year limitations period had expired it was properly dismissed as time-barred.

**C. Appellants failed to state a takings claim.**

Appellants last set of arguments involves their taking claim. *See* AOB at 40–45. They argue that they stated a claim for either a *per se*

taking under *Cedar Point Nursery* or a right-of-access taking under Washington state law. But in either lane, Appellants fail to clear their bar. So, the District Court properly dismissed this claim too.

**1. Appellants cannot state a claim for a physical *per se* taking.**

A physical taking occurs when a government’s action results in the uncompensated taking of a property owner’s right to possess and exclude. Physical takings come in two general forms: categorical or *per se*. A categorical taking occurs when a government confiscates or physically takes a property. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 322 (2002). A *per se* taking occurs when a government enacts regulation that results in physical appropriation of property for itself or a third party. *See Cedar Point Nursery*, 594 U.S. at 149 (“Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred.”).

Appellants do not allege a categorical taking—they do not claim that the City invaded or interfered with their property. Instead, they claim a *per se* taking occurred. *See* AOB at 40–43. They allege that the City committed a taking by “affirmatively creating, assisting, endorsing, and encouraging”: (1) “an indefinite, unpermitted invasion,

occupation, and blockade of the public rights-of-way that provide access to the Plaintiffs' locations"; and (2) "the physical invasion of Plaintiffs' properties by CHOP participants." ER 81 (Compl. at ¶ 167). Their *per se* takings claim fails at the gate, however, because they do not and cannot allege that the City formally authorized the alleged invasion of their properties.

A *per se* taking requires government authorization through regulatory action. *See Cedar Point Nursery*, 594 U.S. at 162 (finding *per se* taking where regulation granted "a formal entitlement to physically invade the growers' land"); *see also Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (emphasis added) ("[T]he Takings Clause requires compensation if the government authorizes a compelled physical invasion of property."); *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) ("This element of required acquiescence is at the heart of the concept of occupation."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982) (cleaned up) ("In short, when the 'character of the governmental action,' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves

an important public benefit or has only minimal economic impact on the owner.”).

Appellants do not allege that the City—whether through regulation, statute, ordinance, or decree—formally authorized protesters to invade their properties. Instead, they vaguely allege that the City “endorsed” or “encouraged” third parties’ trespasses, or “facilitated” CHOP through its public safety actions. *See* ER 73–74, 81 (Compl. ¶¶ 146, 167). But these allegations are far short of the type of formal authorization recognized by the Supreme Court. Take for example the Supreme Court’s decision *Cedar Point Nursery*—the case on which Appellants primarily rely. There the Supreme Court concluded that a California regulation that granted labor organizations “a right to take access’ to an agricultural employer’s property in order to solicit for unionization” would result in a *per se* taking. 594 U.S. at 143, 162. Or consider *Horne v. Department of Agriculture*, where the Court held that an administrative order effected a taking because it required farmers to give the federal government a portion of their raisin crop, free of charge, to stabilize market prices. 576 U.S. 350, 355 (2015). The same prerequisite existed in *Loretto*, where the Court held that a

state statute effected a taking because it authorized cable companies to install equipment on private property without the landowner's consent. 458 U.S. at 438.

Nevertheless, Appellants argue that formal authorization is no longer required and claim that the Supreme Court in *Cedar Point Nursery* “disavow[ed] that the method by which an invasion is sanctioned is relevant to the analysis.” AOB at 42. Their argument, however, misunderstands that Court's decision. In the portion of the opinion Appellants cite, the Court explains that the “essential question” for determining whether a physical appropriation has occurred (as opposed to a regulatory taking) is “whether the government has physically taken property for itself or someone else—by whatever means [a physical taking]—or has instead restricted a property owner's ability to use his own property [a regulatory taking].” *Id.* at 149.

Because Appellants do not and cannot allege that the City expressly authorized the alleged third-party invasions as required, their attempt at alleging a *per se* taking is deficient.

**2. Appellants failed too to state a right-to-access claim.**

Appellants' right-to-access argument fares no better than their *per se* taking one. The parties agree that state law defines the protected property interest. *See* AOB at 43–44. Under Washington law, there is a two-step inquiry for determining whether a claim for diminished access exists. *See Keiffer v. King Cnty.*, 572 P.2d 408 (Wash. 1977). The first step “is to determine if the government action in question has actually interfered with the right of access as that property interest has been defined by our law.” *Id.* at 409–10. This is a question of law. *Pande Cameron & Co. of Seattle v. Cent. Puget Sound Reg'l Transit Auth.*, 610 F. Supp. 2d 1288, 1304 n.2 (W.D. Wash. 2009), *aff'd*, 376 F. App'x 672 (9th Cir. 2010). Only where a recognized property interest has been interfered with does the court move to the second step, which measures the “degree of impairment.” *Id.* at 410.

Appellants skip the first step of the analysis and only argue that their impediments were substantial. *See* AOB at 43–45. But, here too, Appellants' troubles are at the start of the inquiry. “[T]here is no authority under Washington law for a temporary ‘right of access’ takings claim.” *Pande Cameron*, 610 F. Supp. 2d at 1305 (citing cases);

*see, e.g., Quicksilver Audio, Ltd. v. City of Kennewick*, No. CV-07-5034-LRS, 2008 WL 5170446, at \*2 (E.D. Wash. Dec. 9, 2008) (“Under Washington law, a claim for ‘interference with access’ is . . . . limited to damages arising from the complete, permanent loss of access.”); *Stern v. City of Spokane*, 73 Wash. 118, 121, 131 P. 476 (Wash. 1913) (“If the testimony had shown a temporary obstruction incident to the repair of the street, no recovery would have been allowed.”) Rather, where lack of access claims have been recognized all involved permanent access impairments. *See, e.g., Keiffer*, 572 P.2d at 409 (permanent concrete curb); *McMoran v. State*, 345 P.2d 598 (Wash. 1959) (same); *State ex rel. Moline v. Driscoll*, 53 P.2d 622 (Wash. 1936) (lowered street grade); *Lund v. Idaho & W.N.R.R.*, 97 P. 665 (Wash. 1908) (construction of railroad line blocking access to property).

In their complaint, Appellants only assert temporary and intermittent impairments—they do not claim that access to their location was completely impeded. For example, Appellants only claim that “on multiple occasions” customers and vendors either “could not access the properties” or “determined it as unsafe to do so because of CHOP.” ER 49–50, 60 (Compl. ¶¶ 87, 115–16). They also claim that

access was abridged by barriers or dumpsters, without asserting (as necessary) that either the barriers or the dumpsters—which were removed (at the latest) on July 1, 2020—made their properties permanently inaccessible. ER 54–55, 57–58 (Compl. at ¶¶ 100–03, 106).

In fact, Appellants concede that there was continued access to their properties. They allege that that the City posted a “Local Access Only” sign on Eleventh Avenue to inform drivers and pedestrians that the road was open to those needing access. *See* ER 45 (Compl. ¶ 70). They allege that the City serviced dumpsters and portable toilets placed in CHOP daily—and other waste receptacles multiple times a week—indicating that the City’s contractors were able to access the area as needed. ER 45–46 (Compl. at ¶ 75). And Appellants admit too that there was “limited one-way access on Eleventh and Twelfth Avenues” by June 16, 2020. ER 72 (Compl. at ¶ 142).

In short, Appellants’ allegations that they were only intermittently inconvenienced by CHOP will not support a temporary taking claim under Washington law.

### VIII. CONCLUSION

Appellants' complaint was properly dismissed as they failed to plead facts sufficient to save their substantive due process and takings claims. Moreover, their nuisance claim is barred by Washington's two-year statute of limitations. For these reasons, the City respectfully requests that this Court affirm the District Court.

Date: May 7, 2025

Respectfully submitted,

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## STATEMENT OF RELATED CASES

I certify that I am not aware of any related cases currently pending in this court.

Date: May 7, 2025

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## CERTIFICATE OF COMPLIANCE

I certify that this brief contains 11,467 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6). I further certify that this brief complies with the word limit enumerated in Ninth Circuit Rule 32-1.

Date: May 7, 2025

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