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PERSPECTIVE

A disappointing opinion

By Timothy D. Reuben

On Sept. 23, in *LA Alliance for Human Rights v. County of Los Angeles*, 2021 DJDAR 10012, where a coalition of plaintiffs sued Los Angeles over the homelessness crisis, the 9th U.S. Circuit Court of Appeals reversed Central District Judge David O. Carter's sweeping mandatory injunction against Los Angeles. Circuit Judge Jacqueline H. Nguyen, writing for the court, joined by Circuit Judges John B. Owens and Michelle T. Friedland, held that Judge Carter "impermissibly resorted to independent research and extra-record evidence" and therefore vacated the district court's preliminary injunction, remanding the matter "for further proceedings."

The decision was a disappointment, since the appellate court ducked the real issues presented by the case and departed from the traditional appellate court habit of seeking some basis to affirm and reached for justifications to reverse.

What is striking about this opinion is that it acknowledges that all the parties agreed "with the district court's conclusion that structural racism has played a significant role in the current homelessness crisis in the Los Angeles area." Nonetheless, this powerful fact did not appear to be significant to the appellate court, which reached for technical arguments on which to base its decision. The 9th Circuit did not tackle the challenging question of the extent of the district court's power to make orders against the county and city, including, for example, whether it is in the province of the federal court to order that Los Angeles set aside a billion dollars to address the homeless issue. Instead, the appellate court ruled that the plaintiffs lacked standing for all but one of their claims, that the district court relied to some extent on "extra-record evidence," and that the plaintiffs' complaint and declarations did not sufficiently support the court's findings (e.g., no one testified they were Black). Each of these arguments requires an extremely strict application of standing requirements, despite the fact that there is lots of authority to support the exact opposite technical approach used by the appellate court here.

As Judge Nguyen initially acknowledges, "[n]early one in four unhoused people in this country live in Los Angeles County and the crisis is worsening." The opinion further admits that the plaintiffs include both the LA Alliance plus eight individuals, including two who use wheelchairs and "live in or near Skid Row." The LA Alliance itself includes "business and property owners, landlords, housed residents of Skid Row, former homeless residents of Skid Row, and some own property in and around homeless encampments." Plaintiffs also submitted supplemental declarations "from unhoused members" of LA Alliance to support its associational standing. These would appear to be the right plaintiffs — both organizational and individual — who can plead they have suffered damage and have both personal and financial stakes in Skid Row, yet the court found that the plaintiffs lack standing, even dismissing the testimony of the "unhoused members" because the declarations failed to state that they were members "at the time of the filing."

The appellate court also pointed out that no one declared that they were Black. Despite the fact that the issue of racism's impact on homelessness was not even disputed, and that the plaintiffs' motion included both statements at status conferences as well as a written report to the court that acknowledged "the impact of systemic racism ... on homelessness," Judge Nguyen's opinion emphasizes that the plaintiffs did not either allege or provide evidence of racial discrimination.

Of course, the plaintiffs appeared "in almost a dozen settlement and status conferences" in Judge Carter's courtroom during the year before his order while he had stayed the case in the hopes of helping the parties to craft a settlement. During that time, the district court also "heard from non-party community members (housed and unhoused), clergy, City Council members, County Commissioners, the Mayor of Los Angeles, and representatives from state and federal agencies." Obviously, it became apparent that people of color were not only among the plaintiffs, but were among those who were suffering homelessness due to the allegations and evidence presented.

The opinion acknowledges that on appeal, LA Alliance asserted that it has Black members, a fact that the district court could obviously see; however, the appellate court weakly dismisses this simple and indisputable fact which the district court could undoubtedly observe because in their affidavits "none of the listed members identify themselves as Black (or anything else)."

So much for the typical deference provided on appeal to the trial court.

The 9th Circuit also summarizes the plaintiffs' allegations, which are that Los Angeles policies and inactions have created a dangerous environment "to the detriment of businesses and residents." The 14 causes of action include, inter alia, violations of: (1) California Welfare and Institutions Code Section 17000, (2) federal and state disability access laws, and (3) constitutional rights "by providing disparate services to those living and working within the Skid Row area and by enacting policies ... that have resulted in a state created danger to Skid Row-area residents and businesses."

Judge Carter did find that the evidence supported violations of all three of these categories of liability. Yet the 9th Circuit took an unusually narrow interpretation and found that the plaintiffs lacked standing and that the pleadings and supporting evidence did not support Judge Carter's findings and orders. But, of course, the Federal Rules allow

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both notice pleading and liberal amendment in connection with a complaint's allegations, including allowing a trial court to amend according to proof, and yet here the appellate court gave no such deference. There are also many cases where the courts find that if the facts support a theory of liability, a court may impose liability on that basis.

Oddly, the opinion also finds fault with Judge Carter doing his "own independent research." Clearly courts do independent legal research all the time, so although unclear (since the opinion complains about his raising new "legal theories"), hopefully the appellate court was not challenging that Judge Carter did independent legal research (since where appropriate or necessary we want our judges to do their own legal research). Presumably, the appellate court was just criticizing the many references to non-legal sources throughout the district court's ruling, which was quite extensive and did discuss the history of Los Angeles and the development of the homeless problem — much of which was background and added context, but which apparently the appellate court did not appreciate. Rather, the appellate court points out that "only 22 of the 411 footnotes supporting the district court's factual finding included a citation to the record."

But so what? Numerous opinions by courts have cited to extra-record sources, including literature and history, so citations outside of the record are not typically problematic in and of themselves. A court is entitled to take judicial notice of certain information or documents that are not in the record. Typically, the appellate court, even when it discards or disregards certain evidence considered by a trial court, continues on to evaluate what is left of admissible evidence to determine if that alone is sufficient to support the lower court's ruling and so affirm.

So why does the 9th Circuit not analyze those 22 citations to the record to evaluate whether they do support the district court's findings? And why can a trial court not consider what has been placed before it by the parties in the record either at status conferences or written submissions to further support its findings?

There are so many appellate opinions that do acknowledge the wide discretion of a district judge in finding facts based on the evidence, witnesses, and other information before it, but that appellate deference is lacking here.

Yet another example of the appellate court's reaching to reverse Judge Carter is how it dealt with the ADA claims. Because of the wheelchair plaintiffs who lived in Skid Row, the court simply could not deny them standing, nor could it ignore the undisputed evidence of homeless encampments that blocked city sidewalks. But that did not dissuade the appellate court, since it just found that the district court "abused its discretion by relying on extra-record evidence," although the opinion never actually identifies this extra-record, and it would certainly appear that no extra-record evidence was necessary to find this ADA violation. The appellate court also took issue with the breadth of the injunction that ordered clearing all of Skid Row's blocked sidewalks, speculating that "[t]his may be significantly broader remedy than required for [the plaintiffs] to safely navigate sidewalks to complete daily activities."

And yet another example of the appellate court's unduly strict approach is its position that the district court "did not have authority to grant relief against the County under the ADA claim, because Plaintiffs only asserted the claim against the City." But courts grant injunctions all the time against not only the named parties but a party's associate or a related party acting in concert, and the district court expressly found that the city and county were acting in coordination.

Judge Carter's opinion and order was a monumental tome intended to address one of society's most pressing issues; however, perhaps his extensive injunction did go beyond what an Article III court can order. The district court cited the bussing precedents to support the relief granted, but there are legitimate arguments that the order overstepped federal authority. Depending on that constitutional analysis, the 9th Circuit could have reversed the district court's injunction, in whole or in part, provided useful guidance to the court on remand, and also developed meaningful jurisprudence for future courts to consider. Instead, the appellate court avoided the thorny issue of a federal court's power over state governments charged with the responsibility of addressing local issues and stretched to find technical flaws that were arguably not sufficient for reversal.

Nonetheless, even with its faults, the district court's opinion stands as an exceptional effort to describe and confront the homelessness/racism problem. It is just too bad that the appellate court did not take the opportunity to do so as well. ■