UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TAMMY KOHR, EUGENE STROMAN, and JANELLE GIBBS, on behalf of themselves and all others similarly situated, and ROBERT COLTON, Plaintiffs, v. CITY OF HOUSTON, Defendant.	Civil Action No. 17-cv-1473

PLAINTIFFS' APPENDIX TO EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

Dated: August 17, 2017

Respectfully Submitted,

By: /s/ *Joseph M. Abraham*

Joseph M. Abraham
Texas Bar No. 24088879
S.D. Tex. Bar No. 2847789
Dechert LLP
300 West 6th Street, Suite 2010
Austin, Texas 78701
Tel.: 512-394-3000
Fax: 512-394-3001

Trisha Trigilio
Attorney-in-charge
State Bar No. 24065179
S.D. Tex. Bar No. 2461809
American Civil Liberties Union

Foundation of Texas
1500 McGowen Street, Suite 250
Houston, Texas 77004
Phone 713.942.8146
Fax 713.942.8966
ttrigilio@aclutx.org

Kali Cohn
Texas Bar. No. 24092265
S.D. Texas Bar No. 3053958
American Civil Liberties Union
Foundation of Texas
6440 N. Central Expressway
Dallas, TX 75206
Tel: 214-346-6577
Fax: 713-942-8966

Tristia Bauman
District of Columbia Bar No. 1016342
Admitted *pro hac vice*
National Law Center on Homelessness & Poverty
2000 M Street NW, Suite 210
Washington, DC 20036
(202) 638-2535 x. 102
tbauman@nlchp.org

Timothy F. Dewberry
Texas Bar No. 24090074
S.D. Tex. Bar No. 2885846
Dechert LLP
300 West 6th Street, Suite 2010
Austin, Texas 78701
Tel.: 512-394-3000
Fax: 512-394-3001

H. Joseph Escher III
California Bar No. 85551
Admitted *pro hac vice*
Dechert LLP
One Bush Street
Suite 1600
San Francisco, California 94104
Tel.: 415-262-4500
Fax: 415-262-4555

Attorneys for Plaintiffs

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DECLARATION OF JOSEPH M. ABRAHAM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

My name is Joseph M. Abraham, and I declare:

1. I am over the age of eighteen, and I am competent to make this declaration. I provide this declaration based upon my personal knowledge. I would testify to the facts in this declaration under oath if called upon to do so.

2. I am an attorney with the law firm Dechert LLP, counsel of record for Plaintiffs in this action. I submit this declaration in support of the above-captioned motion.

3. Attached to this Declaration as Exhibit 1 is a true and correct copy of a letter from Trisha Trigilio, counsel of record for Plaintiffs in this action, to City of Houston Mayor Sylvester Turner, dated May 9, 2017.

4. Attached to this Declaration as Exhibit 2 is a true and correct copy of email correspondence exchanged between Ms. Trigilio and Connica Lemond, counsel of record for the City in this action, dated August 3, 2017.

5. Attached to this Declaration as Exhibit 3 is a true and correct copy of email correspondence exchanged between Shere Dore of the Homeless Advocate Program and Marc Eichenbaum, Special Assistant to the Mayor for Homeless Initiatives, dated August 7-8, 2017.

6. Attached to this Declaration as Exhibit 4 is a true and correct copy of a letter that I sent to Ms. Lemond, dated August 14, 2017.

7. On August 16, Ms. Trigilio telephoned Ms. Lemond and left a voicemail requesting that Ms. Lemond inform Plaintiffs whether the City intended to begin enforcement of Houston Code of Ordinances §§ 21-61 to -62. As of execution of this declaration, Ms. Lemond had not returned Ms. Trigilio's call.

8. Also, on August 16, I telephoned Deidra Norris Sullivan, counsel of record for the City in this action, and left a voicemail requesting that Ms. Sullivan inform Plaintiffs whether the City intended to begin enforcement of Houston Code of Ordinances §§ 21-61 to -62. Ms. Sullivan returned my call at approximately 5:45PM the same day, at which time she told me that she had no information regarding whether the City intended to begin enforcement of the ordinance. As of the execution of this Declaration, I have not heard again from Ms. Sullivan.

9. Attached to this Declaration as Exhibit 5 is a true and correct copy of a document entitled "Houston/Harris County/Fort Bend County/Montgomery County 2017 Point-in-Time Count Report," available at http://www.homelesshouston.org/wp-content/uploads/2017/06/2017-Executive-Summary-Final-revised-after-HUD-review.pdf, and dated June 14, 2017.

10. Attached to this Declaration as Exhibit 6 is a true and correct copy of the Statement of Interest of the United States, as filed in *Bell v. Boise*, C.A. No. 1:09-cv-540-REB (D. Idaho Aug. 6, 2016) (Dkt. No. 276).

I declare under penalty of perjury under the laws of the United States of America and laws of the State of Texas that the foregoing is true and correct to the best of my knowledge.

Executed this 17th day of August, 2017, in Austin, Texas.

/s/ Joseph M. Abraham
Joseph M. Abraham

EXHIBIT 1

Trisha Trigilio, Staff Attorney
713-942-8146 ext. 114
ttrigilio@aclutx.org

May 9, 2017

Mayor Sylvester Turner
City of Houston
Via Email: sylvester.turner@houstontx.gov

Dear Mayor Turner:

I write concerning two new municipal ordinances[1] that criminalize homelessness. It is hard to disagree with your view that it is "simply not acceptable" for anyone in our city to be forced to live on the streets.[2] But the answer is not to make homelessness a crime.

When it comes to solving homelessness, Houston is doing a lot of things right. Our city is a national leader in reducing homelessness: our local service agencies have housed thousands of people since 2011, reducing the Houston area homeless population by roughly half.[3] Many aspects of your plan to further reduce homelessness are sensible and compassionate solutions, such as investing more resources into the coordinated initiative that has housed thousands of people, as well as lobbying the State to make meaningful investments in mental health and substance abuse treatment. But leveraging the criminal justice system to threaten constitutional rights as a form of "tough love" is not a permissible way to "convince more of our street population to get off the streets."[4] In fact, that tactic is based on a misconception that people have some place else to go.

Houston has already made credible threats of enforcing its new laws against homeless people throughout the city. I write on behalf of a group of homeless Houstonians who want to inform you of the realities they face on the ground and seek assurance that the City intends to respect their constitutional rights. They ask that you commit to the following:

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[1] Codified at HOUSTON, TEX. CODE OF ORDINANCES §§ 21-61 to -64 (Encampments), 28-46 (Aggressive panhandling), 40-27 (Impeding the use of a roadway).

[2] CITY OF HOUSTON MAYOR'S OFFICE, *City Pursues Strategies for Homeless, Panhandlers* (Mar. 2, 2017), http://www.houstontx.gov/mayor/press/strategies-for-homeless-panhandlers.html.

[3] CATHERINE TROISI & COALITION FOR THE HOMELESS, HOUSTON/HARRIS COUNTY/FORT BEND COUNTY 2016 POINT-IN-TIME COUNT REPORT 8 (May 2016), http://www.homelesshouston.org/wp-content/uploads/2016/06/2016-PIT-Executive-Summary-v4.pdf.

[4] *Supra* n.2.

- Do not enforce the anti-camping ordinance against people who lack a fixed, regular, and adequate nighttime residence;

- Do not enforce the anti-panhandling ordinance;

- Do not destroy peoples' possessions, or seize their possessions without providing a procedure for contesting the seizure; and

- Disclose the date and time of any planned enforcement action in homeless encampments, so legal observers, the media, and the public can witness enforcement.

Punishing Homeless People for Sheltering Themselves is Illegal

It is unconstitutional for Houston to punish someone for his or her mere presence in our city.[5] And as a majority of the Supreme Court agreed more than fifty years ago, Houston cannot skirt that rule by punishing a homeless person, who has "no place else to go," for performing necessary acts in public.[6] Sheltering oneself is a necessary act. It is a human need so basic that, even in our prisons, the Constitution requires adequate shelter in order to maintain "contemporary standards of decency."[7] Courts in cities across the country—including Dallas—have concluded that cities cannot punish homeless people who have no place else to go for meeting basic human needs like sleeping and sheltering themselves.[8]

The unsheltered homeless population in Houston has no place else to go: Houston's emergency shelter beds are full. The Way Home, a committee constituted under federal regulation to coordinate homeless assistance resources, directs homeless adults to five different emergency shelters in Houston. Each shelter has been over capacity for years, requiring people in need to sleep on the floor, on mats that overflow from living areas into the kitchen. Each shelter has repeatedly turned people away since the anti-camping ordinance was enacted. Even on the rare occasion when a bed opens up, the number of people in Houston who require shelter "far

[5] *Robinson v. California*, 370 U.S. 660 (1962).

[6] *Powell v. Texas*, 392 U.S. 514, 551 (1968) (White, J., concurring in the judgment); *id.* at 570 (Fortas, J., dissenting) (agreeing punishment is impermissible for one who "does not appear in public by his own volition").

[7] *Helling v. McKinney*, 509 U.S. 25, 32 (1993).

[8] *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev'd on other grounds and vacated in part*, 61 F.3d 442 (5th Cir. 1995). *See also Jones v. City of Los Angeles*, 444 F.3d 1118, 1132 (9th Cir. 2006), *vacated pursuant to settlement agreement*, 505 F.3d 1006 (9th Cir. 2007).

exceeds" the number of available emergency shelter beds.[9] Moreover, barriers to access like criminal history, disabilities, and health and safety concerns can make a bed effectively unavailable to people in need. This unmet need is presumably why you have made the sensible proposal to add more than two hundred emergency shelter beds as part of your plan to address homelessness.

Because unsheltered homeless people living in Houston are on the streets involuntarily, punishing them for sheltering themselves—one of the most basic human needs—effectively criminalizes homelessness in Houston. Enforcing the anti-camping ordinance against this population would be cruel and unconstitutional.

Restricting Panhandling is Unnecessary and Harmful

Asking for charity is speech protected by the First Amendment,[10] and for many people, engaging in this speech means more than exercising a right: it is the difference between eating and going hungry. Restrictions like the anti-panhandling ordinance, which "on its face draws distinctions based on the message a speaker conveys," are content-based restrictions that a court will subject to the most exacting scrutiny.[11] In the wake of *Reed v. Town of Gilbert*, a 2015 Supreme Court decision clarifying the broad scope of ordinances that qualify as content based, anti-panhandling ordinances like Houston's have been struck down in cities across the country.

Houston's anti-panhandling law imposes targeted restrictions on people engaging in "solicitation," which is defined in untenably vague terms but, by any measure, is certainly a content-based restriction. The law also imposes content-based restrictions on impeding a roadway, allowing people to block traffic to solicit for preferred charitable causes, such as the firefighters' charitable causes, but making it a crime to block traffic to engage in any other speech. Houston cannot demonstrate that these restrictions are narrowly tailored to advance a compelling interest, or frankly, any interest, other than shielding more fortunate Houstonians from speech that makes them uncomfortable. Houston does not have sufficient justification for restricting speech that is often a life-sustaining activity.

Permanently Seizing Homeless Peoples' Possessions is Unreasonable

Putting aside the constitutionality of a blanket limitation on a homeless person's property, it would be patently unreasonable for the City to seize a homeless person's possessions indefinitely.[12] Homeless people have a possessory interest in their property, and a right against

[9] *Jones*, 444 F.3d at 1132.

[10] *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664 (2015).

[11] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015).

[12] *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012).

unreasonable seizure of their property, just like anyone else. Violation of the law does not vitiate the possessory interest in one's property; even if the property is contraband, any government seizure of that property must be reasonable.[13] At an absolute minimum, Houston must implement a procedure to tag items that are seized, store them for a reasonable period of time, allow the owner to contest the seizure, and give the owner meaningful notice about how to do so. City governments in Akron, Anchorage, Honolulu, Los Angeles, Pittsburgh, Sacramento, St. Louis, San Diego, and Seattle have been forced to provide these basic constitutional protections in the wake of legal action.

To our knowledge, Houston has not disclosed the existence of any seizure protocol specific to enforcement of the anti-encampment ordinance. We are hopeful that the Houston Police Department has proactively instructed officers about refraining from confiscating important property that cannot fit in a three-foot cube, such as bicycles and pets, and adopted a protocol for respecting Fourth Amendment rights in the rare cases where officers decide a seizure is necessary. If such a protocol exists, the City should share it with the public.

Transparency is Essential to Policing in a Democracy

Policing experts agree that transparency in enforcement actions is essential to modern democratic policing. Adopting a culture of transparency and accountability improves public safety by bolstering the legitimacy of police in the eyes of the community.[14] Facilitating oversight from directly affected communities further democratizes control over police enforcement actions.[15]

The anti-camping ordinance is intended to evict people from Houston's homeless encampments, a contentious public policy decision that, as described above, violates the Constitution. Houston should refrain from enforcing this ordinance against people who truly have nowhere else to go. If the City does intend to clear encampments, the public should be informed of the date and time the police intend to enforce the ordinances at each camp, so that legal observers, the media, and the general public can observe this enforcement action.

The homeless Houstonians for whom I write are fearful of losing their physical liberty, personal autonomy, and the few possessions they have left. While they stand ready to take legal action as necessary, they are hopeful that the information in this letter helps the City to make a more informed enforcement decision that respects their constitutional rights. The anti-camping

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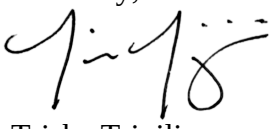
[13] *United States v. Paige*, 136 F.3d 1012, 1021 (5th Cir. 1998) (citing *Soldal v. Cook Cnty.*, 506 U.S. 56, 58 (1992)); *see also Lavan*, 693 F.3d at 1029–30.

[14] PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 9–11 (May 2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

[15] *Id.* at 19–20.

ordinance is currently set to take effect Friday, May 12. People who lack shelter need guidance about what to expect on that day and in the future. Please inform me of the City's intentions by noon on Thursday, May 11.

Sincerely,



Trisha Trigilio
Staff Attorney
ACLU of Texas

cc: Ronald Lewis, City Attorney
City of Houston
ronald.lewis@houstontx.gov

Terri Burke, Executive Director
ACLU of Texas
tburke@aclutx.org

EXHIBIT 2

Abraham, Joseph

From: Lemond, Connica - LGL <Connica.Lemond@houstontx.gov>
Sent: Thursday, August 03, 2017 5:35 PM
To: Trisha Trigilio
Cc: Kali Cohn; Tristia Bauman; Abraham, Joseph; Escher, H.Joseph; Dewberry, Timothy; Andre Segura
Subject: RE: Cleaning plans

FilingDate: 8/3/2017 9:18:00 PM

Hi, Trish. Yes, my information is that the City is planning to come out to the site on Monday to post signs to inform every one of the health nuisance abatement. The notice itself states that the individuals may return to the area after the City gets rid of the unhealthy conditions. They are asked, however, during the pendency of the cleaning to take their belongings with them so as to not risk their safety while we use power washers, etc. to clean the areas. IF the individuals cannot carry property away, the City will help store certain items for ninety days free of charge. However, we cannot store any items that could transmit disease.

Please note: the cleaning is not going to occur on Monday--only the notices going up to advise on the cleaning (date, time). I am not sure exactly when the cleaning will be, but I anticipate it will be later that week or early the following week. The abatement order requires the City to abate the nuisance on or before August 21, 2017.

Thanks, and have a safe flight.

Connica Lemond
Assistant City Attorney, Labor, Employment, and Civil Rights Section
City of Houston Legal Department
connica.lemond@houstontx.gov
(832) 393-6208 (O)
(832) 393-6259 (F)

-----Original Message-----
From: Trisha Trigilio [mailto:TTrigilio@aclutx.org]
Sent: Thursday, August 03, 2017 5:28 PM
To: Lemond, Connica - LGL <Connica.Lemond@houstontx.gov>
Cc: Kali Cohn <KCohn@aclutx.org>; Tristia Bauman <TBauman@nlchp.org>; Joseph Abraham <Joseph.Abraham@dechert.com>; H.Joseph.EscherIII@dechert.com; Timothy.Dewberry@dechert.com; Andre Segura <asegura@aclutx.org>
Subject: Cleaning plans

Hi Connica,

I wanted to memorialize our conversations from this afternoon. First off, thank you very much for getting information from the police department so quickly. We're really glad that we were able to work together to avoid unnecessarily wasting everyone's time in court.

It is our understanding that the only planned action for the next few weeks is a cleaning. The police do not intend to cite or arrest anyone for their presence, or campsite, at the Wheeler encampment. People will be asked to temporarily move their possessions, and given time to do so, but they will be permitted to return once the cleaning is complete.

If I have misunderstood anything about the City's intentions, please let me know.

Thanks again for working with us on this.

Best,
Trisha

EXHIBIT 3

Abraham, Joseph

Subject: RE: Wheeler - This is NOT a solution

FilingDate: 8/16/2017 10:38:46 PM

From: "Eichenbaum, Marc - HCD" <Marc.Eichenbaum@houstontx.gov>
Date: Aug 8, 2017 7:52 AM
Subject: RE: Wheeler - This is NOT a solution
To: "shere dore" <[redacted]@[redacted]>
Cc: "COH - Mayor" <mayor@houstontx.gov>

Shere- I called you yesterday, but you did not answer. I understand your concerns, but they are not valid. The notice says "...temporarily leave the area for the rest of the day." Folks can come right back after the cleaning is done THAT DAY. They will be back and even sleep there that night. We have already done this at the Chartres location and it went very well. I will call you later this morning to discuss further. It is important that we get the right info out. -Marc

From: shere dore [mailto:[redacted]@[redacted]]
Sent: Monday, August 07, 2017 11:00 PM
To: Eichenbaum, Marc - HCD <Marc.Eichenbaum@houstontx.gov>
Cc: COH - Mayor <mayor@houstontx.gov>
Subject: Wheeler - This is NOT a solution

Dear Marc:

I've received the letter given to the homeless at Wheeler today. This is not a solution for our homeless. They're not given a timeline which they can "come back" although I'm aware this is a full on eviction. The posts that have recently been placed at various spots around the camp point to fences that are about to go up. This very same thing took place last summer across the street from Fiesta. Homeless were told to.leave & could come back later only to come back with fences up.

The city is giving roughly 70 people only two & a half days to come up with their own solution with all their stuff on their backs?? Including people with pets? Is the Mayor prepared to deal with the negative backlash?

PEOPLE HAVE NOWHERE TO GO! The city claims shelters are available. Inaccurate! I, myself, took a newly homeless woman to several shelters last Thursday. Every single one was full. There is no housing so the Mayor offering that up is doing nothing but giving false hope. There are so many variations at play here.

While I do agree that Wheeler needs some clean-up effort, I do think the city could have better negotiated how to proceed with this but to kick them out with no where to go leaves no choice but for Houston area activists to respond. I also believe the health department is being extra dramatic in their findings. Deeming the entire area "unsafe" is laughable. But I understand the lingo in order to prevent legal actions. I'd like to see evidence that people have medically suffered because of the "conditions" at Wheeler. Seeing some bird droppings on a tent (actually it was stains, not actually feces) deeming that hazardous proved how petty the health department was willing to be. If urine and human feces is an issue, that could be fixed with a port-o-potty. The trash that's out there can easily be picked up.

Is the city prepared to mass arrest homeless & activists? This is a question that I'd like to have answered. Because we will be having media out there, local & independent media's. I've also contacted the ACLU and will be having an emergency meeting with them in the morning. We are willing to negotiate a better solution in handling this ordeal however if the city refuses, then we are prepared to stand with our homeless community, peacefully but stern. This is not right. ANY homeless advocate who truly cares for the homeless would agree that the way this is being done is not the way you deal with the homeless community.

The homeless have nowhere to go & nothing to lose. Especially when you only give them two and a half days. Houston activist & supporters of homeless advocates are tired of Mayor Turner's campaign on criminalizing the homeless. Let's offer real solutions! Not ousting the homeless like they're chess pieces. I already communicated to you last week without a response.

I hope we can come to an agreement and actually help the homeless.

I hope to hear back from you.

Shere Dore

Homeless Advocate Program

[redacted]

EXHIBIT 4

Dechert LLP

300 W. 6th Street
Suite 2010
Austin, TX 78701-3902
+1 512 394 3000 Main
+1 512 394 3001 Fax
www.dechert.com

JOSEPH M. ABRAHAM

joseph.abraham@dechert.com
+1 512 394 3004 Direct
+1 512 394 3977 Fax

August 14, 2017

VIA E-MAIL CONNICA.LEMOND@HOUSTONTX.GOV

Connica Lemond
Attorney-in-Charge
Assistant City Attorney
City Attorney's Office
Labor, Employment & Civil Rights Section
P.O. Box 368
Houston, Texas 77001-0368
900 Bagby, 3rd Floor
Houston, Texas 77002

Re: *Kohr et al. v. City of Houston*, C.A. No. 4:17-cv-01473 (S.D. Tex.)

Dear Connica:

Following our telephone calls of August 10, we write to reiterate our requests that the City improve its communications regarding factual developments relating to this case. As discussed, we remain concerned that plans to fence off a portion of the Wheeler Encampment are inconsistent with the City's prior representations that all Encampment inhabitants could return to their homes after the cleanup.

As counsel Trisha Trigilio noted in her August 3 email, it was our understanding that all people living at the Encampment "will be permitted to return once the cleaning is complete." Your response confirmed that the City's posted notice "states that the individuals may return to the area after the City gets rid of the unhealthy conditions." We now understand that the City will be using the occasion of the cleanup as the opportunity to fence off one of the three blocks of the Encampment site for conversion to a parking lot for Lazarus House. Notably, this information was not communicated to us, or the Encampment inhabitants, until after the inhabitants were informed of their obligation to vacate the site for the cleanup. Thus, not all of the Encampment's inhabitants will actually be able to "return to the area" they formerly occupied.

Although we accept your representations that this confusion was caused by internal miscommunications, the net effect of the City's actions was misleading. As you know, given ethical restrictions on communications with represented parties, you are our sole permitted source of City information relating to the case. We are sympathetic that decisions regarding the Encampment site may occur in portions of the City's governmental apparatus outside your immediate purview, but that does not absolve the City of its obligation to provide us with complete, accurate, and timely information. We strongly reiterate our prior requests that you take

steps to ensure that you are personally notified by the City of all material developments relating to the subject of this litigation—including the City's current and future plans for on-site action at homeless encampments—and that you then communicate relevant, non-privileged updates to us in a timely manner.

Otherwise, we take issue with your characterization that Lazarus House received permission to build and operate a parking lot during a time when "there wasn't a lot going on" at the Encampment site. You should expect that the scope of future discovery will encompass the process under which the City and TxDOT issued the necessary permit(s) to Lazarus House.

Finally, you stated that you were "assuming" that inhabitants of the portion of the Encampment scheduled for construction would be prohibited from reentering that space. Please confirm at your first reasonable opportunity if that is the City's official position.

Thank you for your consideration. We reserve all legal, equitable, and other rights.

With kind regards,

Joseph M. Abraham

cc: Counsel of record

EXHIBIT 5

Houston/Harris County/Fort Bend County/Montgomery County

2017 Point-in-Time Count Report

Prepared by Catherine Troisi, Ph.D., Richard Stoll, Ph.D., and the Coalition for the Homeless of Houston/Harris County for The Way Home Continuum of Care

May 2017

Overview

A Point-In-Time (PIT) Count of sheltered and unsheltered persons experiencing homelessness in the Houston, Harris County, Fort Bend County, and Montgomery County area was conducted over a three-day period from January 24-26, 2017 with an official date of the night of 23 January. The purpose of the Count is to determine the number of persons experiencing homelessness [defined by the Department of Housing and Urban Development (HUD) as those staying in emergency shelter, transitional housing, or safe haven with beds dedicated for homeless persons or those persons who are unsheltered (i.e., staying in a place not meant for human habitation)]. The PIT Count is a federal requirement for all communities receiving funding from HUD. The Way Home Continuum of Care (CoC) covers a vast geographic region (3,711 sq. miles, including all of Houston, Harris County, Fort Bend County, and Montgomery County) with a large dispersed unsheltered population. Due to the size of the geographic area covered by the Count, we know that not all unsheltered persons experiencing homelessness can be identified in a short period of time (we are much more confident about counting the number of those experiencing homelessness who are sheltered). However, the PIT Count gives a good assessment of the extent of the problem in the region and can allow for comparisons over time to help understand how well a community is solving the problem of homelessness.

The PIT Count was organized and led by the Coalition for the Homeless in consultation with UTHealth School of Public Health. Many homeless services providers participated as well as community volunteers, including homeless and formerly homeless persons.

The 2017 PIT counted individuals staying in a total of 61 shelters including emergency shelters (n=32), transitional housing units (n=29), and safe havens (n=0) on the night of 23 January based on reports received from the providers and data entered into the Homeless Management Information System (HMIS). Unsheltered homeless individuals (those sleeping on the streets or in other places not meant for habitation) were counted using direct engagement and interview when possible, and observation if not. Teams walked under bridges, along the

bayous and other areas where encampments of homeless individuals had been identified. They also investigated abandoned buildings where homeless persons may be residing.

Changes from 2011 through 2017 in PIT Count Methodology

A major change to the PIT Count in 2017 was the addition of Montgomery County to the geographical area to be canvassed. Montgomery County lies to the north of Harris County with 1,047 square miles (http://www.mctx.org/for_visitors/index.php). While results from Montgomery County are included in the description of findings from the 2017 Count, comparisons with previous six years' results exclude this additional area to allow for a valid assessment. This year's results will serve as a baseline for future year Counts that will continue to include Montgomery County.

Several significant changes were made in the methodology of the 2016 and 2017 unsheltered counts compared to the previous five years. In the past, the PIT Count has been a purely observational one, performed during a single night between the hours of approximately 5 to 11 pm. Beginning in 2016, we undertook to directly engage and interview, when possible[1], every person experiencing homelessness in the jurisdiction using a Coordinated Access approach. This was possible because of the dramatic decrease in the number of those experiencing homelessness in the area due to the community's success in housing individuals through permanent housing strategies. There is a danger of counting people twice or mistaking them as unsheltered, however, with this method as someone on the street during the day may have been in a shelter the night before or approached twice during the three-day period. We guarded against this in three ways:

[1]We were not able to engage and interview those who refused, those who were sleeping, those who were physically impossible to reach (e.g., spotted across a highway), or those whom the interviewer felt it would be dangerous to approach. This was approximately half of those sighted.

- The geographic region to be covered was divided into three areas and each area was canvassed on a specific day of the Count
- Interviewees were asked if they had been questioned previously and, if so, they were not included more than once in the Count
- Interviewees were asked where they slept on the night of 23 January 2017 (the official night of the Count) and were classified as unsheltered homeless only if they slept in a place not meant for human habitation, per HUD guidelines. This assured that we did not double count someone who was included in the HMIS shelter count and that we did not include those who appeared as if they were experiencing homelessness but were not, according to HUD guidelines.

Several improvements implemented in previous years were continued. Traditional homeless services providers were involved under the umbrella of the The Way Home CoC and the Coalition for the Homeless, along with academia (UTHealth School of Public Health). This included the use of over 150 surveyors recruited from the homeless provider community, outreach teams, and VA staff. The CoC drew on consumer volunteers (persons who had in the past or were currently experiencing homelessness) to provide expertise and guidance during the Count. We continued the use of an Incident Command System (ICS), a standardized management tool used in fire, police, and public health preparedness activities ensuring integration of efforts through its defined organizational structure. Observational counts of people not able to be interviewed (see footnote above) were performed.

With approval from the Department of Housing and Urban Development, the unsheltered count took place over three days, January 24-26, 2017, with the night of 23 January designated as the official date for the Count. The geographic area for the PIT was divided into 3 sections for purposes of counting unsheltered individuals. On each day of the count, at least 60 volunteer teams canvassed the area designated for that day to interview unsheltered persons experiencing homelessness. Four to five Staging Area locations were set up each day of the Count with a total of 15 Staging Area Captains and co-Captains between all locations.

A survey tool was designed to collect selected demographic and personal characteristics of those interviewed, including both data required for the PIT Count report to HUD and other information to assist in designing programs to house the homeless. Whereas in the past the survey tool was on paper, we now use a tablet-based survey. There are several advantages to this including the ability to link to HMIS. All individuals and families who were identified as being chronically homeless, youth/young adults (under 24), and veterans were assessed for housing on the spot by one of 25-trained Coordinated Access Assessors. Due to GPS mapping technology included with the tablets, the PIT execution and data could be monitored in real time. Volunteers could be tracked while conducting assessment based on the user IDs assigned

The enhanced methodology developed in previous years for the sheltered count also was continued. All emergency shelters and transitional housing in the area, whether or not they were officially part of the HMIS, were contacted and inventoried. Shelter providers were trained on entering data and assessments into HMIS and given the opportunity to confirm the data counted on the night of the PIT Count. Shelters that do not use HMIS such as domestic violence shelters were asked to report their numbers on 23 January using the housing inventory chart.

The following training sessions were held before the 2017 PIT:

- The Coalition for the Homeless hosted a Case Manager Resource Exchange on December 13, 2016 dedicated to filling key positions for the PIT Count by members of The Way Home CoC. A one-hour presentation on the PIT Count methodology was conducted.
- Four volunteer trainings were conducted on the 12th, 17th, and 19th of January 2017, respectively.
    - Three of the trainings were targeted at volunteers from partnering agencies serving those experiencing homelessness. Tablets were only assigned to those who were experienced in working with this population. This training involved

the use of tablets & assignment of user IDs and log-ins. Tablets were available for hands-on use and volunteers practiced entering information for each question on the tablet survey tool.

- The fourth training was held for community volunteers. This training included the role of the driver, how to read maps, how to identify homeless hot spots, and proper etiquette to follow when approaching someone that might be experiencing homelessness.

- Staging Area Captains were trained on January 23, 2017. This included the use and distribution of tablets, volunteer sign-in, distribution of maps, and map interpretation.

2017 PIT Count Key Findings

Data collected shows a total of 3,605 sheltered and unsheltered homeless individuals (per HUD's definition) in the Houston/Harris County/Fort Bend County/Montgomery County region during the PIT Count (Figure 1). Breaking down where those experiencing homelessness were found, we determined that most were in Houston/Harris County with only one out of 75 (1.3%) counted in Fort Bend county while approximately one out of twenty persons experiencing homelessness were found in Montgomery County (5.3%). It is important to note that, for those who were unsheltered on the night of 23 January, geographical assignment was determined by where they were interviewed during the day, which may be near where they seek services, not necessarily where they sleep.

The combined population of Houston, Harris County, Fort Bend County and Montgomery County, according to population estimates on 1 July 2016, was 5,887,368[2]. This puts the percent of homeless individuals within these three counties at 0.061% or one out of every 1,629 residents. To allow comparisons over previous years (when Montgomery County was not included), we calculated the homelessness rate in only Houston/Harris County and Fort Bend

[2] http://www.census.gov/quickfacts/ accessed 24 April 2017

County. The combined population within these two counties on 1 July 2016 was 5,331,165. This puts the number of homeless individuals at 1 out of every 1,563 residents compared to 1 out of 1,450 residents in 2016 and 1 out of every 450 residents in 2011, a substantial decrease.

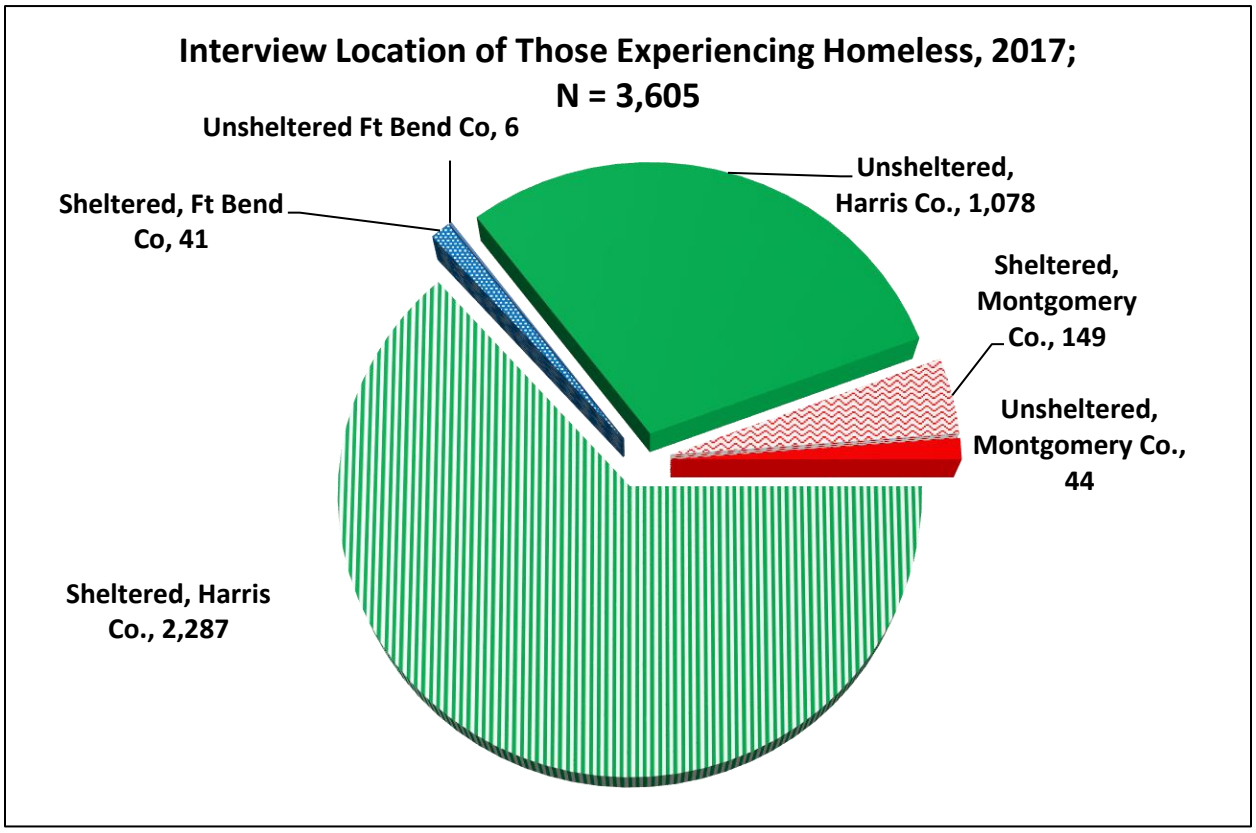


Figure 1

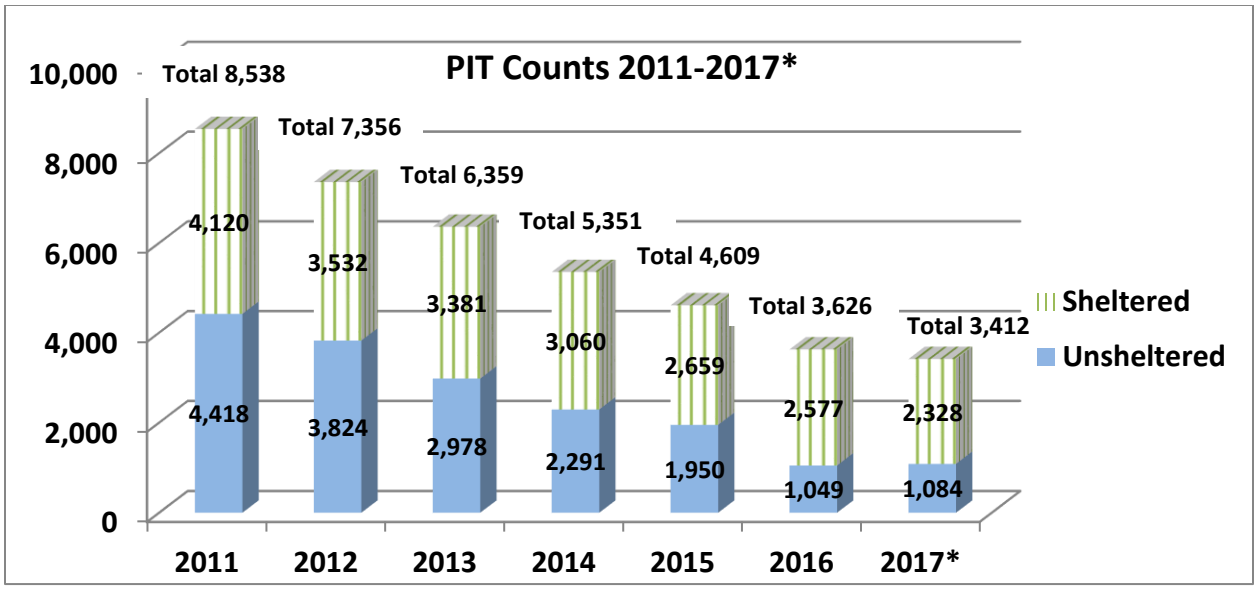
Comparison between 2017 and 2011-2016 PIT Counts

Figure 2 shows findings from the last seven years of the PIT Count. While the PIT Counts during years 2011-2015 used a standardized observational count methodology and so valid comparisons can be made between those years, the methodology changed significantly in 2016 and so evaluations must be made with caution. An observational count over our vast geographic area during a single night (like those PIT Counts conducted from 2011-2015) is likely to miss some people and therefore result in an undercount. In addition, there is no way to

verify that those observed during an observational count are actually homeless per the HUD definition or that they were not counted before, despite best efforts, leading to an overcount. In 2016, to obtain a more accurate count, we began directly engaging and interviewing all persons presumed to be experiencing homeless. This method also has limitations. We may not have identified all persons (leading to an undercount) or may count persons twice (leading to an overcount), despite best efforts to avoid this. However, we had the advantage of talking to those interviewed and so asked them if they had interviewed previously and collected information on whether or not they qualified as homeless per the HUD definition. We were not able to interview approximately half of the total unsheltered population. We applied the percentage of those not homeless or previously counted among those we were able to interview to those we were not able to interview. We then subtracted that number of people from the "not interviewed" group, assuming they were not truly homeless or had been previously counted.

Data from Montgomery County is not included in the comparisons (Figure 2) as this is the first year the CoC included that area in the PIT Count. Montgomery County data from 2017 will be used as a baseline for comparison in future years.

The 2017 PIT Count of 3,412 persons experiencing homelessness (Houston/Harris/Fort Bend Counties only) shows a decrease of 5,126 persons from that found in 2011. This corresponds to a 60% decrease compared to the 2011 count and a 6% decrease compared to the 2016 PIT Count of sheltered and unsheltered individuals experiencing homelessness. The decrease seen is encouraging, particularly given the increase in population of the Houston/Harris County/Fort Bend County area by approximately 541,000 over the past six years. While the precise magnitude of homelessness cannot be determined, the level and trend of the decrease does provide solid evidence that the number of persons experiencing homelessness in the Houston/Harris County/Fort Bend County area has decreased over the past six years.



*includes data from Houston/Harris County/Ft. Bend County only for comparison purposes with previous years

Figure 2

In 2017, 1,128 of those experiencing homelessness (one third of the total and including Montgomery County) were found on the streets or in places not meant for habitation compared to over 50% in 2011. Only data from Houston/Harris County/Fort Bend County (unsheltered number = 1,084) are included for comparison purposes to previous years (Figures 2 & 3). This also shows an encouraging trend and may reflect successes of The Way Home's focus on placing homeless individuals into permanent housing and its Coordinated Access system.

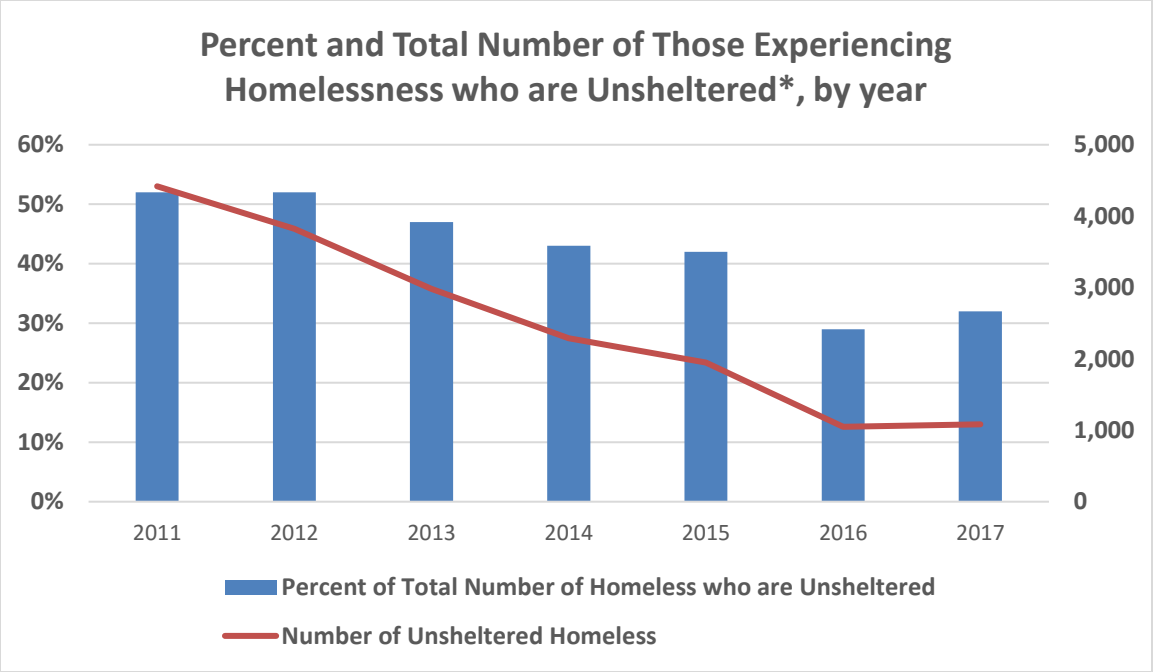


Figure 3

***Houston/Harris County/Fort Bend County only**

Homelessness in Houston/Harris County/Fort Bend County/Montgomery County using an Expanded Definition

HUD's rules and regulations dictate the definition of homelessness used for the Count, and these figures are reported to HUD in the Homeless Data Exchange. However, a more complete picture of homelessness in the region can be obtained by widening the definition of homelessness to include individuals in county jails (Harris, Fort Bend, and Montgomery) the night of the Count who indicated that they were homeless before arrest (and therefore likely to be so after release). When these numbers are added to the 2017 PIT Count (Figure 4), the total number of homeless individuals in the region is 5,651 with the largest percentage sheltered (44%).

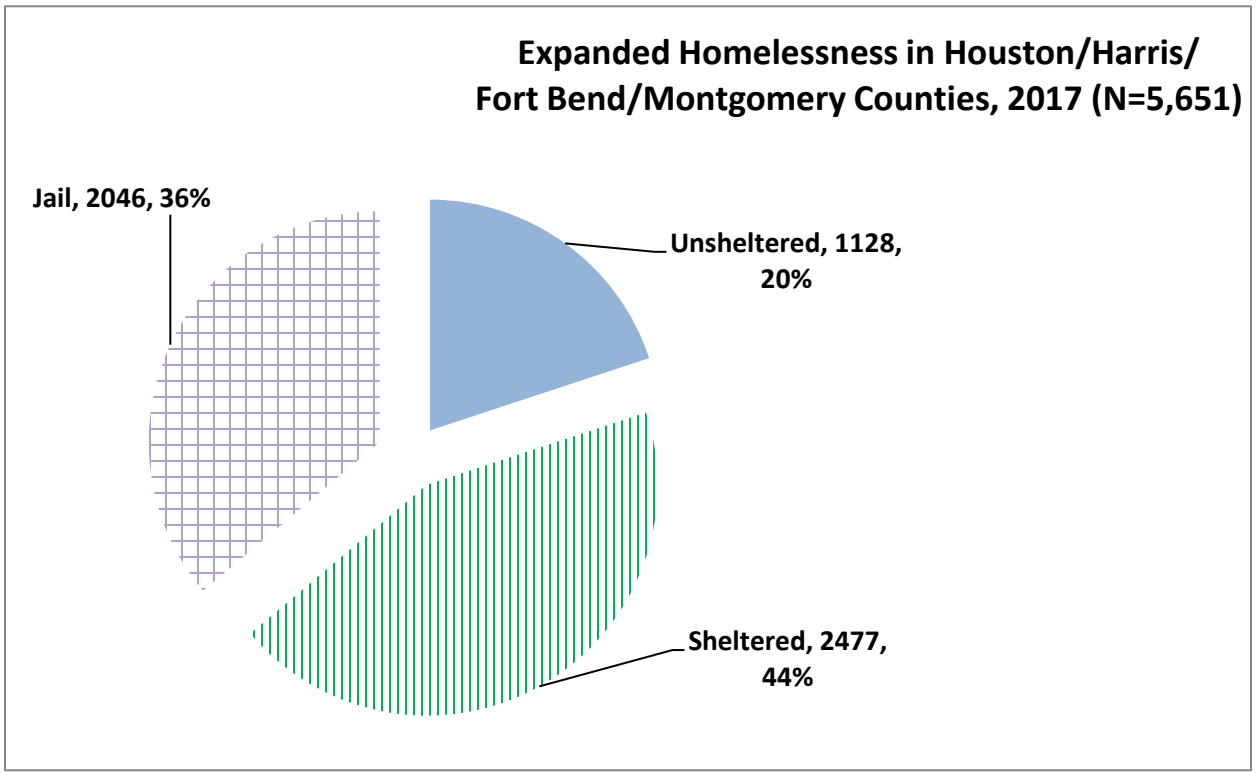
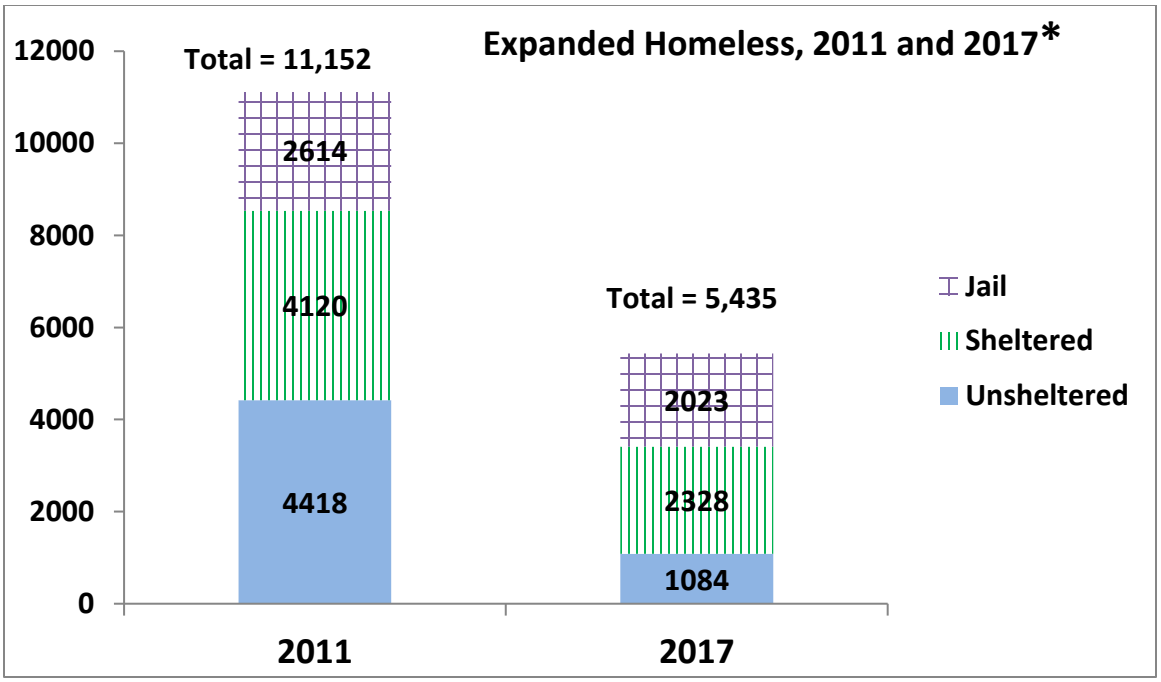


Figure 4

A comparison of data from 2011 and 2017 using this expanded definition of homelessness is shown in Figure 5. Again, only data from Houston/Harris County/Fort Bend County are included for comparison purposes, as 2017 will serve as the baseline for future comparisons including Montgomery County. In 2011, 11,152 individuals were deemed to be experiencing homelessness in Houston/Harris County/Fort Bend County using the expanded definition. The 2017 finding of 5,435 represents a 51% decrease or 5,717 fewer people in the total number of those counted experiencing homelessness (expanded definition) since 2011, a decrease similar to that found when assessing using only the HUD definition of homelessness. The largest decrease was in the unsheltered population (75% fewer unsheltered homeless in 2017 compared to 2011). The number of persons experiencing homelessness who were in jail the night of the Count showed the smallest decrease at 22%. The decreases seen are encouraging, particularly given the estimated increase of over 541,000 in the population of Harris and Fort Bend Counties over the last six years.



*Houston/Harris County/Fort Bend County only for comparison purposes

Figure 5

Permanent Housing

At the same time as the observed decrease in the number of persons counted experiencing homelessness is an increase in the number of persons placed in permanent housing. Permanent housing (PH) consists of Rapid Re-housing (RRH) and Permanent Supportive Housing (PSH) programs. From January 2012 to March 2017, 9,015 homeless persons have been placed in permanent housing. Another 2,221 veterans (note: household member numbers for these veterans are not available) were housed through the HUD-VASH program for a minimum of 11,236 formerly homeless persons housed over the last five and a quarter years.

Characteristics of Those Experiencing Homelessness

HUD requires that certain subpopulations of persons experiencing homelessness be counted along with the total number of homeless persons. These subpopulations include:

- Veterans
- Chronically homeless individuals and families[3]
- Survivors of domestic violence
- Persons with HIV/AIDS
- Severely mentally ill
- Experiencing chronic substance use disorder (alcohol and/or drugs).

This information can be captured by HMIS for those in shelters (although only those answering positively to a question are counted and so we cannot distinguish between negative responses and missing responses). The total shelter (or total number of adults in the shelter) population was used as the denominator to calculate percentages, but the actual percent may be higher, given that some responses may be missing.

It is more difficult to get this information on the unsheltered population, as these characteristics cannot be determined by observation. In previous years during the observational counts, we administered paper surveys to those interviewed by outreach specialist teams the night of the Count and the next morning to clients at agencies providing meals or day services to the homeless community to provide an estimation of the percent of these subpopulations. For the 2016 and 2017 Counts, due to the use of electronic surveys, we

[3] HUD's definition of chronic homelessness is four or more episodes of homelessness within the past three years for a total of 12 months or longer or one or more current consecutive years of homelessness. In addition, the individual must have a disabling condition which makes daily activities difficult (e.g., medical, psychological, substance abuse) and prevents them from holding a job. A chronically homeless family meets the above definition with at least one child under the age of 18 years living with his/her parent(s). For sheltered individuals, they must be staying in emergency shelter or safe haven, but not in transitional housing.

were able to capture information on all of those interviewed. Unfortunately, however, only approximately half of the unsheltered homeless were interviewed due to interviewee refusal or inability to access the person. The results from those interviewed were extrapolated to the total community of those experiencing homelessness. One caveat is that information was based on self-reporting and so may not represent the true percentage in the homeless population.

The age range of the total homeless population and by sheltered or unsheltered status on the night of January 23 is shown in Figures 6a-c. In the total population, three out of four persons experiencing homelessness were over the age of 24. Approximately one out of six were under the age of 18. However, all of those under age 18 were in sheltered situations except for one person who slept on the streets that night. One-third of those under age 18 were in transitional housing. Two unaccompanied youth under the age of 18 years were in an emergency shelter the night of the Count. The unsheltered population was older with over nine out of ten (92%) between ages 25 and 64 and a small group 65 or older (2%). The sheltered homeless population was younger. Of the 2477 persons in emergency shelter or transitional housing, one of four (24%) was below the age of 18 years and one out of 16 (7%), ages 18-24 years.

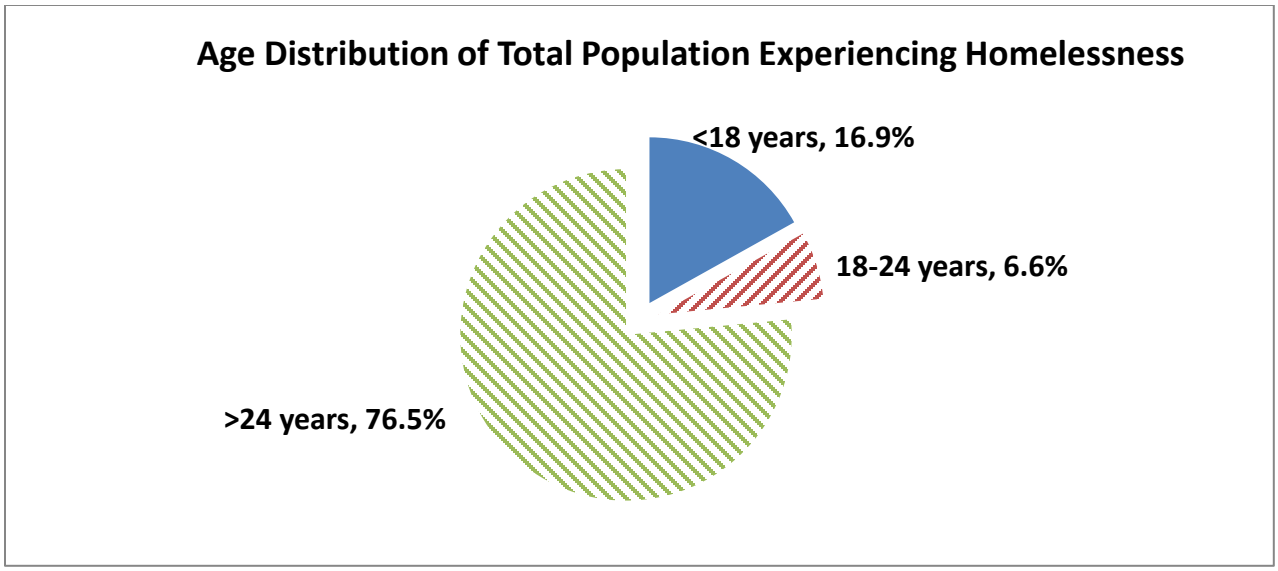


Figure 6a

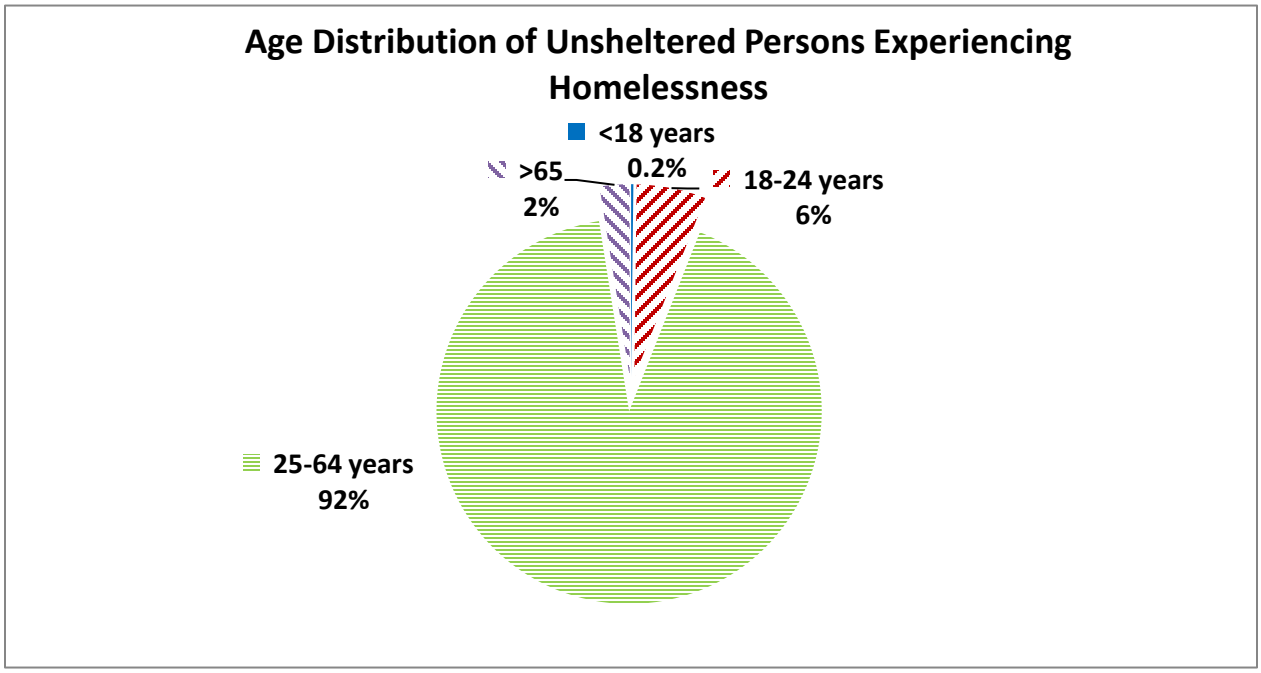


Figure 6b

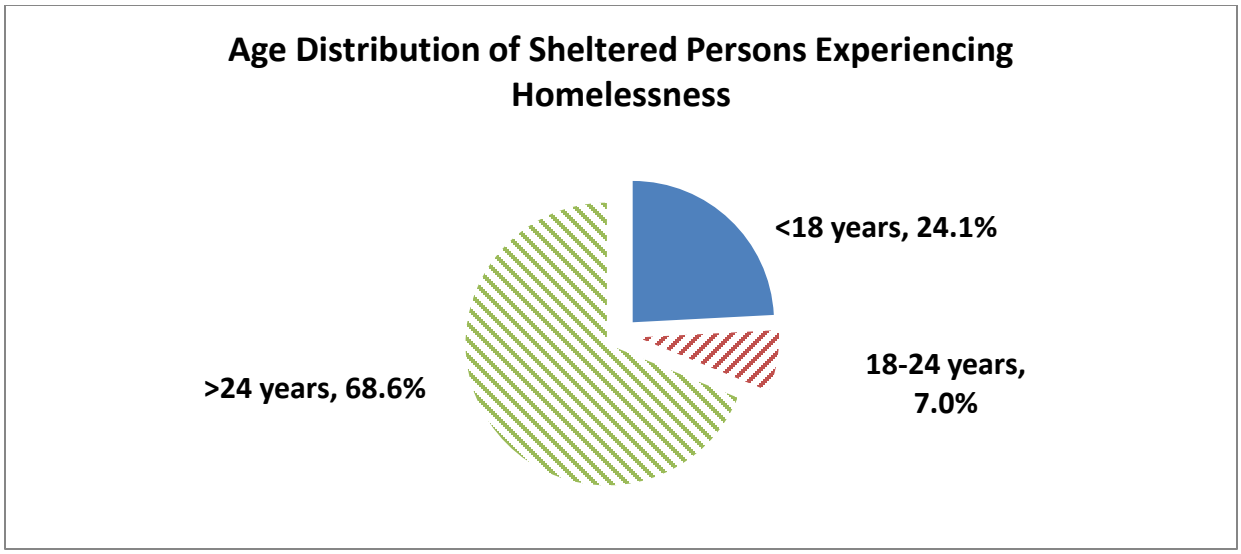


Figure 6c

Figures 7 and 8 show subpopulations for the total homeless population surveyed as well as a breakdown by sheltered and unsheltered status. Overall, three out of five persons in the total population experiencing homeless were male with a higher percentage in the unsheltered population (80%). Only seven persons experiencing homelessness identified as transgender. Two out of thirteen (5.5%) identified as Hispanic with no substantial differences between the sheltered and unsheltered populations.

The number of veterans (those who served in the military or activated into the National Guard with service of 2 or more years) experiencing homelessness decreased 25% from 2016 (N = 537) to 2017 (N = 405). Gap analysis and take down targeting have been predicting an annual steady state volume of between 1200 and 1400 homeless veterans based on opposing actions of successful housing efforts versus returning veterans and those falling temporarily back into

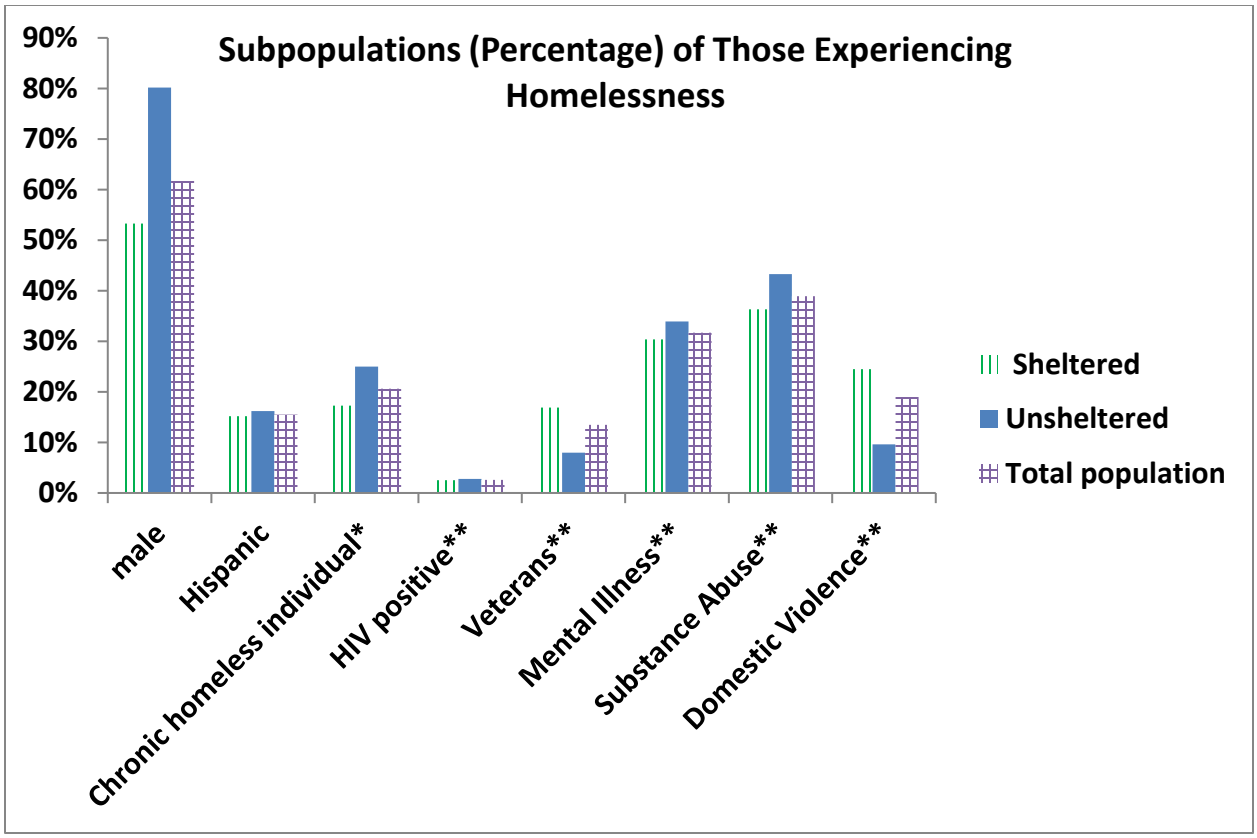


Figure 7

*among sheltered individuals, only those in emergency shelters can be designated chronically homeless
**among adults only

homelessness. The 2017 PIT number (on a given night) is reflective of this annual steady state volume. Over three out of four (78%) of the 405 homeless veterans identified this year were in emergency shelters or transitional housing, a slight increase over the 75% found last year. It is important to note that of the 90 veterans who were unsheltered the night of the Count, 21% had a dishonorable or other than honorable discharge from the military and thus not eligible for VA benefits (note: type of military discharge not collected on those veterans in shelter). However, The Way Home has funding available to provide permanent housing for those Veterans.

Among the total homeless population counted, approximately one in five met the HUD definition of a chronically homeless individual with only four chronically homeless families (all

sheltered) identified. This is a slight increase than that found in 2016 – however, reporting requirements changed in 2017 and now both children and adults can be considered chronically homeless (whereas previously only adults could be chronically homeless). If one person in a household is classified as chronically homeless, all household members are considered so. The lower rate of chronicity among those in shelters points to the success of prioritizing those individuals for placement in permanent housing.

Other subpopulations reported in the total adult population experiencing homelessness include nearly one in three (32%) with self-reported serious mental illness and two out of five (39%) with substance use disorder (alcohol and/or other drugs). Unsurprisingly, both mental illness and substance abuse were higher in the unsheltered vs. the sheltered population.

Approximately one in thirty-eight (2.6%) of the total population experiencing homelessness reported as HIV positive although the true percentage may be higher since many may not have been tested and therefore don't know their status. Over one in three of those in shelters had experienced domestic violence, not surprising since there are shelter beds specifically dedicated to those fleeing domestic violence.

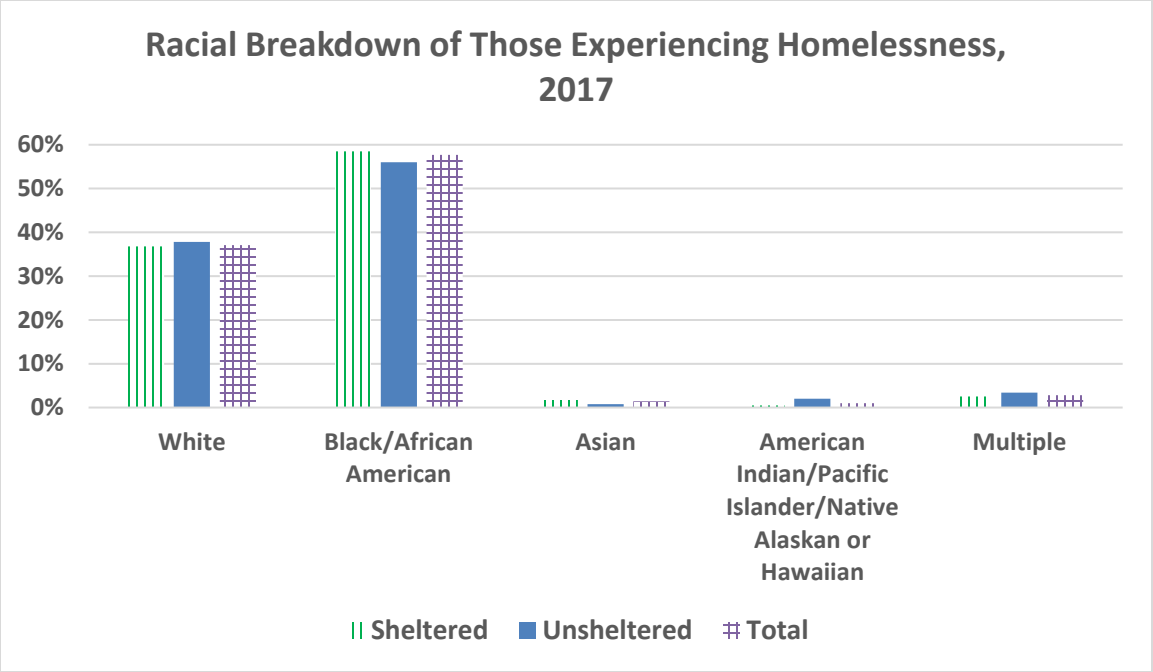


Figure 8

The racial self-classification of those experiencing homelessness is shown in Figure 8. The clear majority of those experiencing homelessness were White or Black/African-American. Racial classification did not vary substantially between the sheltered and unsheltered populations.

Characteristics of Unsheltered Persons Experiencing Homelessness

Persons who slept in a place not meant for human habitation (unsheltered) were surveyed and data collected via tablets. We collected additional information on this population other than that required by HUD for the PIT Count and results are shown below. One caveat is that we were able to interview and collect data on only half of the unsheltered homeless (see footnote, page 3) and so results may not be generalizable to the total group of those experiencing homelessness as those we were able to interview may have different characteristics than those whom we were not. All data was self-reported.

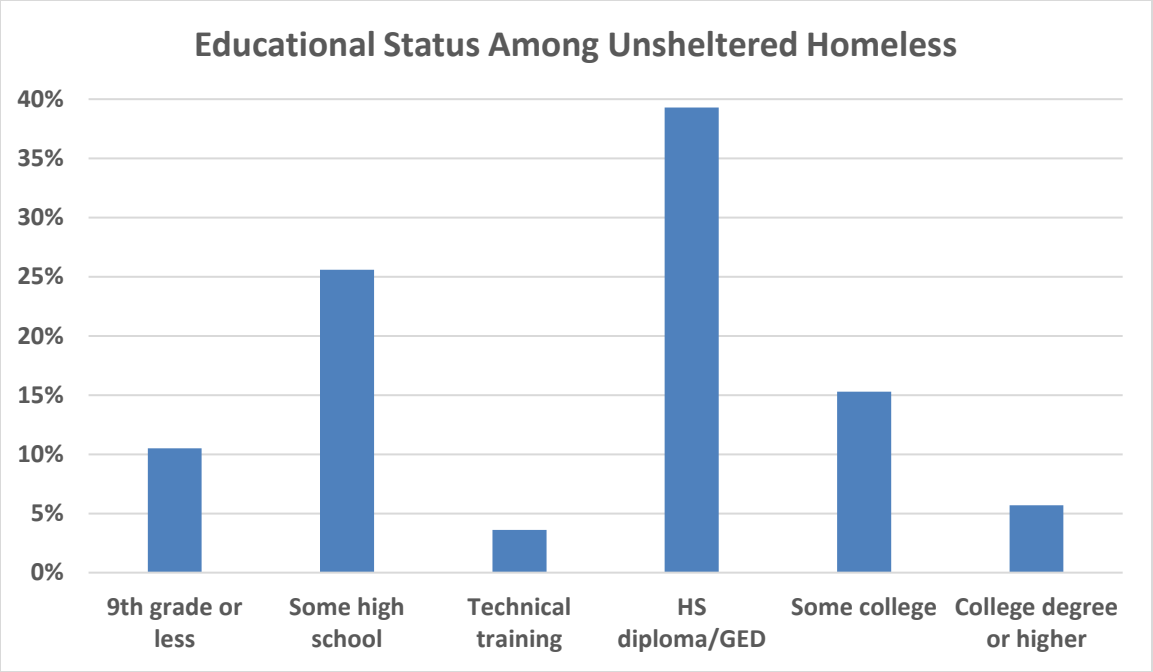
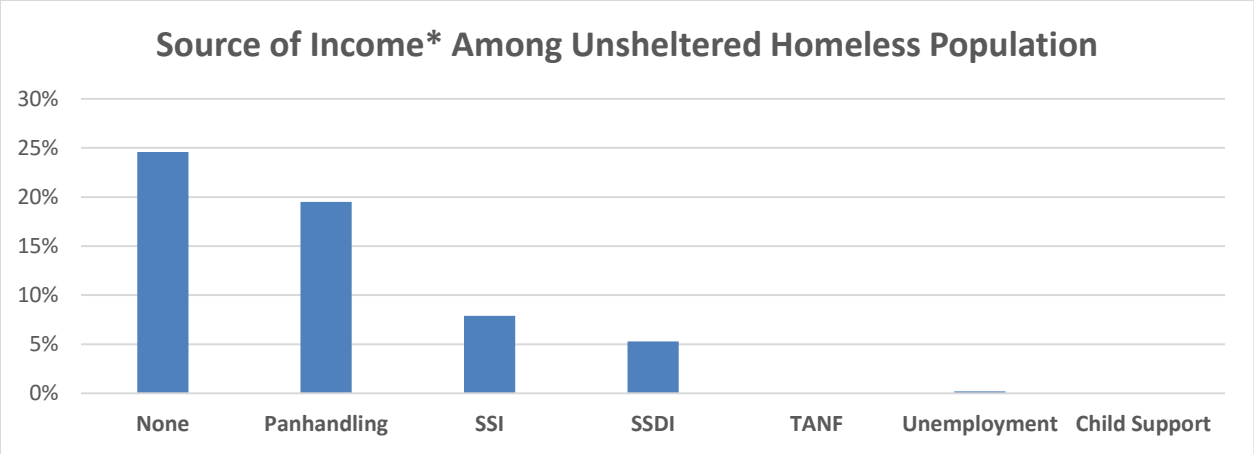


Figure 9

We asked about highest educational level obtained (Figure 9). Three out of five of the unsheltered homeless individuals had at least a high school diploma or GED but one in ten had completed ninth grade or less. One of five had some college, college degree, or higher. Source of income was queried (Figure 10). The two main sources of income reported were from panhandling and SSI and SSDI. One of five unsheltered homeless were observed panhandling by interviewers. One in four (24.5%) reporting no income source. Current job status in shown in Figure 11 with over four out of five (86%) not working but approximately half (48%) looking for work.



*More than one source of income could be reported

Figure 10

The part of town in which people usually slept was asked as well as where they first became homeless (Figures 12 and 13). Nearly half of those interviewed had slept in downtown or midtown Houston but almost one in three indicated "Other". Over three out of four first became homeless in Houston with smaller percentages in the outlying areas although one of ten indicated they first became homeless outside the Greater Houston area.

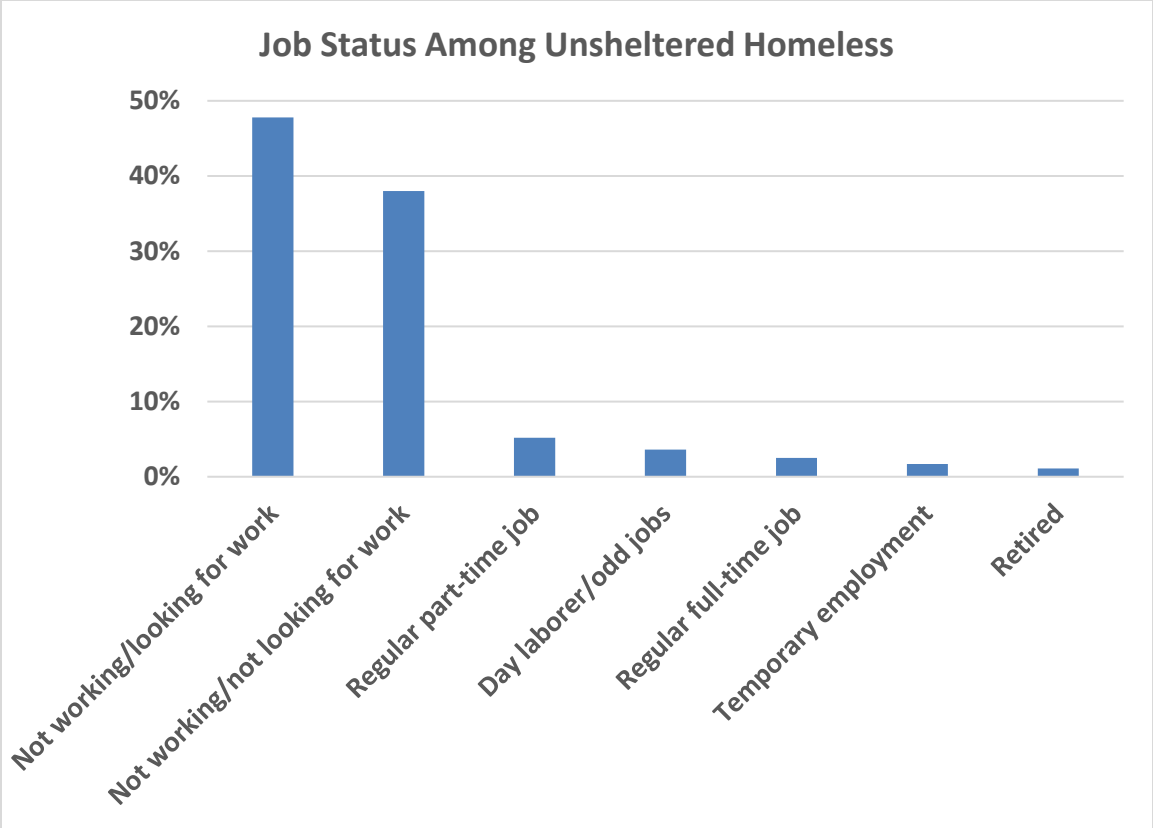


Figure 11

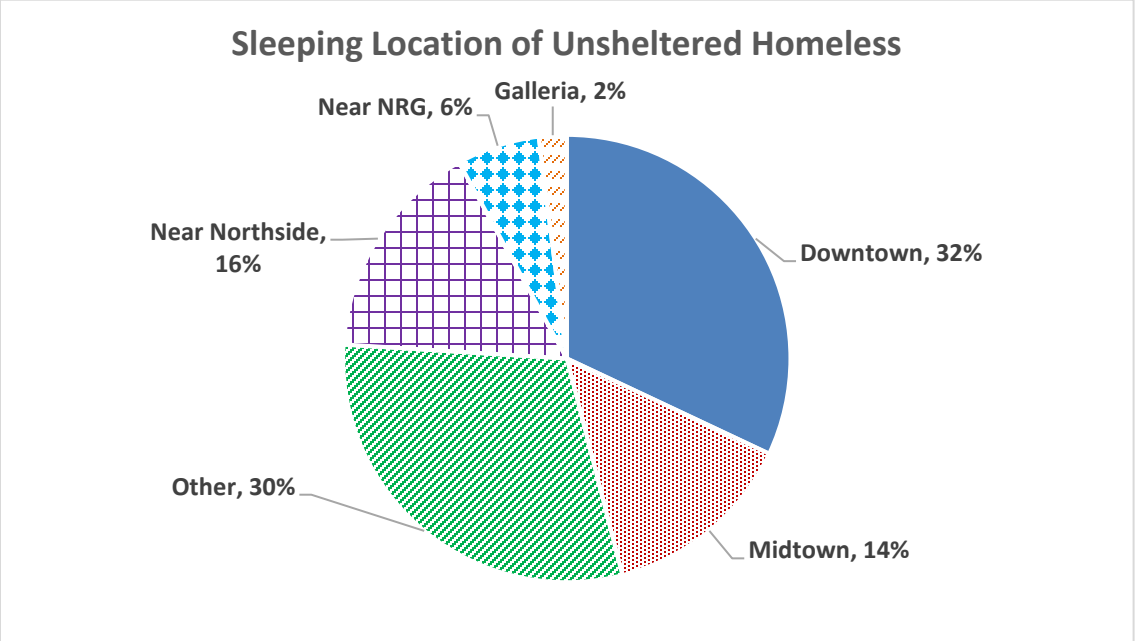


Figure 12

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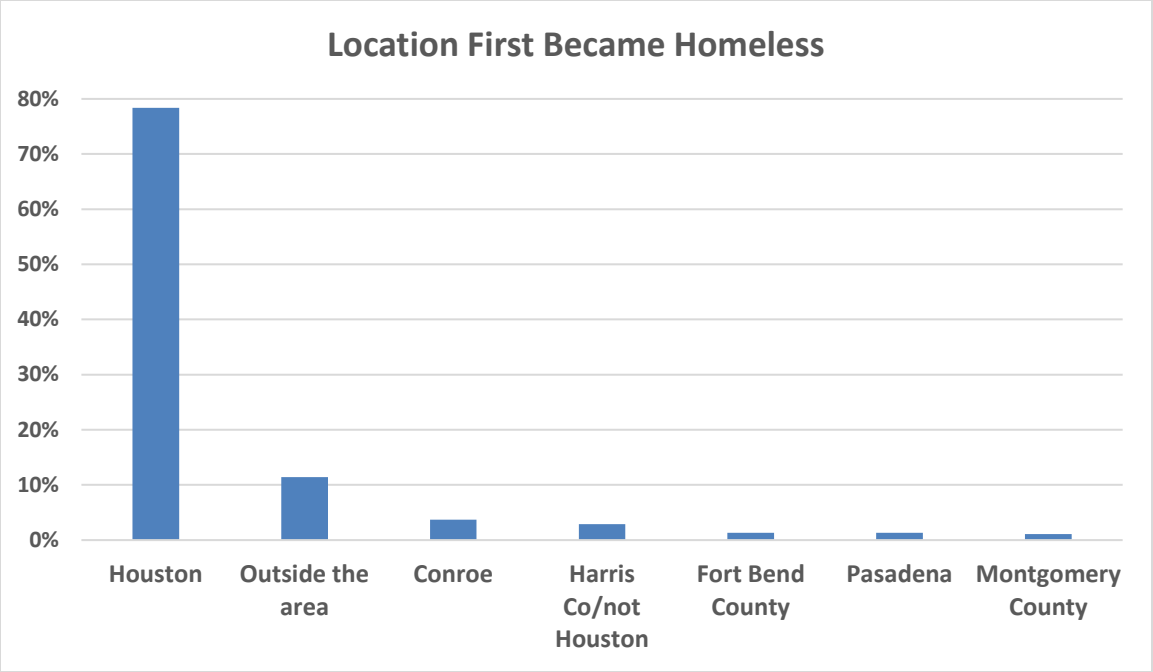

Figure 13

Summary and Conclusions

New methodology designed in 2011 to increase the completeness and accuracy of the Point-In-Time Count of sheltered and unsheltered persons experiencing homelessness in the Houston/Harris County/Fort Bend County region was used until 2015. Beginning last year, due to the community's success in decreasing the number of those experiencing homelessness, a modified approach using direct engagement and interview was implemented to count those who were unsheltered. The unsheltered count took place over three days in January and we attempted to interview every person identified thought to be experiencing homelessness. If that was not possible, observational data was recorded. An important change this year is that Montgomery County was added to the PIT Count, and so data from that region was not included in comparisons with previous counts (Houston/Harris County/Fort Bend County).

A total of 3,605 persons experiencing homelessness were counted in Houston/Harris County/Fort Bend County/Montgomery County, with 1,128 (31%) unsheltered homeless individuals (staying in a place not meant for human habitation) and 2,477 (69%) staying in emergency shelters or transitional housing the evening of 23 January 2017. No persons were staying in safe havens. Most of these individuals were interviewed in Harris County (93.4%). A much smaller percent was interviewed in Fort Bend County (1.3%) and Montgomery County (5.3%). However, it is important to note that the unsheltered persons were classified as to where they were interviewed or spotted, not where they slept the night of the Count. Persons move around during the day and may congregate near services. An expanded definition of homelessness which includes those in jails in those three counties on the night of the count who indicated that they were homeless before arrest led to a total count of 5,651 individuals.

The 2017 PIT Count represents a 60% decrease in the number of homeless individuals counted compared to the number counted in January 2011 and a 6% decrease compared to the number counted in January 2016 (Figures 2 and 14, both exclude Montgomery County data). This corresponds to over 5,700 fewer people experiencing homelessness over the past six years in the Houston/Harris County/Fort Bend County area. This is even more impressive, given that the population of that area has increased by approximately 541,000 during that time. Concomitant with this has been an increase in those placed in in permanent housing with over 11,000 persons housed since 2012.

One-quarter of those experiencing homelessness were classified using the HUD definition as being chronically homeless. This is much higher than what was found in 2016 but the definition changed and this led to the higher number. Characteristics of those experiencing homelessness were younger age for sheltered (16.9% under age 18 and another 6.6% ages 18-24 years) but older age for unsheltered persons (94% over age 24). More males than females were found, especially among the unsheltered. Equal numbers of white and Black/African-Americans were found in both sheltered and unsheltered populations. High rates of substance abuse and mental illness were found in both populations. The number of military veterans experiencing

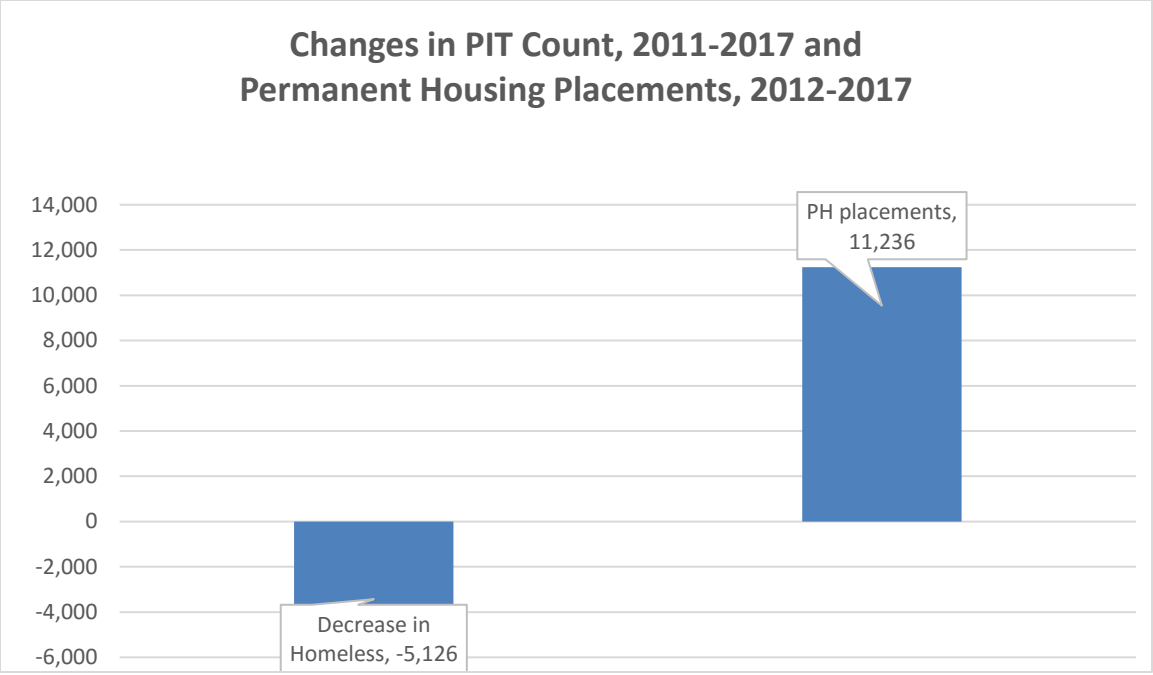

Figure 14

homelessness decreased by 25% from 2016 with 405 veterans enumerated. Among unsheltered veterans, 21% were not eligible for VA benefits.

We were able to collect additional information on the unsheltered homeless. Educational status was relatively high with three out of five with a high school diploma/GED or college education. Most had no source of income although one out of five mentioned panhandling for income. One out of five was observed by the interviewer as panhandling. Eight-five percent were not working.

Similar PIT Count methodologies were used from 2011-2015, allowing for direct comparisons between those years; however, the unsheltered count methodology was modified last year. While this makes comparisons for 2016 with previous years less reliable, our findings are consistent in showing a linear decrease in those experiencing homelessness happening at the same time as people are being placed in permanent housing. These findings provide evidence that the number of those experiencing homelessness is being addressed and reduced and that the focus on housing vulnerable and chronically homeless individuals is helping reduce the

number of those experiencing homelessness in Houston/Harris County/Fort Bend County. In 2017, Montgomery County was added to the geographic region covered by the CoC and therefore, the PIT Count. This addition to the area to be counted means that this year's Count will serve as a baseline for comparisons for the total area going forward.

EXHIBIT 6

VANITA GUPTA
Principal Deputy Assistant Attorney General
Civil Rights Division
United States Department of Justice

MARK KAPPELHOFF
EVE HILL
Deputy Assistant Attorney Generals
Civil Rights Division

JUDY PRESTON
Acting Chief
Civil Rights Division
Special Litigation Section

TIMOTHY MYGATT
Special Litigation Counsel
Civil Rights Division
Special Litigation Section

SHARON BRETT (NY 5090279)
Trial Attorney
Civil Rights Division
Special Litigation Section
950 Pennsylvania Ave NW
Washington, DC 20530
Phone: (202) 353-1091
Email:Sharon.Brett@usdoj.gov

WENDY OLSON
United States Attorney for the District of Idaho
United States Department of Justice

CHIRAAG BAINS
Senior Counsel to the Assistant Attorney General
Civil Rights Division

Of Counsel:
Lisa Foster
Director
Office for Access to Justice

Maha Jweied
Deputy Director
Office for Access to Justice

Robert Bullock (CA 219942)
Senior Counsel
Office for Access to Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
Phone: (202) 514-5324
Email: Bob.Bullock@usdoj.gov

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JANET F. BELL, et al., Plaintiffs, v. CITY OF BOISE, et al., Defendants.	Civil Action No. 1:09-cv-540-REB Hon. **STATEMENT OF INTEREST OF THE UNITED STATES**

STATEMENT OF INTEREST OF THE UNITED STATES

On any given night in the United States, half a million people are likely to be experiencing homelessness.[1] Homeless individuals are a diverse population, including children, families, veterans, and the elderly. The causes of homelessness are also varied. In recent years, some people who were affected by the economic downturn and foreclosure crisis have become homeless.[2] Some homeless individuals have serious and persistent physical or behavioral health conditions that neither they nor the communities in which they live have sufficient services to accommodate. As a result, these individuals are unable to obtain permanent housing.[3] Other individuals are homeless because of circumstances beyond their control; they are victims of domestic violence and trafficking, or youth who are separated from their families.[4] These individuals must find space in a public shelter or sleep on the street.

For many homeless people, finding a safe and legal place to sleep can be difficult or even impossible. In many cities, shelters are unable to accommodate all who are homeless.[5] In 2014, 42% of homeless individuals slept in unsheltered, public locations—under bridges, in cars, in parks, on the sidewalk, or in abandoned buildings.[6]

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[1] U.S. Dep't of Hous. and Urban Dev., *2014 Annual Homeless Assessment Report* ("2014 AHAR") 1 (October 2014), *available at* https://www.hudexchange.info/resources/documents/2014-AHAR-Part1.pdf. The 2014 AHAR found that as of January 2014, 578,424 individuals in the United States were homeless on any given night.

[2] *See generally id.* Nationally, 11% of all homeless adults are veterans. *Id.* at 40.

[3] U.S. Interagency Council on Homelessness, *Opening Doors: Federal Strategic Plan to Prevent and End Homelessness* 6, 10-11 (2010), *available at* http://usich.gov/PDF/OpeningDoors_2010_FSPPreventEndHomeless.pdf.

[4] There are approximately 45,205 unaccompanied homeless children in the United States. 2014 AHAR at 1. "Unaccompanied children and youth" is defined in the AHAR as a person under the age of 25 who is not a member of a family or a multi-child household. *Id.* at 32.

[5] *Id.*

[6] *Id.* at 14. In 2014 there were roughly 153,000 unsheltered homeless individuals nationwide on any given night. *Id.*

In this case, Plaintiffs are homeless individuals who were convicted of violating certain city ordinances that prohibit camping and sleeping in public outdoor places.[7] They claim that the City of Boise and the Boise Police Department's ("BPD") enforcement of these ordinances against homeless individuals violates their constitutional rights because there is inadequate shelter space available in Boise to accommodate the city's homeless population. Plaintiffs argue that criminalizing public sleeping in a city without adequate shelter space constitutes criminalizing homelessness itself, in violation of the Eighth Amendment.[8]

The parties disagree about the appropriate framework for analyzing Plaintiffs' claims. Plaintiffs encourage the court to follow *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) (*vacated after settlement*, 505 F.3d 1006 (9th Cir. 2007)), which held that enforcement of anti-camping ordinances may violate the Eighth Amendment on nights where there is inadequate

[7] *See* Revised Second Am. Compl. at 4-5, ECF No. 171. Plaintiffs in this case challenge the application of two Boise Municipal Code ordinances. The first ordinance, Boise City Code § 9-10-02, prohibits "us[ing] any of the streets, sidewalks, parks or public places as a camping place at any time, or to cause or permit any vehicle to remain in any of said places to the detriment of public travel or convenience." The ordinance defines "camp" or "camping" to mean "the use of public property as a temporary or permanent place of dwelling, lodging or residence, or as a living accommodation at any time between sunset and sunrise, or as a sojourn." The second ordinance, § 6-01-05(A), prohibits "disorderly conduct," which includes "[o]ccupying, lodging or sleeping in any building, structure or place, whether public or private, or in any motor vehicle without the permission of the owner or person entitled to possession or in control thereof."

[8] Plaintiffs allege that BPD's enforcement practices are unconstitutional because: 1) there is insufficient shelter space available to accommodate all who are homeless in Boise, Pls. Mem. in Supp. of Pls. Mot. for Summ. J. ("Pls. Mem."), ECF No. 243-2, at 16-18; 2) there are restrictions on certain shelter beds that some homeless individuals are unable to meet, thereby preventing them from obtaining shelter space even when beds may be unoccupied, *id.* at 20; and 3) the BPD continues to enforce the anti-camping and disorderly conduct ordinances when shelters are full and against those who do not qualify for the beds, either because BPD officers are insufficiently trained or they are unaware when shelters are full because of unreliable reporting from the shelters. *Id.* at 20-21. Defendants, on the other hand, contend that there has never been a time when a homeless individual was turned away from a shelter due to lack of space, and even if that were to occur, the BPD would not enforce the ordinances under such circumstances. Defs. Resp. in Opp'n to Pl. Mot. for Summ. J. ("Defs. Resp."), ECF No. 257, at 7-10. The parties dispute whether individuals are being turned away from shelters for lack of space or inaccessibility to persons with disabilities. The parties also dispute whether the beds available in the Boise Rescue Mission, which is affiliated with a religious institution, should be counted in the total number of available beds for homeless individuals, as use of those beds may subject them to unwanted proselytizing. Pls. Mem. at 13-14. The United States takes no position on any of these disputes.

shelter space available for all of a city's homeless individuals. Pls. Mem. at 5. Defendants, on the other hand, assert that Plaintiffs' reliance on *Jones* is "heavily misplaced, factually unsupported, and immaterial to this case." Defs. Resp. at 7.

Because the summary judgment briefing in this case makes clear that there is a significant dispute between the parties on the applicability of *Jones* and conflicting lower court case law in this area, the United States files this Statement of Interest to make clear that the *Jones* framework is the appropriate legal framework for analyzing Plaintiffs' Eighth Amendment claims. Under the *Jones* framework, the Court should consider whether conforming one's conduct to the ordinance is possible for people who are homeless. If sufficient shelter space is unavailable because a) there are inadequate beds for the entire population, or b) there are restrictions on those beds that disqualify certain groups of homeless individuals (e.g., because of disability access or exceeding maximum stay requirements), then it would be impossible for some homeless individuals to comply with these ordinances. As set forth below, in those circumstances enforcement of the ordinances amounts to the criminalization of homelessness, in violation of the Eighth Amendment.

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal court.[9] Pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"), the United States enforces the rights of individuals to be free from unconstitutional and abusive policing. The United States has used its

[9] The full text of 28 U.S.C. § 517 is as follows: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

authority under Section 14141 to investigate numerous jurisdictions for unconstitutional police practices.[10]

The United States also has a broad interest in ensuring that justice is applied fairly, regardless of wealth or status. In 2010, Attorney General Eric Holder launched the Office for Access to Justice ("ATJ") at the Department of Justice to address the access-to-justice crisis in the criminal and civil justice systems. ATJ's mission is to help the justice system deliver outcomes that are fair and accessible to all.[11] ATJ works with other federal agencies on a range of programs and policies affecting low-income and vulnerable people—including agencies that work to prevent and end homelessness.

The United States also has an interest in breaking the cycle of poverty and criminalization. Numerous federal initiatives are tasked with reducing the criminalization of homelessness and promoting alternatives to incarceration that are more cost-effective, efficient, and fair. For example, the United States Interagency Council on Homelessness ("USICH"), composed of nineteen cabinet secretaries and agency heads, coordinates federal efforts to end homelessness. USICH was established through the Stewart B. McKinney Homeless Assistance Act in 1987 and was most recently reauthorized in 2009 with the passage of the Homeless Emergency Assistance and Rapid Transition to Housing Act. 42 U.S.C. § 11311 *et seq*.

In 2010, USICH and ATJ, with support from the Department of Housing and Urban Development ("HUD"), held a summit entitled *Searching for Balance: Civic Engagement in*

[10] *See, e.g.*, Letter from Jocelyn Samuels, Acting Ass't Att'y Gen., to Hon. Richard J. Berry, Mayor of Albuquerque, N.M. (Apr. 10, 2014), *available at* http://www.justice.gov/crt/about/spl/documents/apd_findings_4-10-14.pdf; Letter from Thomas Perez, Ass't Att'y Gen. to John Engen, Mayor of Missoula, Mont. (May 15, 2013), *available at* http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf; Investigation of the New Orleans Police Dep't, U.S. Dep't of Justice, Civil Rights Division (Mar. 16, 2011), *available at* http://www.justice.gov/crt/about/spl/nopd_report.pdf.

[11] *See* Office for Access to Justice, U.S. Dep't of Justice, http://www.justice.gov/atj/ (last visited June 16, 2015).

Communities Responding to Homelessness on the development of constructive alternatives to the criminalization of homelessness. A related report, *Searching Out Solutions: Constructive Alternatives to Criminalization*, explores themes raised at the summit.[12] HUD also produced a guide, *Reducing Homeless Populations' Involvement in the Criminal Justice System*, intended to raise awareness among law enforcement and service providers about available resources to serve homeless people, and those at risk of homelessness, who are involved in the criminal justice system.[13]

DISCUSSION

The "Cruel and Unusual Punishments" Clause of the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667-68 (1977). Pursuant to that clause, the Supreme Court has held that laws that criminalize an individual's status, rather than specific conduct, are unconstitutional. *Robinson v. California*, 370 U.S. 660 (1962). In *Robinson*, the Court considered a state statute criminalizing not only the possession or use of narcotics, but also addiction. Noting that the statute made an addicted person "continuously guilty of this offense, whether or not he had ever used or possessed any narcotics within the State"—and further that addiction is a status "which may be contracted innocently or involuntarily," given that "a person may even be a narcotics addict from the moment of his birth"—the Court found that the statute impermissibly criminalized the status of addiction and constituted cruel and unusual punishment. *Id.* at 666-67 & n.9.

[12] U.S. Interagency Council on Homelessness, *Searching Out Solutions: Constructive Alternatives to Criminalization* (2012), *available at* http://usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf.

[13] U.S. Dep't of Justice, *Reducing Homeless Populations' Involvement in the Criminal Justice System* (2012), *available at* http://www.justice.gov/sites/default/files/atj/legacy/2012/05/09/doj-resource-guide.pdf.

Six years after *Robinson*, the Court addressed whether certain acts also may not be subject to punishment under the Eighth Amendment if they are unavoidable consequences of one's status. In *Powell v. Texas*, 392 U.S. 514 (1968), the Court considered the constitutionality of a statute that criminalized public intoxication. A four-member plurality interpreted *Robinson* to prohibit *only* the criminalization of status and noted that the statute under consideration in *Powell* criminalized conduct—being intoxicated in public—rather than the status of alcohol addiction. The plurality declined to extend *Robinson*, citing concerns about federalism and a reluctance to create a "constitutional doctrine of criminal responsibility." *Id.* at 534 (plurality opinion). Moreover, the plurality found that there was insufficient evidence to definitively say Mr. Powell was incapable of avoiding public intoxication. *Id.* at 521-25. The dissenting justices, on the other hand, found that the Eighth Amendment protects against criminalization of conduct that individuals are powerless to avoid, and that due to his alcoholism, Mr. Powell was powerless to avoid public drunkenness. *Id.* at 567 (dissenting opinion). The dissenters, therefore, would have reversed Mr. Powell's conviction. *Id.* at 569-70.

Justice White provided the decisive fifth vote to uphold Mr. Powell's conviction. Instead of joining the plurality opinion, in a separate concurrence he set forth a different interpretation of *Robinson*. Justice White did not rest his decision on the status-versus-conduct distinction raised by the plurality. Instead, Justice White considered the voluntariness, or volitional nature, of the conduct in question. *See Powell*, 392 U.S. at 548-51 (White, J., concurring in the judgment). Under this analysis, if sufficient evidence is presented showing that the prohibited conduct was involuntary due to one's condition, criminalization of that conduct would be impermissible under the Eighth Amendment. *Id.* at 551.

Notably for the present case, Justice White specifically contemplated the circumstances of individuals who are homeless. He explained that, "[f]or all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking." *Id.* Justice White believed some alcoholics who are homeless could show that "resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible." *Id.* For these individuals, the statute "is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk." *Id.* Ultimately, Justice White sided with the plurality because Mr. Powell did not present evidence to show that he was incapable of avoiding public places while intoxicated. *Id.* at 552. However, Justice White's concurrence articulated the narrowest grounds for the decision; accordingly, it is the only controlling precedent from *Powell*. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining that the narrowest position controls when no rationale garners the votes of a majority of the Court).

Robinson and *Powell* have resulted in a division among courts on how to analyze claims regarding enforcement of anti-camping ordinances against homeless individuals. Because *Powell* did not produce a majority opinion on whether the Eighth Amendment prohibits only the criminalization of status or also the criminalization of involuntary conduct, it does not provide a binding test for how courts should analyze these issues. Some courts have adopted the plurality's strict interpretation of *Robinson*, opining that the Eighth Amendment limits only the criminalization of status, not of conduct. *See, e.g.*, *Lehr v. City of Sacramento*, 624 F. Supp. 2d. 1218 (E.D. Cal. 2009) (finding the Eighth Amendment inapplicable where a statute criminalizes conduct and not status). Others have considered the voluntariness of the conduct, and whether

the conduct is inextricably linked to one's status, such that punishing the conduct is indistinguishable from punishing the status. *See, e.g.*, *Jones*, 444 F.3d 1118 (finding anti-camping ordinance violated Eighth Amendment because it criminalized sleeping in public when homeless individuals had no other choice but to sleep in public, and therefore criminalized the status of homelessness itself); *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995) (same); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992) (same). Finally, some courts have avoided the debate altogether by deciding a case on factual grounds. *See, e.g.*, *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000) (not deciding the legal issue of whether the Eighth Amendment reaches conduct that is inextricably linked to status because Orlando proved the voluntary nature of public sleeping by "present[ing] unrefuted evidence" that the city's large homeless shelter "has never reached its maximum capacity and that no individual has been turned away because there was no space available or for failure to pay the one dollar nightly fee"); *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 59 (2015) (upholding an anti-camping ordinance because the plaintiffs failed to "allege why [they] had no shelter").

The differing interpretations of *Robinson* and *Powell* have caused drastically different results for both individuals and the criminal justice system. In the mid-1990s, the United States twice filed briefs in appellate cases to help clarify the Eighth Amendment analysis for claims brought by individuals who were convicted of violating anti-camping ordinances. *See* Brief for the United States as Amicus Curiae, *Joyce v. City and County of San Francisco*, No. 95-16940 (9th Cir. Mar. 29, 1996); Brief for the United States as Amicus Curiae, *Tobe v. City of Santa Ana*, No. S03850 (Cal. June 9, 1994). In those briefs, the United States took the position—as it does here—that criminalizing sleeping in public when no shelter is available violates the Eighth

Amendment by criminalizing status. In the twenty years since the United States last weighed in on this issue, courts' analyses of these statutes have remained divergent.

Consistent with the position taken in its previous filings, the United States now urges this Court to adopt the reasoning of *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006). Although the Ninth Circuit ultimately vacated its opinion in *Jones*—pursuant to a settlement agreement between the parties, 505 F.3d 1006 (9th Cir. 2007), not for any substantive reason—its logic remains instructive and persuasive.

The *Jones* court considered the enforcement of a Los Angeles ordinance prohibiting sitting, lying, or sleeping in public. There, like here, the court was asked to consider a statute that, on its face, criminalized conduct rather than status. Importantly, the plaintiffs in *Jones* presented evidence suggesting that there was an inadequate number of shelter beds available for homeless individuals, so many individuals had no choice but to sleep in public in violation of the city's ordinance. *See Jones*, 444 F.3d at 1137.

The *Jones* court found enforcement of the ordinance to be unconstitutional as applied to the plaintiffs because of inadequate shelter space. The court based its decision on its conclusion that, "[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human." *Id.* at 1136. Because sleeping is unavoidable, the court then considered whether the plaintiffs had a choice to sleep somewhere other than in public, concluding that they did not: "for homeless individuals in [Los Angeles'] Skid Row who have no access to private spaces, these acts can only be done in public." *Id.* at 1136. As a result, the court found that sleeping in public is "involuntary and inseparable from" an individual's status or condition of being homeless when no shelter space is available. *Id.* at 1132. The court

concluded that, under those circumstances, "by criminalizing sitting, lying, and sleeping, the City [of Los Angeles] is in fact criminalizing [Plaintiffs'] status as homeless individuals." *Id.* at 1137.

Defendants assert that reliance on *Jones* would be "misplaced, factually unsupported, and immaterial to this case." Def. Rep. at 7. In advocating against the applicability of *Jones*, Defendants rely on a conduct-versus-status distinction that does not withstand close scrutiny. *Id.* (stating that the Boise ordinances "avoid criminalizing status by making *conduct* an element of the crime"). However, Defendants' position is unpersuasive because the Eighth Amendment analysis is not limited to a reading of the plain language of the statute in question. Rather, the practical implications of enforcing the statute's language are equally important. Those implications are clear where there is insufficient shelter space to accommodate the homeless population: the conduct of sleeping in a public place is indistinguishable from the status of homelessness.

Supreme Court precedent suggests as much. As the *Jones* court correctly noted, *Powell* is best read as providing support for Plaintiffs' argument against the criminalization of involuntary sleeping in public, not as posing a barrier to that position. Indeed, five members of the *Powell* Court (Justice White and the four dissenting Justices) believed that punishing truly involuntary or unavoidable conduct resulting from status would violate the Eighth Amendment; only four Justices would have held otherwise. *Jones*, 444 F.3d at 1135.

It should be uncontroversial that punishing conduct that is a "universal and unavoidable consequence[] of being human" violates the Eighth Amendment. *See id.* at 1136. It is a "foregone conclusion that human life requires certain acts, among them . . . sleeping." *Johnson*, 860 F. Supp. at 350. As the *Jones* court noted, it is impossible for individuals to avoid "sitting, lying, and sleeping for days, weeks, or months at a time . . . as if human beings could remain in

perpetual motion." *Jones*, 444 F.3d at 1136. Once an individual becomes homeless, by virtue of this status certain life necessities (such as sleeping) that would otherwise be performed in private must now be performed in public. *Pottinger*, 810 F. Supp. at 1564; *see also Johnson*, 860 F. Supp. at 350 ("they must be in public" and "they must sleep"). Therefore, sleeping in public is precisely the type of "universal and unavoidable" conduct that is necessary for human survival for homeless individuals who lack access to shelter space. *Id.*

In this way, the Boise anti-camping and disorderly conduct ordinances are akin to the ordinance at issue in *Robinson*, at least on nights when homeless individuals are—for whatever non-volitional reason(s)—unable to secure shelter space.[14] When adequate shelter space exists, individuals have a choice about whether or not to sleep in public. However, when adequate shelter space does not exist, there is no meaningful distinction between the status of being homeless and the conduct of sleeping in public. Sleeping is a life-sustaining activity—*i.e.*, it must occur at some time in some place. If a person literally has nowhere else to go, then enforcement of the anti-camping ordinance against that person criminalizes her for being homeless. *See id.* at 1136-37.

Adopting the *Jones* court's approach would not implicate the knotty concerns raised by the *Powell* plurality and cited by the district courts that depart from *Jones*. In *Powell*, the plurality was concerned with the Cruel and Unusual Punishments Clause becoming "the ultimate arbiter of the standards of criminal responsibility." 392 U.S. at 533; *see also Joyce v. City & Cnty. of San Francisco*, 846 F. Supp. 843, 857 (N.D. Cal. 1994); *Lehr*, 624 F. Supp. 2d at

[14] In *Powell*, Justice White noted that he may have held differently on the merits if there was evidence presented that Mr. Powell was unable to avoid drinking in public; the availability of alternative venues in which Mr. Powell could drink was essential to Justice White's concurrence in the judgment. *See Powell*, 392 U.S. at 553.

1231.[15] The Justices in the *Powell* plurality declined to extend the Eighth Amendment prohibition to the punishment of involuntary conduct because they feared doing so would allow violent defendants to argue that their conduct was "compelled" by any number of "conditions." *Powell*, 392 U.S. at 534 (expressing concern that a hypothetical murderer could claim a compulsion to kill). The plurality was reluctant to "defin[e] some sort of insanity test in constitutional terms." *Id.* at 536.

But these concerns are not at issue when, as here, they are applied to conduct that is essential to human life and wholly innocent, such as sleeping. No inquiry is required to determine whether a person is compelled to sleep; we know that no one can stay awake indefinitely. Thus, the Court need not constitutionalize a general compulsion defense to resolve this case; it need only hold that the Eighth Amendment outlaws the punishment of unavoidable conduct that we know to be universal. Moreover, unlike the hypothetical hard cases that concerned the *Powell* plurality, the conduct at issue in the instant case is entirely innocent. Its punishment would serve no retributive purpose, or any other legitimate purpose. As the plurality in *Powell* itself noted, "the entire thrust of *Robinson*'s interpretation of the Cruel and Unusual

[15] In *Lehr*, the district court declined to follow the Ninth Circuit's decision in *Jones* in evaluating the plaintiffs' Eighth Amendment as-applied claims regarding the City of Sacramento's anti-camping ordinance. Despite evidence that the population of homeless individuals in Sacramento far outnumbered the available shelter beds, the court decided to follow the plurality opinion in *Powell* and the dissent from *Jones* because there was no precedential opinion in place, and it found the *Jones* dissent "to be the more persuasive and well-reasoned opinion." *Lehr*, 624 F. Supp. 2d at 1231. For the reasons discussed above, the United States disagrees with *Lehr* and urges this Court to reject its analysis. The rationale in *Joyce* is equally unpersuasive. In *Joyce*, a pre-*Jones* district court decision, the court rejected the relevance of whether the City of San Francisco provided enough beds for homeless individuals. Rather than consider how and when the city enforced its state and local laws prohibiting camping and sleeping in public places, the court looked only at the language of the statute itself and concluded that it addressed only "acts" that derive from a person's status, and not the status itself. *Joyce*, 846 F. Supp. at 857 (N.D. Cal. 1994). The *Joyce* court therefore declined to grant the plaintiffs' motion for a preliminary injunction. However, while the plaintiffs' appeal was pending before the Ninth Circuit, the City of San Francisco suspended, and eventually eliminated, enforcement of the challenged laws, issuing a memorandum affirming the rights of all homeless individuals. *See Joyce v. City and Cnty. of San Francisco*, No. 95-16940, 1996 WL 329317 (9th Cir. June 14, 1996).

Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act [or] has engaged in some behavior *which society has an interest in preventing*." *Powell*, 392 U.S. at 533 (emphasis added).

Using this reasoning, the vital question for the Court becomes: Given the current homeless population and available shelter space in Boise, as well as any restrictions on those shelter beds, are homeless individuals in Boise capable of conforming the necessary life activity of sleeping to the current law? If not, enforcing the anti-camping ordinances and criminalizing sleeping in public violates the Eighth Amendment, because it is no different from criminalizing homelessness itself. The *Jones* framework, developed from analyses of earlier cases, makes it clear that punishing homeless people for "acts they are forced to perform in public effectively punishes them for being homeless." *Pottinger*, 810 F. Supp. 1551, 1564; *see also Jones*, 444 F.3d at 1136-37; *Johnson*, 860 F. Supp. at 350.

The realities facing homeless individuals each day support this application of the Eighth Amendment. Homelessness across the United States remains a pervasive problem. As the *Jones* court observed, "an individual may become homeless based on factors both within and beyond his immediate control, especially in consideration of the composition of the homeless as a group: the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable." *Jones*, 444 F.3d at 1137. Regardless of the causes of homelessness, individuals remain homeless involuntarily, including children, families, veterans, and individuals with physical and mental health disabilities. Communities nationwide are suffering from a shortage of affordable housing. And, in many jurisdictions, emergency and temporary shelter systems are already underfunded and overcrowded. For example, the 2010 Hunger and Homelessness Survey conducted by the

U.S. Conference of Mayors found that 64% of cities reported having to turn people away from their shelters.[16]

At least one of the Justices in *Robinson* was concerned with how criminalizing certain conditions (there, addiction to narcotics) may interfere with necessary treatment and services that could potentially improve or alleviate the condition. *See Robinson*, 370 U.S. at 673-75 (Douglas, J., concurring). Those concerns are equally applicable in this context. Criminalizing public sleeping in cities with insufficient housing and support for homeless individuals does not improve public safety outcomes or reduce the factors that contribute to homelessness. As noted by the U.S. Interagency Council on Homelessness, "[r]ather than helping people to regain housing, obtain employment, or access needed treatment and service, criminalization creates a costly revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back."[17] Issuing citations for public sleeping forces individuals into the criminal justice system and creates additional obstacles to overcoming homelessness. Criminal records can create barriers to employment and participation in permanent, supportive housing programs.[18] Convictions under these municipal ordinances can also lead to lengthy jail sentences based on the ordinance violation itself, or the inability to pay fines and fees associated with the ordinance violation. Incarceration, in turn, has a profound effect on these individuals'

[16] U.S. Conference of Mayors, *2010 Hunger and Homelessness Survey* (2010), *available at* http://www.usmayors.org/pressreleases/uploads/2010_Hunger-Homelessness_Report-final%20Dec%2021%202010.pdf (*cited in Searching out Solutions: Constructive Alternatives to Criminalization*, *supra* note 12 at 7).

[17] *Searching out Solutions: Constructive Alternatives to Criminalization*, *supra* note 12 at 7.

[18] The Federal Interagency Reentry Council, established by Attorney General Eric Holder in January 2011, is working to coordinate efforts to remove these barriers at the federal level, so that individuals are able to move past their criminal convictions and compete for jobs, attain stable housing, support their children and families, and contribute to their communities. *See* Federal Interagency Reentry Council, *Overview* (May 2014), *available at* http://csgjusticecenter.org/wp-content/uploads/2014/05/FIRC_Overview.pdf.

lives.[19] Finally, pursuing charges against individuals for sleeping in public imposes further burdens on scarce public defender, judicial, and carceral resources. Thus, criminalizing homelessness is both unconstitutional and misguided public policy, leading to worse outcomes for people who are homeless and for their communities.

CONCLUSION

For the reasons stated above, the Court should adopt the analysis in *Jones* to evaluate Boise's anti-camping and disorderly conduct ordinances as applied to Plaintiffs in this case. If the Court finds that it is impossible for homeless individuals to secure shelter space on some nights because no beds are available, no shelter meets their disability needs, or they have exceeded the maximum stay limitations, then the Court should also find that enforcement of the ordinances under those circumstances criminalizes the status of being homeless and violates the Eighth Amendment to the Constitution.

Submitted this 6th day of August, 2015.

s/ Sharon Brett
Sharon Brett
Attorney for the United States of America

[19] *See* Nat'l Law Ctr.on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* 32-33 (2014), *available at* http://www.nlchp.org/documents/No_Safe_Place.

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2015, I served the foregoing via the Court's CM/ECF system, which will automatically provide notice to all counsel of record.

/s/ Sharon Brett

SHARON BRETT
Trial Attorney
United States Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
(202) 353-1091

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TAMMY KOHR, EUGENE STROMAN, and JANELLE GIBBS, on behalf of themselves and all others similarly situated, and ROBERT COLTON, Plaintiffs, v. CITY OF HOUSTON, Defendant.	Civil Action No. 17-cv-1473

DECLARATION OF SHERE DORE IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

My name is Shere Dore, and I declare:

1. I am over the age of eighteen, and I am competent to make this declaration. I provide this declaration based upon my personal knowledge. I would testify to the facts in this declaration under oath if called upon to do so.

2. I have extensive knowledge about Houston's unsheltered homeless population and their access to emergency shelter beds. I prepared this declaration on an emergency basis, and I anticipate revising it to be more comprehensive when time permits. I prepared this declaration after visiting the Wheeler encampment on Wednesday, August 16, 2017, and learning that the City has threatened to prosecute Wheeler residents for encampment in a public place beginning Thursday, August 17, 2017. I spoke with multiple encampment residents whom Houston police officers threatened with prosecution if they did not take down their tents by

Thursday, August 17, 2017. I also saw copies of the notices distributed by the police that threaten to arrest and prosecute encampment residents.

3. Based on my experience, it is my opinion that the overwhelming majority of unsheltered homeless people in Houston are in public involuntarily. The number of unsheltered homeless people in Houston far exceeds the number of available emergency shelter beds. Houston's emergency shelter beds are almost always full.

I. Basis of Knowledge

4. I am the founder of the Homeless Advocate Program. Our mission is to assess and assist with the needs of Houston's homeless population, with a focus on food, hygiene, clothing, and shelter. I have been advocating for Houston's homeless population in this capacity for six years.

5. My main job is to assess homeless peoples' needs and connect them with services. I estimate that I have assisted hundreds of homeless people in Houston with access to services. I also spend four nights a week serving the homeless through food sharing programs. I also provide clothing and hygiene supplies to homeless people.

6. My job entails helping unsheltered homeless people access emergency shelter beds. I call shelters to seek emergency shelter beds for unsheltered homeless people nearly every day. I also visit emergency shelters in person.

7. In my capacity as founder of the Homeless Advocate Program, I also advocate for the needs of the homeless population with the City Council and the Mayor's Office. I regularly testify before the City Council, and I maintain working relationships with the City's policy specialists so I can negotiate for our client population based on on-the-ground conditions.

8. Before founding the Homeless Advocate Program, I worked in food banks. I also founded a program to provide manicures to homeless women (to boost self-esteem), and another program that provided a special Mother's Day dinner for homeless mothers. I've been generally active in service to Houston's homeless population for years.

9. I was also a client of a shelter myself, at the Star of Hope Women and Families Shelter, from February through March 2012. During that period, I directly observed the daily operations of the shelter.

II. Homeless Population in Houston

10. According to the most recent and comprehensive data that are publicly available, there are more than 1,000 unsheltered homeless people in Harris County, as reported in the 2017 Point-in-Time count. Based on my experience, that statistic strikes me as underrepresentative of the true number of unsheltered homeless people in Houston.

11. The annual Point-In-Time count is organized by the Houston Coalition for the Homeless. It is the most comprehensive count of unsheltered homeless people that exists, but it is imperfect. To conduct the count, agency staff and volunteers walk around Houston on nights in late January to count all the unsheltered homeless people they can find. This count is underrepresentative of the true number of unsheltered homeless people in Houston, for multiple reasons: I have observed the police, who were deployed to protect the counting volunteers, acting in ways towards the homeless that cause homeless people to avoid the count. I've also personally been present in places where volunteers were supposed to turn out to count a certain area, and no one showed up.

12. The unsheltered homeless population in Houston includes many different vulnerable populations. Many unsheltered homeless people are felons who cannot find housing

or employment. Many have significant, untreated mental health problems. Many are veterans who have untreated mental health issues and limited job skills. And many are people who were laid off and fell behind on their rent. Each of these populations is on the street for reasons that they cannot change. They are not in public voluntarily.

13. In short, the overwhelming majority of unsheltered homeless people in Houston—who number, at least, in the hundreds—are not voluntarily homeless.

III. Emergency Shelter in Houston

A. Emergency Shelter Bed Capacity in Houston

14. Most shelter beds fall into two general categories: program beds and emergency shelter beds. Program beds are limited to people who participate in a program, such as a drug treatment program, which typically has very specific criteria and requires people to give up their freedom for thirty days.

15. Houston's lead homeless services agency, the Coalition for the Homeless, refers homeless adults to emergency shelter beds in five different shelters:

(a) Star of Hope Men's Shelter (aka "Men's Development Center")

(b) Star of Hope Women and Families Shelter

(c) Salvation Army Men's Shelter (aka "Red Shield Lodge")

(d) Salvation Army Family Shelter

(e) Salvation Army Single Women's Shelter (aka "Sally's House")

16. These shelters do the best they can, but Houston simply has not allocated them the resources they need to accommodate the entirety of Houston's unsheltered homeless population.

17. The emergency shelter beds in Houston are full, and they have been full for years. The shelters are full so consistently that every shelter with emergency beds has a designated

number of "overflow" spots. Overflow clients are required to sleep lined up on the floor in the common area. This practice is unsafe and unsanitary, because the shelters are only built to house one person per bed. The shelters have dozens of overflow clients sleeping on the floor without adequate staff or bathrooms to serve that client population. Cramming people together on the floor is also an obvious fire hazard.

18. For example, at the Star of Hope Women and Families Shelter, the shelter operators folded up the tables in the common area after dinner and put me and my children on mats on the floor. If I got up at night to go to the bathroom, I would have to carefully step over many people to make my way there. I know from my advocacy for Houston's unsheltered homeless population that the overflow accommodations are similarly bad at other shelters.

19. The overflow spaces are nowhere near sufficient to accommodate Houston's unsheltered homeless population. Every day, people wait in line outside each of the five emergency shelters at designated times in the morning and afternoon. Every day, people who wait in those lines are turned away.

20. Even if each shelter squeezed overflow clients onto every square inch of their floor space—which would be unsafe and unsanitary—the floor space in these shelters simply could not physically accommodate the hundreds of unsheltered homeless people in Houston.

21. I believe that the City is acting under misleading counsel about the capacity of emergency shelters to house additional people. I understand that Marc Eichenbaum, the City's Special Assistant to the Mayor for Homeless Initiatives, has informed the Mayor and City Councilmembers that emergency shelters have capacity to house more people. But the reality is that beds at each of these shelters are full, and the shelters can accept people only by squeezing them into an additional "overflow" space on the floor. Shelters only make this accommodation

for people who have a special favor called in through the Houston Police Department or a homeless outreach team—not directly for chronically homeless people on the streets. But it would be impossible for the emergency shelters to accommodate every homeless person who needs a bed.

22. Since the anti-camping ordinance was passed on April 12 of this year, I have called shelters repeatedly to ask whether they will accept unsheltered homeless people whom I know to be in need. I have called each of the five shelters mentioned above, and I have not been able to get the emergency shelters to accept a single person.

23. I have worked with one woman, who is pregnant, and who was kicked out of a program bed at the Star of Hope Women and Families shelter because she took her infant son to the hospital instead of doing her chores. Her son had gotten bed bug bites all over his face during their stay at the shelter, and he was running high fever—but the shelter staff still refused to let the woman back in to access her bed. Neither the Salvation Army Family Shelter, nor any other shelter in Harris County or Fort Bend County, had the capacity to give this woman and her son a bed.

C. Barriers to Accessing Available Emergency Shelter Beds in Houston

24. Even on the rare occasion when a bed opens up, there are many barriers between the open bed and a person in need. These barriers, on their own or in combination, can make it impossible or unreasonably onerous for people to access shelter.

25. **Cost** is a barrier. At the Salvation Army Men's Shelter, men are required to pay $10 a day after their first nine days in an emergency shelter bed. Most homeless people cannot afford this amount, especially given the new restrictions on panhandling.

26. **Criminal history** is a barrier. To my knowledge, none of the Salvation Army shelters, and none of the shelters that accept families, are legally permitted accept people who are registered sex offenders.

27. **Identification** is a barrier. Some shelters require government-issued identification in order to enter. Getting identification can be a difficult process, depending on where a person were born. That process often requires obtaining certified medical records, school records, social security records, and/or a birth certificate.

28. **Employment** is a barrier. Holding or searching for a job makes it difficult or impossible to access emergency shelter beds. All shelters offering emergency beds require clients to wait in line for a spot at some point during the day, though that time can vary by shelter. Waiting in line during the day is difficult for people who are searching for work, and impossible for someone who works an overlapping day shift. Sometimes, people face the choice of standing in line for emergency shelter or accepting a temporary job placement through Pacesetters, a temporary employment agency. Shelters also require clients to check in by the early- to mid- evening, which is impossible for someone who works the night shift, or works late and needs to take a bus ride across town to the shelter.

29. **Travel** is a barrier. The Star of Hope shelters are about an hour walking from the Wheeler Encampment, and about thirty minutes walking from the Houston Public Library, where we hold our food sharing program. When I was experiencing homelessness, I was lucky enough to be healthy, but these distances were still quite a walk for me. Plus, people who wait in line need to pack up all their possessions and take them on their back. It is extremely difficult for people with mobility impairments, and no money for a bus ticket, to wait in line at shelters every day on the small chance they might get a spot.

30. **Mental health problems and addiction** are additional barriers to accessing shelter. Many homeless Houstonians have substance abuse problems and/or mental health issues. People with alcoholism are kicked out of shelters for being visibly intoxicated. People with mental health issues that manifest as aggression can be kicked out of shelters because of fights, or misconstrued reactions. Some homeless people with mental health problems can also be extremely resistant to seeking out emergency shelters.

31. **Desire for freedom** is a barrier. Each emergency shelter prohibits people from leaving the shelter from check-in time, which is generally in the early evening, to check-out time, which is generally in the early morning. While shelters do not physically prevent people from leaving, anyone who leaves is not allowed back inside.

32. **Health and safety concerns** are a barrier. Every shelter is infested with bedbugs. People come out of shelters covered in bed bug bites. And squeezing overflow clients together on the floor, in areas that were not meant for people to sleep, is a fire hazard.

33. **Property ownership** is a barrier. Shelters also limit how much property a person can have if they sleep there, and generally the limitation is to one or two suitcases. Shelters require clients to discard any food in their bags. Clients are required to surrender their property to the shelter, including cell phones, and the shelter locks them away. For example, in the Star of Hope Shelter for Women and Families, the shelter operators store occupants' property in a locked shed that they cannot access. It is also not uncommon for property to be stolen or accidentally returned to the wrong person. For homeless people, it can be devastating to have any of one's few remaining possessions—like a cell phone— stolen.

34. **Family Structure** is a barrier. The Star of Hope shelters regularly split up opposite-sex couples, even married couples with children, sending men away to the men's

shelter. The result is that married couples must separate from one another if they wish to access emergency shelter beds.

35. Altogether, these and other barriers, whether standing alone or in conjunction, make shelter beds functionally unavailable to many unsheltered homeless people in Houston.

IV. Conclusion

36. Emergency shelter beds in Houston are consistently full. The number of unsheltered homeless people in Houston far exceeds the number of available emergency shelter beds.

37. There are many barriers that can make a shelter bed functionally unavailable to an unsheltered homeless person, including practical barriers, like cost, criminal history, lack of identification, employment, travel, and mental health problems and addiction, as well as matters of personal dignity and rights, like freedom of movement, health and safety, property ownership, and familial association.

I declare under penalty of perjury under the laws of the United States of America and laws of the State of Texas that the foregoing is true and correct to the best of my knowledge.

Executed this 17th day of August, 2017, in Houston, Texas.

/s/ Shere Dore
Shere Dore

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

TAMMY KOHR, EUGENE STROMAN, and JANELLE GIBBS, on behalf of themselves and all others similarly situated, and ROBERT COLTON, Plaintiffs, v. CITY OF HOUSTON, Defendant.	Civil Action No. 17-cv-1473

DECLARATION OF KEITH KUCIFER IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

My name is Keith Kucifer, and I declare:

1. I am over the age of eighteen, and I am competent to make this declaration. I provide this declaration based upon my personal knowledge. I would testify to the facts in this declaration under oath if called upon to do so.

2. I am a private investigator affiliated with the firm of Gradoni & Associates. I was formerly employed by the Texas Department of Public Safety for over 20 years, as a member of the Highway Patrol, Motor Vehicle Theft Sergeant, and Motor Vehicle Theft Lieutenant. My firm has been retained by the ACLU of Texas in connection with the above-captioned matter.

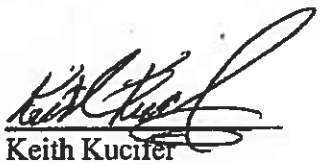
3. In connection with our engagement, from May 22 to 23, 2017, my colleagues Jose Arreola, Edna Velez, and I called and visited each of the Salvation Army Family Residence, Salvation Army Sally's House, Salvation Army Red Shield Lodge, Star of Hope Women &

Family Emergency Center, and Star of Hope Men's Development Center emergency shelters. Personnel at each of the five shelters informed my colleagues and I that they were at or would meet capacity that evening, and would not have any beds free.

4. In addition, I was also asked to return to the same five shelters on August 16, 2017, after the hour of about 4:00PM, to assess whether any of the shelters had available beds. Personnel at each of the five shelters informed me that they were at capacity for this evening, and did not have any beds free.

I declare under penalty of perjury under the laws of the United States of America and laws of the State of Texas that the foregoing is true and correct to the best of my knowledge.

Executed this 16th day of August, 2017, in Tomball, Texas.



Keith Kucifer

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

TAMMY KOHR, EUGENE STROMAN, and JANELLE GIBBS, on behalf of themselves and all others similarly situated, and ROBERT COLTON, Plaintiffs, v. CITY OF HOUSTON, Defendant.	Civil Action No. 17-cv-1473

DECLARATION OF EUGENE STROMAN IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

My name is Eugene Stroman, and I declare:

1. I am over the age of eighteen, and I am competent to make this declaration. I provide this declaration based upon my personal knowledge. I would testify to the facts in this declaration under oath if called upon to do so.

2. I am a Plaintiff in this action. I submit this declaration in support of the above-captioned motion.

3. I am homeless. I currently live in a tent in the Wheeler encampment with my wife.

4. I have repeatedly tried to get into multiple Houston-area emergency shelters, but I have not been able to access shelter beds consistently. Both shelters that accept men are long distances from the Wheeler encampment, and require that I wait in line for a long time before I

can learn whether they actually have any beds free. In addition, no shelter with available beds will accept me and my wife together.

5. Approximately three months ago, officers from the Houston Police Department came to the Wheeler encampment and passed out copies of a notice entitled "WARNING: Encampment Violation." The notice says that the police can arrest me and take me to jail for camping in a public place. A true and correct copy of that notice is attached as Exhibit 1 to this Declaration.

6. On the morning of Wednesday, August 16, 2017, officers from the Houston Police Department again came to the Wheeler encampment. They again passed out copies of the same notice entitled "WARNING: Encampment Violation." The notice says that the police can arrest me and take me to jail for camping in a public place.

7. On Wednesday, the police told me and other people who live at the Wheeler encampment that we would have to take down our tents the following day, Thursday, August 17. The police told me that they would be coming back Thursday or Friday, and that if we did not take our tents down, they would write us tickets for camping in a public place.

8. I need a tent so that my wife and I can secure ourselves and our possessions, and protect ourselves from the weather and pests such as insects, rats, opossums, and raccoons.

9. I have nowhere else to go. If the police give me no choice beside taking down my tent and leaving the Wheeler encampment, I will stay here and receive a ticket.

I declare under penalty of perjury under the laws of the United States of America and laws of the State of Texas that the foregoing is true and correct to the best of my knowledge.

Executed this 17th day of August, 2017, in Houston, Texas.

Eugene Stroman

EXHIBIT 1

WARNING
Encampment Violation

A City of Houston law makes it illegal to encamp in a public place in Houston without permission from the City. YOU ARE VIOLATING THIS LAW.

"Encampment" means any of the following:

- Setting up a tent or other structure.
- Using a grill, stove, or heater.
- Keeping too much property.

Things to remember about "keeping too much property" in a public place:

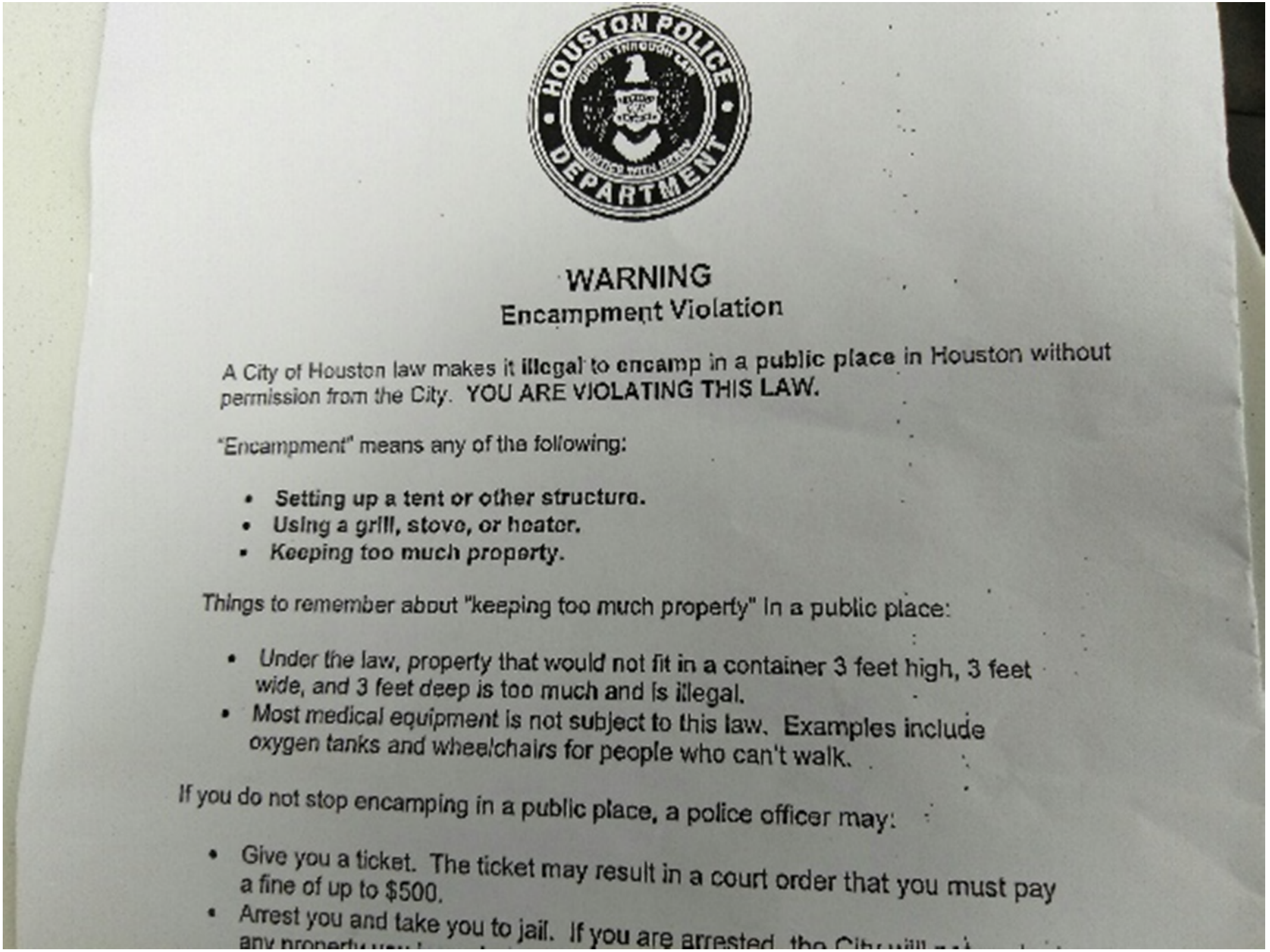
- Under the law, property that would not fit in a container 3 feet high, 3 feet wide, and 3 feet deep is too much and is illegal.
- Most medical equipment is not subject to this law. Examples include oxygen tanks and wheelchairs for people who can't walk.

If you do not stop encamping in a public place, a police officer may:

- Give you a ticket. The ticket may result in a court order that you must pay a fine of up to $500.
- Arrest you and take you to jail. If you are arrested, the City will not protect any property you leave behind from damage or theft.

If you need help ...

On the reverse side of this warning is information about medical treatment, mental health treatment, temporary shelters, help with drug or alcohol problems, coordinated housing assessment, and other services that may be available to you.



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MHD20170509

KeyCite Yellow Flag - Negative Treatment
Distinguished by Smith v. City of Corvallis, D.Or., June 6, 2016

2009 WL 2386056
Only the Westlaw citation is currently available.
United States District Court, D. Oregon.

Marlin ANDERSON, Mary Bailey, Matthew Chase, Jack Golden, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
CITY OF PORTLAND; City of Portland Police Chief Rosanne Sizer, in her individual and official capacity; City of Portland Police Officer J. Hurley, in his individual and official capacity; City of Portland Police Officer J. Fulitano, in his individual and official capacity; City of Portland Police Officers Does 1 Through 50, Defendants.

Civ. No. 08–1447–AA.
|
July 31, 2009.

West KeySummary

1 **Civil Rights**
Criminal Law Enforcement;Police and Prosecutors

A putative class of homeless persons adequately stated a § 1983 claim that their right to be free from cruel and unusual punishment was violated by a city's enforcement of anti-camping and temporary structure ordinances. The homeless persons alleged that the ordinances criminalized them for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property. Essentially, they argued that the ordinances criminalized their status of being homeless and not their conduct. Given that they were bringing an as-applied challenge, precisely when, where, and how the city enforced the ordinances would require development of the facts. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

8 Cases that cite this headnote

Attorneys and Law Firms

Monica Goracke, Ed Johnson, Spencer M. Neal, Oregon Law Center, Portland, OR, for plaintiffs.

David A. Landrum, Deputy City Attorney, Office of City Attorney, Portland, OR, for defendants.

OPINION AND ORDER

AIKEN, Chief Judge:

***1** Plaintiffs bring a class action suit under 42 U.S.C. § 1983, alleging violations of their rights to be free from cruel and unusual punishment under the Eighth Amendment and their rights to travel, freedom and movement, and equal protection under the Fourteenth Amendment. Plaintiffs contend that defendants' enforcement of no-camping and temporary structure ordinances essentially criminalizes the status of being homeless, singles out the homeless for disparate treatment, and prevents the homeless from traveling to or residing in the City of Portland. Accordingly, plaintiffs seek a declaration that defendants' enforcement of the ordinances is unconstitutional, an injunction prohibiting their enforcement against plaintiffs and other class members, as well as damages, costs, and attorneys fees.

Defendants City of Portland, Police Chief Rosanne Sizer, and City of Portland Police Officers J. Hurley and J. Fulitano (the City) move for dismissal of plaintiffs' claims under Fed.R.Civ.P. 12(b)(6) for failure to state a claim. The motion is granted with respect to plaintiffs' right to travel, freedom of movement and substantive due process claims, and denied with respect to plaintiffs' Eighth Amendment and equal protection claims.

BACKGROUND

The Portland City Code (PCC) renders it unlawful "for any person to camp in or upon any public property or public right of way" unless otherwise authorized by the

PCC or the mayor in "emergency circumstances." PCC § 14A.50.020(B). "To camp" is defined as "to set up, or to remain in or at a campsite, for the purpose of establishing or maintaining a temporary place to live." *Id.* § 14A.50.020 (A)(1). "Campsite" is defined as "any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire is placed, established, or maintained, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure...." *Id.* § 14A.50.020(A)(2). A violation of § 14A.50.020 is punishable by a fine not to exceed $100 and a term of imprisonment not to exceed 30 days. *Id.* § 14A.50.020(C).

It is also unlawful "to erect, install, place, leave, or set up any type of permanent or temporary fixture or structure of any material(s) in or upon non-park public property or public right-of-way without a permit or other authorization from the City." PCC § 14A.50.050(A). Any such fixture or structure is deemed a "public nuisance," and "[i]n addition to other remedies provided by law," may be "summarily" abated by the police. *Id.* § 14A.50.050(B).

An Executive Order issued by the Chief of Police addresses the "clean-up" of "established campsites" by police officers. Defendants' Memorandum in Support of Motion of Dismiss, Ex. 3. A "camp clean-up" is "any organized, prearranged operation by or on behalf of the Bureau to remove illegal campers, camps or camp structures from an established campsite." *Id.* p. 1. "Established campsites" are "locations where a camp structure such as a hut, lean-to or tent is set up for the purpose of maintaining a temporary place to live and exists on public property." *Id.* Under the Executive Order, officers are required to post a 24–hour notice prior to clean-up of the campsite and to notify JOIN—a local agency that provides services to homeless persons—of the pending clean-up. *Id.* p. 2. Campsites located on private property or public rights of way or those constituting "public health hazards" do not require 24 hours notice prior to clean-up. *Id.* pp. 2–3.

***2** Plaintiffs Marlin Anderson, Mary Bailey, Matthew Chase, and Jack Golden are involuntarily homeless and reside in Portland, Oregon.

Anderson has physical and mental disabilities that preclude full-time employment. Anderson occasionally finds temporary work and resides in a van with his five dogs. Anderson has been warned by police officers not to camp in Delta Park in northeast Portland.

Bailey also has disabilities that prevent full-time employment, including seizures that affect her memory. Bailey and her partner, plaintiff Matthew Chase, usually sleep outside in southeast Portland near the Hawthorne Bridge. Bailey and Chase are frequently told by police officers that they cannot lie down and to "move along." Although her medical problems require Bailey to rest, police officers have told Bailey that she cannot lie down to sleep. Shelter beds for women are extremely limited in Portland, and Bailey needs the help and protection of Chase when she suffers seizures.

Golden is also disabled and receives disability benefits. Golden cannot find affordable housing and typically sleeps outside in southeast Portland near the Hawthorne Bridge. While sleeping outside, Golden has been told by police officers to "move along."

Defendant Rosanne Sizer is the Chief of Police of the Portland Police Bureau, and defendants J. Hurley and J. Fulitano are Portland Police Bureau Officers who issued camping or unlawful structure citations to Anderson, Chase, and Golden.

On the afternoon of August 30, 2007, Anderson was napping on top of his sleeping bag in Delta Park in north Portland, just south of the dog park at Hayden Meadows Drive. Officer Hurley made contact with Anderson and cited him for unlawful camping under PCC § 14A.50.020. Anderson pled not guilty and was scheduled for trial on October 15, 1997. On October 11, 2007, after being notified that Anderson would be represented by counsel, the District Attorney dismissed the citation.

On May 7, 2008, Chase and Golden were in a temporary campsite under the Hawthorne Bridge. Portland police officers posted a no-camping notice on each of their tents, with handwritten notes stating: "1 p.m., time to be moved or this stuff will be taken away ." Chase and Golden understood this to mean that they had 24 hours from 1:00 p.m. on May 7, 2008 to move their tents and belongings. Instead, just before 9:00 p.m. on May 7, 2008, Officer Fulitano arrived and ordered them to remove their belongings immediately. The officer cited both men for "erecting a structure on public property" in violation of PCC § 14A.50.050.

In September 2008, Bailey and Chase were living in the parking lot of a private building in southeast Portland with the permission of the building manager. The manager told Bailey and Chase that police officers had threatened to "shut down" the building if Bailey and Chase did not move their belongings. On or about October 1, 2008, Bailey and Chase moved their personal property to the nearby street, taking care not to obstruct public rights-of-way. The next day, they found most of their belongings gone and the rest scattered about. A "notice of illegal camping" was found with their belongings, with no date or time given for the clean-up and seizure of their property.

***3** Bailey and Chase went to the address listed on the notice to retrieve their property and found only a few pieces of clothing that were wet and moldy. Missing were two bicycles, two bicycle trailers, clothing, boots, tools, personal items, and family photographs and mementos, including the ashes of Bailey's deceased father. Bailey and Chase allege that, if given adequate notice of the sweep, they would have contacted a local service agency to help move their property.

On December 12, 2008, plaintiffs filed suit. Plaintiffs allege that the City's enforcement of the anti-camping and temporary structure ordinances essentially criminalizes the status of homelessness in violation of the Eighth Amendment, because it punishes them for sleeping in a public place even though they have no lawful place to sleep. Plaintiffs also allege that they and other homeless people have been singled out for enforcement of the anti-camping and temporary structure ordinances, thus denying them equal protection under the law. Finally, plaintiffs allege that defendants' enforcement of the ordinances interferes with their fundamental rights of travel and freedom of movement, and infringes on their substantive liberty interests.

DISCUSSION

The City argues that plaintiffs fail to state a claim for which relief may be granted. Fed.R.Civ.P. 12(b)(6). At this stage of the proceedings, plaintiffs' factual allegations are accepted as true, with all inferences construed in their favor. *Outdoor Media Group, Inc. v. City of Beaumont,* 506 F.3d 895, 900 (9th Cir.2007). Although plaintiffs' complaint need not assert detailed factual allegations, it nevertheless must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

A. Cruel and Unusual Punishment under the Eighth Amendment

Plaintiffs allege that the City's enforcement of the ordinances targets their involuntary conduct of sleeping outside on public property, essentially criminalizing the status of homelessness in violation of the Eighth Amendment's prohibition against cruel and usual punishment. The City moves to dismiss this claim on grounds that: 1) violation of the temporary structure ordinance is not a "crime"; 2) plaintiffs lack standing to assert an Eighth Amendment claim absent convictions under the challenged ordinances; and 3) the ordinances do not violate the Eighth Amendment because they criminalize conduct rather than status.

1. Temporary Structure Ordinance PCC § 14A.50.050

The City argues that the Eighth Amendment does not apply to PCC § 14A.5 0 .050, because erecting a temporary structure is considered a nuisance rather than a crime and is punishable through abatement of the structure instead of fines and/or imprisonment. However, as noted by plaintiffs, abatement is not the sole remedy for erecting a temporary structure on public property or rights of way. Rather, abatement is available "in addition to other remedies provided by law," PCC § 14A.50.050(B), which include a fine of not more than $500 and a term of imprisonment not exceeding six months. *Id.* § 14A.20.060. Therefore, the temporary structure ordinance is not outside the scope of the criminal process and accompanying Eighth Amendment restrictions.

2. Standing

***4** Defendants next argue that plaintiffs lack standing to bring an Eighth Amendment challenge, because they have not been convicted of violating the ordinances. Relying on the Fifth Circuit decision in *Johnson v. City of Dallas,* 61 F.3d 442 (5th Cir.1995), defendants argue that "the Eighth Amendment 'was designed to protect those convicted of crimes,' " and absent convictions under the anti-camping or temporary structure ordinances, plaintiffs have not suffered injury in fact and therefore lack standing to raise a Eighth Amendment challenge. *Id.* at 444 (quoting

Ingraham v. Wright, 430 U.S. 651, 664, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977)). At oral argument, the City conceded that two plaintiffs have convictions under the temporary structure ordinance. Regardless of actual convictions, I find that plaintiffs' allegations are sufficient to confer standing.

In *Ingraham,* the Supreme Court described three ways in which the Eighth Amendment "circumscribes" the criminal process:

> First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and *third, it imposes substantive limits on what can be made criminal and punished as such.*

Ingraham, 430 U.S. at 667 (citations omitted) (emphasis added). Thus, while the City is correct that *Ingraham* recognized the "primary purpose" of the Eighth Amendment is to protect those convicted of crimes, it also limits "what can be made criminal," implicating conduct that is *subject* to criminal prosecution. *See Lehr v. City of Sacramento,* 2009 WL 1420967, *9 (E.D.Cal. May 20, 2009); *Joyce v. City and County of San Francisco,* 846 F.Supp. 843, 853 (N.D.Cal.1994). Therefore, I do not find that *Ingraham* limits Eighth Amendment challenges to those plaintiffs who have been convicted of a crime. Instead, I follow the lead of the Ninth Circuit and apply established requirements for standing. *See Jones v. City of Los Angeles,* 444 F.3d 1118, 1126 (9th Cir.2006), *vacated by* 505 F.3d 1006 (9th Cir.2007). [1]

To establish Article III standing, plaintiffs must show injury in fact, causation, and redressability. *Prescott v. County of El Dorado,* 298 F.3d 844, 846 (9th Cir.2002). Where the plaintiffs seek to enjoin law enforcement activities, "standing depends on [their] ability to avoid engaging in the illegal conduct in the future." *Jones,* 444 F.3d at 1126 (citing *Hodgers–Durgin v. de la Vina,* 199 F.3d 1037, 1041 (9th Cir.1999) (en banc)). Plaintiffs need only establish a "reasonable expectation" that their conduct will recur and trigger the alleged harm. *Id.* at 1127.

Here, plaintiffs allege past injuries and threatened future injuries resulting from the City's enforcement of the anti-camping and temporary structure ordinances through the threat of criminal sanctions and the loss of personal property. Further, plaintiffs claim that they may be excluded from public parks in Portland for up to 180 days for violating the anti-camping ordinances. Plaintiffs allege that they are likely to violate the ordinances in the future by sleeping in public places, because they have no other place to sleep. *Jones,* 444 F.3d at 1127. Thus, plaintiffs have standing to assert an Eighth Amendment claim.

3. Status vs. Conduct

***5** The City next argues that plaintiffs fail to state a meritorious Eighth Amendment claim, because the challenged ordinances target the conduct of camping and erecting temporary structures rather than the status of being homeless. Plaintiffs respond that they do not assert a facial challenge to the ordinances; rather, plaintiffs argue that the City's enforcement of the ordinances extends beyond the limits of "what can be made criminal" under the Eighth Amendment. *Ingraham,* 430 U.S. at 667.

On two occasions, the Supreme Court has addressed whether laws impermissibly criminalize status rather than conduct. In *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) the Court found unconstitutional a statute rendering it criminal to "be addicted to the use of narcotics." In so holding, the Court equated drug addiction to an illness "which may be contracted innocently or involuntarily" and found that the imposition of criminal punishment against a drug addict, "even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there," constituted cruel and unusual punishment. *Id.* at 667.

A few years later, the Court addressed a criminal statute prohibiting public intoxication. *See Powell v. Texas,* 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). A plurality of the Court distinguished *Robinson* and found that the statute proscribed conduct in conformity with the Eighth Amendment, even though the defendant was a chronic alcoholic and claimed to have no control over his alcohol consumption. *Id.* at 532–33. The plurality interpreted *Robinson* to prohibit the criminalization of "mere status" and declined to extend Eighth Amendment protection to "involuntary" conduct. *Powell,* 392 U.S. at 534–36 ("Ultimately, then, the most troubling aspects of this case, were *Robinson* to be extended to meet it,

would be the scope and content of what could only be a constitutional doctrine of criminal responsibility.").

Courts have reached differing conclusions in deciding whether the Eighth Amendment protects homeless persons against the enforcement of criminal laws that prohibit sleeping in public areas. For examples, in *Jones,* the Ninth Circuit concluded that a City of Los Angeles ordinance that criminalized "sitting, lying, or sleeping on public streets and sidewalks at all times" could not be enforced against the homeless population. *Jones,* 444 F.3d at 1120, 1138. The court reasoned:

> Because there is substantial and undisputed evidence that the number of homeless persons in Los Angeles far exceeds the number of available shelter beds at all times, including on the nights of their arrest or citation, Los Angeles has encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless. A closer analysis of *Robinson* and *Powell* instructs that the involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable status, and incidental conduct which is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment.

***6** *Id.* at 1132; *see also Pottinger v. City of Miami,* 810 F.Supp. 1551, 1564 (S.D.Fla.1992) (finding that "arresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless").

In contrast, the Eleventh Circuit rejected a similar challenge to a City of Orlando ordinance, emphasizing that the city presented "unrefuted" evidence that a large homeless center had "never reached its maximum capacity" and no individual was ever turned away by the shelter for lack of available space. *Joel v. City of Orlando,* 232 F.3d 1353, 1362 (11th Cir.2000). Thus, the court concluded that "[t]he City is constitutionally allowed to regulate where 'camping' occurs, and the availability of shelter space means that Joel had an opportunity to comply with the ordinance." *Id. see also Joyce,* 846 F.Supp. at 857, 858 ("On no occasion, moreover, has the Supreme Court invoked the Eighth Amendment in order to protect acts derivative of a person's status .... such a holding would be required to provide constitutional protection to any condition over which a showing could be made that the defendant had no control."). Similarly, the district court in *Lehr* recently rejected the analysis of the Ninth Circuit in *Jones,* finding it unsupported by *Powell* or *Robinson. Lehr,* 2009 WL 1420967 at *14, 17 (declaring that plaintiffs' argument would "set precedent for an onslaught of challenges to criminal convictions by those who seek to rely on the involuntariness of their actions").

Citing *Joel, Joyce, Lehr,* and Judge Rymer's dissent in *Jones,* the City argues that plaintiffs fail to allege inadequate shelter space to render their conduct "involuntary," that the ordinances target conduct rather than status, and that homelessness is not a constitutionally cognizable status engendering protection for derivative acts. Plaintiffs emphasize that no case relied on by the City was decided at the pleadings stage and argue that they are entitled to demonstrate that the City's enforcement of the challenged ordinances criminalizes conduct—i.e., sleeping in public—that is inexplicably intertwined with their "involuntary condition" of homelessness.

I recognize and appreciate the reluctance of *Joyce* and *Lehr* to extend blanket constitutional protection to involuntary acts derivative of status, given the dearth of precedential guidance. I further agree with *Lehr* that disallowing criminal sanctions based on the involuntariness of such conduct creates a slippery slope that may not be contained. *Lehr,* 2009 WL 1420967, *17 (a decision in the plaintiffs' favor "would potentially provide constitutional recourse to anyone convicted on the basis of conduct derivative of a condition he is allegedly 'powerless to change' "). That said, it seems a reasonable proposition under the Eighth Amendment that homeless persons should not be subject to criminal prosecution for merely sleeping in public at any time of day.

***7** Ultimately, I part company with the reasoning employed by *Jones, Joel,* and *Pottinger* and decline to

adopt the pronouncement that the Eighth Amendment limitation on criminalizing "mere status" depends *solely* on whether the challenged law or its enforcement targets derivative, "involuntary" conduct. *See, e.g., Jones,* 444 F.3d at 1132 ("the involuntariness of the act or condition ... is the critical factor delineating a constitutionally cognizable status"); *Pottinger,* 810 F.Supp. at 1562 (noting that the "voluntariness of the status or condition is the decisive factor"). Rather, an equally important factor is the nature of the prohibited conduct.

Notably, while reiterating the principal that an *actus reas* is required for criminal proscription, the Supreme Court in *Powell* also looked to the nature of the act and the reasons for its prohibition:

> The State of Texas thus has not sought to punish a mere status, as California did in Robinson; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, *it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards ... and which offends the moral and esthetic sensibilities of a large segment of the community.*

Powell, 392 U.S. at 532 (emphasis added); *see also Jones,* 444 F.3d at 1139 (recognizing that "both the [Supreme] Court and [the Ninth Circuit] have constrained this category of Eighth Amendment violation to persons who are being punished for *crimes that do not involve conduct that society has an interest in preventing* ") (Rymer, J., dissenting) (emphasis added); *Pottinger,* 810 F.Supp. at 1564, 1565 n. 19 (noting the "harmless" and "innocent" nature of criminalized conduct). Thus, in addition to the involuntariness of the targeted conduct and its relatedness to a claimed status, a critical factor is whether and to what degree the City's enforcement of the anti-camping and temporary structure ordinances criminalizes "conduct that society has an interest in preventing."

Here, plaintiffs argue that the City is enforcing the anti-camping ordinance to prohibit sleeping or lying on public property at any time if "bedding material" is present. Plaintiffs allege that officers cited Anderson for napping on top of his sleeping bag in a City park during the day. Plaintiffs further allege that police officers have told Bailey, Chase, and Goldman to "move along" when lying down or sleeping on public property. Plaintiffs maintain that Portland has far more homeless people than available shelter space, and that many homeless people cannot access shelters based on physical disabilities, mental illness, or other factors. Plaintiffs argue that if homeless people have nowhere else to sleep, punishing them for sleeping in a public place essentially renders sleeping, and their status of homelessness, a crime.

Thus, I find that plaintiffs adequately state a claim under the Eighth Amendment, in that they allege that the City's enforcement of the anti-camping and temporary structure ordinances criminalizes them for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property. Given that plaintiffs bring an as-applied challenge, precisely when, where and how the City enforces the anti-camping and temporary structure ordinances requires development of the facts. Accordingly, the City's motion is denied with respect to plaintiff's Eighth Amendment claim.

B. Equal Protection

***8** The City next moves for dismissal of plaintiffs' equal protection claim, arguing that strict scrutiny does not apply to the court's review of the challenged ordinances, and that the City posits a rational basis for the prohibition of camping and temporary structures on public property.

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' " *Plyler v. Doe,* 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (quoting *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920)). Where a plaintiff alleges selective enforcement of criminal laws in violation of the Equal Protection Clause, the "plaintiff must demonstrate that enforcement had a discriminatory effect and the police were motivated by a discriminatory purpose." *Rosenbaum v. City and County of San Francisco,* 484 F.3d 1142, 1152 (9th Cir.2007) (citing *Wayte v. United States,* 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985)). Further, plaintiffs "seeking to enjoin alleged selective enforcement must demonstrate the police misconduct is part of a 'policy, plan, or a pervasive pattern.' " *Id.* at 1153 (quoting *Thomas v. County of Los Angeles,* 978 F.2d 504, 509 (9th Cir.1993)).

Notably, "the availability of such a claim has never been limited only to those groups accorded heightened scrutiny under equal protection jurisprudence." *Stemler v. City of Florence,* 126 F.3d 856, 874 (6th Cir.1997). "Instead, a plaintiff makes out a selective-enforcement claim if she shows that the state based its enforcement decision on an 'arbitrary classification,' that ... gives rise to an inference that the state 'intended to accomplish some forbidden aim' against that group through selective application of the laws." *Id.* (quoting *Oyler v. Boles,* 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) and *Futernick v. Sumpter Twp.,* 78 F.3d 1051, 1056 (6th Cir.1996)).

Thus, for purposes of this motion I need not decide whether homelessness is a "suspect class," whether sleeping is a "fundamental right," or whether strict scrutiny or rational basis review applies. [2] Here, plaintiffs allege that police officers cited Anderson for napping on a sleeping bag in a public park, repeatedly tell Bailey, Chase, and Golden to "move along" while lying down or sleeping outside, and seize personal property while conducting camp clean-ups without adequate notice. Further, plaintiffs allege that the City's enforcement is strategically deployed to target and harass homeless persons. Given plaintiffs' allegations of selective enforcement of the anti-camping and temporary structure ordinances against the homeless based on improper motives, I find that plaintiffs sufficiently state an equal protection claim.

C. Right to Travel and Freedom of Movement

The City moves for dismissal of plaintiffs' right to travel and freedom of movement claims, arguing that the challenged ordinances do not distinguish between residents and non-residents, apply to all persons within the City limits, and do not infringe on plaintiffs' rights to interstate travel or freedom of movement.

***9** Plaintiffs respond that the anti-camping and temporary structure ordinances burden their fundamental right to travel and freedom of movement by denying their ability to "merely exist in a place," i.e., to travel to and reside in the City of Portland, without risking citation or arrest. Plaintiffs argue that being cited or told to "move along" for sleeping outside with "any sleeping matter" on any public property at any time restricts homeless persons' ability to travel to or reside in Portland. I am not persuaded.

"Citizens have a fundamental right of free movement, historically part of the amenities of life as we have known them." *Nunez by Nunez v. City of San Diego,* 114 F.3d 935, 944 (9th Cir .1997) (citation and quotation marks omitted). The Supreme Court has "expressly identified this 'right to remove from one place to another according to inclination' as 'an attribute of personal liberty' protected by the Constitution." *City of Chicago v. Morales,* 527 U.S. 41, 53, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). Further, the Constitution guarantees the fundamental right to interstate travel. *Nunez,* 114 F.3d at 944 (citing *Shapiro v. Thompson,* 394 U.S. 618, 629, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969)). The Supreme Court has not recognized a fundamental right to intrastate travel, though plaintiffs contend the right has been recognized implicitly.

Regardless, I am unpersuaded by the cases on which plaintiffs rely. In *Pottinger,* the district court declared that "the City's enforcement of laws that prevent homeless individuals who have no place to go from sleeping, lying down, eating and performing other harmless life-sustaining activities burdens their right to travel" by denying them "certain life necessities." 810 F.Supp. at 1580. In so holding, the district court cited *Memorial Hosp. v. Maricopa County,* 415 U.S. 250, 259, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), where the Supreme Court held that a statute conditioning free medical care on a one-year residency requirement violated the equal protection clause because it penalized the exercise of the right to travel by denying a basic "necessity of life." In contrast, the City here is not granting or withholding basic "necessities of life" through travel or residency restrictions. I thus decline to adopt the reasoning in *Pottinger.*

In *Johnson v. Board of Police Comm'rs,* 351 F.Supp.2d 929 (E.D.Mo.2004) the district court found a likelihood of success on the merits of the plaintiffs' right to travel claim, noting that they "have been arrested while eating, sitting, or standing in public places in the Downtown area," "physically removed from the Downtown area by police and abandoned north of the area," and "told that they are not wanted in certain Downtown areas." *Id.* at 949. Here, although plaintiffs allege that police officers may exclude homeless persons from public parks for violating the anti-camping or temporary structure ordinances, plaintiffs do not allege that they have been

excluded from a particular area of Portland. Therefore, I find *Johnson* distinguishable.

***10** As alleged in their Complaint, I fail to discern how the alleged actions of the City interfere with plaintiffs' constitutional right to travel. Plaintiffs allege that police officers have told them to "move along" when sleeping in public and conducted camp clean-ups and seized their property. However, plaintiffs do not allege that the City has attempted to restrain their movement, prevented them from traveling to or from the City, or excluded them from certain areas of the City. Granted, the City's enforcement of the anti-camping and temporary structure ordinances may render Portland unattractive to homeless persons, but it does not constitute inference with plaintiffs' right to travel or freedom of movement that rises to the level of a constitutional deprivation. *See Davison v. City of Tuscon,* 924 F.Supp. 989, 993 (D.Ariz.1996).

D. Substantive Due Process

Plaintiffs also assert a substantive due process claim, alleging that the "decision to remain in a public place of one's choice is as much a part of personal liberty as the freedom of movement inside our country's borders." Complaint, ¶ 53. Plaintiffs also allege that they have a "human need to sleep somewhere in the city in which they reside, and have no lawful alternative to sleeping outside." *Id.* ¶ 54.

However, plaintiffs cannot assert a substantive due process claim under the Fourteenth Amendment when the challenged conduct falls under a more specific constitutional right. *Albright v. Oliver,* 510 U.S. 266, 272–75, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); *Graham v. Connor,* 490 U.S. 386, 394–95, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.' " *Albright,* 510 U.S. at 273 (quoting *Graham,* 490 U.S. at 395).

Plaintiffs concede that the rights asserted under their substantive due process claim are duplicative of those asserted under their right to travel and freedom of movement claims. Therefore, this claim is dismissed.

CONCLUSION

Defendants' Motion to Dismiss (doc. 6) is GRANTED in part and denied in part. Plaintiffs' right to travel, freedom of movement, and substantive due process claims are HEREBY DISMISSED. Defendants' motion is denied with respect to plaintiffs' Eighth Amendment and equal protection claims.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 2386056

Footnotes

1 *Jones* involved a similar challenge brought by homeless persons against the City of Los Angeles. *Jones* was vacated by the Ninth Circuit to facilitate settlement between the parties and may not be cited as binding precedent. *Jones,* 505 F.3d 1006. However, because the decision to vacate did not affect the reasoning in *Jones,* I may consider it as persuasive authority in developing an informed analysis of the issues presented. *See DHX, Inc. v. Allianz AGF MAT, Ltd.,* 425 F.3d 1169, 1176 (9th Cir.2005) ("But at minimum, a vacated opinion still carries informational and perhaps even persuasive or precedential value.") (Beezer, J., concurring); *McKenzie v. Day,* 57 F.3d 1493, 1494 (9th Cir.1995) (utilizing vacated opinion as persuasive authority and adopting analysis).

2 Plaintiffs also allege that the City's enforcement interferes with their fundamental rights under the Eighth and Fourteenth Amendments.

2017 WL 1488464
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Stacy COBINE, Nanette Dean, Christina Ruble, Lloyd Parker, Gerrianne Schulze, Sarah Hood, Aaron Kangas, Lynette Vera, Aubrey Short, Marie Anntonette Kinder, and John Travis,
v.
CITY OF EUREKA, Eureka Police Department, and Andrew Mills, in his official capacity as Chief of Police, Defendants.

No. C 16–02239 JSW
|
Signed 04/25/2017

Synopsis

Background: Homeless individuals brought putative class action against the city, alleging violations of their Fourth, Eighth, and Fourteenth Amendment rights, as well as violation of their right to privacy under the California Constitution, arising out of city's eviction of individuals from their encampment in public marsh pursuant to anti-camping ordinance. City moved to dismiss.

Holdings: The District Court, Jeffrey S. White, J., held that:

[1] city's actions did not rise to level of deliberate indifference required to state substantive due process claim;

[2] plaintiffs' pre-enforcement challenge of ordinance prohibiting storage of personal property on public property was ripe for review;

[3] plaintiffs failed to make out a claim for violation of the Fourth Amendment with regard to city ordinance provision prohibiting storage of personal property in public areas and calling for impoundment of personal property found stored on public property;

[4] pre-enforcement challenge of provision of ordinance calling for immediate destruction of bulky items and items posing threat to health and safety of public was not ripe for review; and

[5] plaintiffs failed to allege claim for relief for violation of their right to autonomy privacy under the California Constitution.

Motion granted in part and denied in part.

West Headnotes (25)

[1] Federal Courts
Evidence;Affidavits

As a general rule, a district court may not consider any material beyond the pleadings in ruling on a motion to dismiss for lack of subject matter jurisdiction; however, documents subject to judicial notice may be considered. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[2] Sentencing and Punishment
Declaring Act Criminal

The Eighth Amendment prohibition against cruel and unusual punishment imposes substantive limits on what can be made criminal and punished as such. U.S. Const. Amend. 8.

Cases that cite this headnote

[3] Constitutional Law
Control and use in general

Municipal Corporations
Prevention of improper use or obstruction

City's alleged actions in evicting homeless individuals from their encampment in public marsh and prohibiting homeless population from residing in their own tents and makeshift shelters in their own encampment on public land, causing homeless individuals to reside and sleep on streets in unfamiliar areas and rendering them vulnerable to

assault, theft, and harassment, did not rise to level of deliberate indifference required to state a substantive due process claim under danger-creation doctrine; homeless individuals did not demonstrate that city placed them in an inherently more dangerous situation than they had faced previously in absence of allegations of intentional eviction during precarious weather conditions or facts indicating deliberate indifference to safety and welfare of the population. U.S. Const. Amend. 14.

Cases that cite this headnote

[4] **Constitutional Law**
Personal and bodily rights in general

The Due Process Clause of the Fourteenth Amendment protects a citizen's liberty interest in her own bodily integrity. U.S. Const. Amend. 14.

Cases that cite this headnote

[5] **Constitutional Law**
Creation of danger or risk

Although the state's failure to protect an individual against private violence does not generally violate the guarantee of due process, it can where the state action affirmatively places the plaintiff in a position of danger, that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced. U.S. Const. Amend. 14.

Cases that cite this headnote

[6] **Constitutional Law**
Creation of danger or risk

Under the danger-creation doctrine, which is an exception to general rule that Fourteenth Amendment's Due Process Clause does not confer any affirmative right to governmental protection from private violence, courts consider the whether the danger was affirmatively created by the state action, and whether the state acted with deliberate indifference to a known or obvious danger. U.S. Const. Amend. 14.

Cases that cite this headnote

[7] **Constitutional Law**
Creation of danger or risk

When examining whether a state actor affirmatively places an individual in danger, a court does not look solely to the agency of the individual, nor should it rest its opinion on what options may or may not have been available to the individual; instead, court must examine whether the state actor left the person in a situation that was more dangerous than the one in which they found him. U.S. Const. Amend. 14.

Cases that cite this headnote

[8] **Constitutional Law**
Creation of danger or risk

Deliberate indifference to a known or obvious danger to which an individual is subjected, as element for due process violation based on danger creation, is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his actions. U.S. Const. Amend. 14.

Cases that cite this headnote

[9] **Searches and Seizures**
Determination and relief

Homeless individuals adequately alleged that they faced a realistic danger of sustaining direct injury as result of city's enforcement of ordinance prohibiting storage of personal property in public areas and calling for impoundment of personal property found stored on public property, as required for their Fourth Amendment pre-enforcement challenge to the ordinance to be ripe for judicial review, where individuals alleged that they planned to store their personal belongings on public property and that they faced credible threat that city would try to

enforce the ordinance against them. U.S. Const. Amend. 4.

Cases that cite this headnote

[10] **Federal Courts**
Threat of enforcement

A pre-enforcement challenge to a statute or ordinance is ripe where the government conduct poses a real and immediate threat to a plaintiff's constitutional rights.

Cases that cite this headnote

[11] **Constitutional Law**
Persons Entitled to Raise Constitutional Questions;Standing

Constitutional Law
Ripeness;prematurity

To satisfy Article III standing or ripeness prerequisite to asserting pre-enforcement challenge to a statute or ordinance, plaintiff must demonstrate that he has suffered an injury-in-fact, that is, he faces a realistic danger of sustaining a direct injury as result of statute's operation or enforcement; direct injury requirement, however, does not have to be fully consummated in order to obtain preventative relief, as it is sufficient for standing purposes that plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is credible threat that the challenged provision will be invoked against plaintiff. U.S. Const. art. 3, § 2, cl. 1.

Cases that cite this headnote

[12] **Searches and Seizures**
Persons, Places and Things Protected

Fourth Amendment protects man's personal right to retreat into his own home, no matter how ramshackle, and be free from intrusion. U.S. Const. Amend. 4.

Cases that cite this headnote

[13] **Searches and Seizures**
Circumstances Affecting Validity of Warrantless Search, in General

The government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking. U.S. Const. Amend. 4.

Cases that cite this headnote

[14] **Municipal Corporations**
Destruction of or injury to property

Searches and Seizures
Particular concrete cases

Homeless individuals failed to make out claim for violation of the Fourth Amendment with regard to provision of city ordinance prohibiting storage of personal property in public areas and calling for impoundment of personal property found stored on public property, since they alleged, and ordinance text showed, that ordinance included procedural safeguards to prevent erroneous or unconstitutional deprivation of individuals' property, as it gave 24-hour notice prior to impounding of any personal property and required that impounded personal property be stored by city for 90 days prior to being discarded. U.S. Const. Amend. 4.

Cases that cite this headnote

[15] **Searches and Seizures**
Determination and relief

Homeless individuals' Fourth Amendment pre-enforcement challenge to portion of city ordinance that called for immediate destruction of bulky items left or stored in public areas or items deemed so left or stored that were deemed to pose immediate threat to health or safety of the public was not ripe for judicial review; although ordinance provided no procedural safeguard as it did not explicate how large items would be treated or if owners would get sufficient notice to find storage elsewhere, nor did it state how city would determine any particular item posed

actual threat to health or safety of the public or whether storage, instead of destruction, was feasible, allegations did not state that any of the individuals currently owned a bulky item or item that could be considered to pose immediate threat to health and safety of the public. U.S. Const. Amend. 4.

Cases that cite this headnote

[16] **Constitutional Law**
Particular Issues and Applications
Municipal Corporations
Invasion of private rights in general

Homeless individuals failed to allege a claim for relief for violation of their right to autonomy privacy under the California Constitution based on the alleged loss of right to make intimate personal decisions and conduct personal activity without observation, intrusion, or interference in order to take advantage of emergency shelter after city evicted them from their encampment in public marsh, where there were no allegations that state action was responsible for alleged privacy intrusions compelled by specific restrictions and conditions enforced by alternative shelters offered, as restrictions and conditions were not enforced by city, but rather, private groups that offered temporary shelter. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[17] **Constitutional Law**
Disclosure of personal matters

Legally protected privacy interest, as required to assert violation of right to autonomy privacy under the California Constitution, includes conducting personal activities without observation, intrusion, or interference as determined by established social norms. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[18] **Constitutional Law**
Reasonable, justifiable, or legitimate expectation

To assert violation of right to autonomy privacy under the California Constitution, plaintiff's expectations of privacy must be reasonable; this element of the claim rests on an examination of customs, practices, and physical settings surrounding particular activities as well as the opportunity to be notified in advance and consent to the intrusion. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[19] **Constitutional Law**
Right to Privacy

To assert violation of right to autonomy privacy under the California Constitution, in addition to privacy interest and reasonable expectation of privacy requirements, plaintiff must be able to show that intrusion is so serious in nature, scope, and actual or potential impact as to constitute an egregious breach of social norms. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[20] **Constitutional Law**
Compelling interest

No violation of right to autonomy privacy under California's Constitution occurs if claimed intrusion on privacy is justified by one or more compelling interests. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[21] **Constitutional Law**
Right to Privacy
Constitutional Law
Reasonable, justifiable, or legitimate expectation
Torts
Intrusion

Court assesses claim for violation of privacy under the California Constitution by application of common law and constitutional

tests for establishing a privacy violation, which requires court to consider (1) the nature of any intrusion upon reasonable expectations of privacy, and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant interests. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[22] **Civil Rights**
Nature and elements of civil actions

In order to state a claim under § 1983 for violation of the Constitution, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[23] **Civil Rights**
Private Persons or Corporations, in General

Since, in general, private parties do not act under color of state law for purposes of a § 1983 claim, in order to state a claim under § 1983 against a private party, plaintiff must allege facts tending to show that private party's conduct caused a deprivation of federal rights that may be fairly attributable to a state actor. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[24] **Civil Rights**
Private Persons or Corporations, in General

A two-part test exists to determine whether private-party action causes a deprivation that occurs under color of state law as required to state a claim under § 1983 against a private party: first, the deprivation of federal rights must be caused by exercise of some right or privilege created by the state, by rule of conduct imposed by the state, or by a person for whom the state is responsible, and second, the party charged with deprivation must be a state actor. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[25] **Civil Rights**
Private Persons or Corporations, in General

Civil Rights
Public support, license, or regulation; utilities and monopolies

Person may become a state actor, for purposes of a claim under § 1983, by performing a public function or being regulated to the point that the conduct in question is practically compelled by the state. 42 U.S.C.A. § 1983.

Cases that cite this headnote

Attorneys and Law Firms

Shelley Kay Mack, Peter Eric Martin, Martin & Mack LLP, Arcata, CA, for Plaintiff.

Cyndy Day–Wilson, City of Eureka, Eureka, CA, for Defendants.

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE

***1** Now before the Court is the motion filed by the City of Eureka, the Eureka Police Department and Andrew Mills, Chief of Police ("collectively "Eureka") to dismiss the first amended complaint for injunctive and declaratory relief pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Having carefully reviewed the parties' papers, considered their arguments and the relevant legal authority, the Court HEREBY DENIES and GRANTS IN PART the motion to dismiss.

The first amended complaint was filed by eleven homeless individuals in the City of Eureka, individually and now on behalf of all others similarly situated. Originally, the complaint was filed by plaintiffs Stacy Cobine, Nanette Dean, Christina Ruble, Lloyd Parker, Gerrianne Schulze, Sarah Hood, Aaron Kangas, Lynette Vera, Aubrey Short, Marie Anntonette Kinder, and John Travis (collectively "Plaintiffs") in tandem with a motion for a temporary retraining order ("TRO") seeking to enjoin Eureka from removing the homeless individuals and their belongings from an encampment at the Palco Marsh on the Eureka Waterfront on May 2, 2016.

On the morning of May 2, 2016, after consideration of the parties' papers, relevant legal authority, and the record, and having had the benefit of oral argument, the Court granted in part and denied in part the motion for a TRO.

After the clearing of the Palco Marsh encampment, on May 17, 2016, Eureka moved to dismiss this action. Thereafter Plaintiffs filed a first amended complaint, thereby mooting the motion to dismiss. The amended complaint updates the factual predicate of this matter post-eviction and seeks to bring the action as a putative class action by and on behalf of homeless residents of the City of Eureka for violations of the Fourth, Eighth and Fourteenth Amendments to the United States Constitution pursuant to 42 U.S.C. Section 1983 and Article I, Sections 1, 7, and 17 of the California Constitution. Plaintiffs allege four claims for relief: (1) violation of prohibition against cruel and unusual punishment under the Eighth Amendment and California Constitution Sections 7 and 17; (2) violation of substantive due process under the Fourteenth Amendment and California Constitution Article I, Section 7; (3) violation of the right to be secure from unreasonable seizures under the Fourth Amendment; and (4) violation of the right to privacy pursuant to the United States Constitution and the California Constitution Article I, Section 1.

BACKGROUND

Plaintiffs, a group of eleven homeless individuals, have sued Eureka for alleged violations of their constitutional and statutory rights. According to the allegations in their complaint, Plaintiffs contend that Eureka announced that on May 2, 2016, it was going to evict a sizable community of homeless people who were then living at an encampment at the Palco Marsh. (First Amended Complaint ("FAC") ¶ 2.) The Palco Marsh is located on City property near the Bayshore Mall in Eureka, California, and is a portion of land that had been occupied by a homeless population since 2002. (*Id.*)

***2** On March 18, 2016, the City of Eureka established a deadline of May 2, 2016 for the removal of the homeless encampment then in violation of Eureka's anti-camping ordinance, codified at Eureka Municipal Code section 93.02. (*Id.* at ¶¶ 5, 191.) On March 22, 2016, the Eureka Police Department distributed flyers entitled "Notice to Vacate" to homeless individuals living at the Palco Marsh. (*Id.* at ¶ 192.) The Notice indicated that it was a violation of the Municipal Code to camp on public or private property within the City of Eureka and that all personal property had to be removed prior to May 2, 2016 or the City would remove the property. (*Id.*) The Notice further indicated that any property that was removed could be reclaimed by arrangement with the City within 90 days of its removal. (*Id.* at ¶ 193.) Lastly, the Notice indicated that any person who failed to comply with the provisions of the Notice and to vacate the area of all possessions would be prosecuted. (*Id.*)

The City of Eureka's anti-camping ordinance provides:

> **§ 93.02 Camping Permitted Only in Specifically Designated Areas**
>
> (A) Except as provided herein, no person shall camp in any public of private space or public or private street, except in areas specifically designed for such use. ***CAMP*** shall mean residing in or using a public or private space for living accommodation purposes, such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings (including but not limited to clothing, sleeping bags, bedrolls, blankets, sheets, luggage, backpacks, kitchen utensils, cookware, and similar material), or making any fire or using any tents, regularly cooking meals, or living in a parked vehicle. These activities constitute camping when it reasonably appears, in light of all the circumstances, that a person is using a public space as a living accommodation regardless of his/her intent or the nature of any other activities in which he/she might also be engaging. ***PRIVATE*** shall mean affecting or belonging to private individuals, as distinct from the public generally. All police officers

are hereby charged with the enforcement of the camping provisions of this chapter.

Eureka, Cal. Municipal Code § 93.02. Public space includes parks, beaches, public parking lots or public areas. Public streets are defined to include any public street or public sidewalk, including public benches. (*Id.*)

Penalties for violation of the anti-camping code are provided by Eureka Municipal Code section 10.99, which provides that "[i]t shall be unlawful for any person to violate any provision or fail to comply with any of the requirements of this code.... Any person violating any of such provisions or failing to comply with any of the mandatory requirements of this code shall be guilty of a misdemeanor ... [and] shall be punishable by a fine of not more than $1,000 or by imprisonment in the county jail for a period not exceeding six months, or by both such fine and imprisonment." Eureka, Cal. Municipal Code § 10.99.

The City of Eureka planned to evict the homeless occupants of the Palco Marsh in order to tear down several concrete structures located in the vicinity and to make way for a new segment of the Eureka Waterfront Trail. According to the parties' submissions, this eviction has been completed.

Plaintiffs allege that in July 2016, the Eureka City Council unanimously passed a municipal ordinance codifying the process the City had been following with regard to personal property stored in public areas. (FAC ¶ 209.) The ordinance, now codified at Eureka Municipal Code Section 130.14, provides that " 'no Person shall Store Personal Property in Public Area,' and 'All Stored Personal Property in Public Area may be impounded by the City' pursuant to 24–hours written notice. Impounded personal property is to be stored by the City for ninety (90) Days, and if not claimed within that time period, may be discarded. The proposed ordinance further provided that 'bulky items'—except for tents, any item too large to fit in a closed 60–gallon bin—and those items deemed by Defendants to pose 'an immediate threat to the health or safety of the public' may be immediately removed without prior notice and summarily discarded." (*Id.*)

***3** The Court shall address further specific details as necessary in the remainder of its order.

ANALYSIS

A. Applicable Legal Standard for Motion to Dismiss.

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. The Court's "inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle [ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)).

Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570, 127 S.Ct. 1955. "A claim has facial plausibility when 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, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246–47 (9th Cir. 1990).

[1] As a general rule, "a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds, Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (citation omitted). However, documents subject to judicial notice may be considered on a motion to dismiss. In doing so, the Court does not convert a motion to dismiss to one for summary judgment. *See Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). The Court may review matters that are in the public record,

including pleadings, orders and other papers filed in court. *See id.*

B. Eighth Amendment Claim.

Eureka moves to dismiss Plaintiffs' first claim for relief for violation of the prohibition against cruel and unusual punishment afforded by the Eighth Amendment and the California Constitution Article I, Section 7. Plaintiffs argue that criminalizing public camping in a city without adequate shelter space to accommodate the city's homeless population constitutes the criminalization of homelessness itself, in violation of the Eighth Amendment.

[2] The Eighth Amendment prohibition against cruel and unusual punishment "imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667–68, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). The Supreme Court has interpreted the scope of those limitations to find that laws criminalizing an individual's status, rather than specific conduct, are unconstitutional. *See, e.g., Robinson v. California*, 370 U.S. 660, 666–67, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). In *Robinson*, the Court struck down a state statute that made it a criminal offense to be addicted to narcotics on the ground that it made an addicted person "continuously guilty of [the] offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there." *Id.* at 666, 82 S.Ct. 1417. Such a statute, the *Robinson* Court declared, would be akin to a law making "it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease," and would "be universally thought to be an infliction of cruel and unusual punishment." *Id.*

***4** A few years later, in *Powell v. Texas*, the Supreme Court addressed whether a statute criminalizing public intoxication would be impermissible under the Eighth Amendment. 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). In a four-judge plurality upholding the conviction, the Court found that its prior precedent in *Robinson* prohibited the criminalization of status and noted that the statute in *Powell* concerned conduct—the act of being intoxicated in public, rather than the status of alcohol addiction. *Id.* at 534, 88 S.Ct. 2145. The plurality found that plaintiff had not definitively demonstrated that he was incapable of avoiding public intoxication as a result of his alcohol addiction. *Id.* at 521–25, 88 S.Ct. 2145. In a separate concurrence, Justice White upheld the plaintiff's conviction and focused not on the distinction between status and conduct, but rather on the voluntariness of the prohibited conduct. *See Powell*, 392 U.S. at 548–51, 88 S.Ct. 2145 (White, J., concurring). Under Justice White's analysis, the statute would impermissibly criminalize conduct under the Eighth Amendment if sufficient evidence were presented to demonstrate the prohibited conduct was involuntary based on one's condition. *Id.* at 551, 88 S.Ct. 2145. In his concurrence, Justice White noted that for the homeless, "[f]or all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking." *Id.* Although he ultimately found that the plaintiff had not presented evidence demonstrating that he was incapable of avoiding public places while intoxicated, Justice White found that alcoholics who are homeless *could* show that "resisting drunkenness is impossible and that avoiding public spaces when intoxicated is also impossible," and for those individuals, the statute "is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk." *Id.*

Without a clear majority holding in *Powell*, the Ninth Circuit in *Jones v. City of Los Angeles* held a Los Angeles ordinance that criminalized sitting, lying, or sleeping in a public way at any time of day was unconstitutional as applied to the homeless. 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated by settlement*, 505 F.3d 1006 (9th Cir. 2007). [1] Because the record in *Jones* affirmatively established that the number of homeless individuals vastly outnumbered the amount of shelter beds and low income housing available in Los Angeles, the court determined that the homeless had no choice but to be present on the neighborhood's public streets and sidewalks. *Id.* at 1137. Accordingly, the Ninth Circuit found that the Eighth Amendment prohibited the defendant from punishing involuntary sitting, lying, or sleeping in public at any time of day because such conduct is an unavoidable consequence of being human and homeless without any available shelter in the City of Los Angeles. *Id.* at 1138.

Under the rubric adopted in *Jones*, the determination whether the ordinance in this matter violates the Eighth Amendment requires a two-part inquiry. First, the Court must determine whether the homeless have no choice but to sleep in the City of Eureka's public spaces. "This could

be established either on the basis that there is insufficient shelter space or perhaps because, for at least a portion of the homeless population, the 'chronic homeless,' living in a shelter is not a viable option." *Bell v. City of Boise*, 834 F.Supp.2d 1103, 1108 (D. Idaho 2011), *reversed on other grounds*, 709 F.3d 890, 894–95 (9th Cir. 2013).[2] Second, the Court must find that the enforcement of the ordinance "effectively penalizes the homeless simply for being present or engaging in innocent activity, such as sleeping, that does not warrant punishment under the Eighth Amendment and, in effect, criminalizes the status of being homeless." *Id.* In this matter, the factual record has not been developed and a determination on this inquiry would be premature.

In its motion to dismiss the complaint, Eureka argues that there have been other decisions which have determined that similar statutes addressing homeless conduct merely criminalize behavior and not status. *See, e.g., Ashbauer v. City of Arcata*, No. CV 08-02840 MHP (NJV), 2010 WL 11211481, at *6 (N.D. Cal. 2010) (holding that "the Eighth Amendment does not extend protection to involuntary conduct, such as camping overnight on public grounds, attributable to Plaintiffs' homeless status."); *see also Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 40 Cal.Rptr.2d 402, 892 P.2d 1145 (1995) (holding that plaintiffs had not established that they lacked "alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations"). The Court finds persuasive those courts that have recognized a basis for an Eighth Amendment challenge to an ordinance proscribing conduct that may be involuntary. Should this Court find, through the development of the factual record that the evidence establishes that Eureka has available and adequate homeless shelter space, the camping ordinance would not be found to criminalize involuntary conduct as a result of homelessness. *See, e.g., Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000) (affirming summary judgment where city produced unrefuted evidence that it provided available space the concluding that the camping ordinance therefore did not criminalize involuntary behavior). However, without a developed factual record and based solely on the representations made in the complaint which at this procedural posture must be taken as true, the Court finds that a determination on the viability of an Eighth Amendment challenge to Eureka's City ordinance is premature. Accordingly, the motion to dismiss the Eighth Amendment claim for relief is DENIED.

C. Substantive Due Process Claim.

***5** **[3]** **[4]** **[5]** **[6]** In their second claim for relief, Plaintiffs make an as-applied challenge based upon a violation of the Fourteenth Amendment to the United States Constitution and violation of the California Constitution Article 1, Section 7 for violation of substantive due process rights. Plaintiffs allege that Eureka violated their substantive due process rights by placing them in a known danger with deliberate indifference to their personal, physical safety. It is well established that the Constitution protects a citizen's liberty interest in her own bodily integrity. *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 673–74, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); *Wood v. Ostrander*, 879 F.2d 583, 589 (9th Cir. 1989). It is also well established that "although the state's failure to protect an individual against private violence does not generally violate the guarantee of due process, it can where the state action 'affirmatively place[s] the plaintiff in a position of danger,' that is, where the state action creates or exposes an individual to a danger which he or she would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006) (citations omitted). Under the danger-creation doctrine, courts consider the whether the danger was affirmatively created by the state action, and whether the state acted with deliberate indifference to a known or obvious danger. *See id.* at 1062–64.

[7] **[8]** When examining whether a state actor "affirmatively places an individual in danger, [a court does] not look solely to the agency of the individual, nor [should it rest its] opinion on what options may or may not have been available to the individual. Instead, [the court must] examine whether the [state actor] left the person in a situation that was more dangerous than the one in which they found him." *Id.* at 1061–62. Deliberate indifference "is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his actions." *Bryan County v. Brown*, 520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

In *Sanchez v. City of Fresno*, the district court found that homeless plaintiffs had stated a claim under the danger-creation doctrine where plaintiffs alleged that the city had timed the demolitions of plaintiffs' shelters and property during the onset of the winter months where they knew that the cold and freezing temperatures and

weather conditions would threaten plaintiffs' continued survival. 914 F.Supp.2d 1079, 1102 (E.D. Cal. 2012). Here, Plaintiffs allege that the City's forced eviction from the Palco Marsh encampment and prohibition on the homeless population from residing in their own tents and makeshift shelters in their own encampment on public land caused them to reside and sleep "on the street in unfamiliar areas, and without the support of the community, render[e]d them vulnerable to assault, theft, harassment, and worse." (FAC at ¶¶ 4, 212.)

However, considering the stringent standard for finding deliberate indifference, the Court finds here that the allegations do not confirm that the state action was the impetus that put Plaintiffs in an inherently dangerous situation. In the absence of particular allegations that the state action put the Plaintiffs in an inherently dangerous situation, the Court is bound to find that the generalized dangers of living on the street preexisted Plaintiffs' relocation from the Palco Marsh. From the allegations in the amended complaint, it appears that the encampment residents were permitted to sleep in a City-owned parking lot or were offered temporary emergency shelter accommodations. (*See id.* at ¶¶ 202, 203.) The current circumstances are certainly not ideal, but the Court finds they do not amount to a deliberate indifference of placing Plaintiffs in an inherently more dangerous situation than they had faced previously. The general circumstances of being homeless in Humboldt County cannot be minimized. Without allegations of intentional eviction during precarious weather or other facts indicating deliberate indifference to the safety and welfare of the population, the Court must dismiss the claim. *See Sanchez*, 914 F.Supp.2d at 1102. The specific allegations here of state action regarding finding temporary shelter alternatives or moving a substantial portion of the population to a parking lot from public land does not rise to the level required by the stringent standard of deliberate indifference.

***6** Accordingly, the Court GRANTS the motion to dismiss the second claim for relief for violation of substantive due process under the Fourteenth Amendment and the California Constitution, Article 1, Section 7. Because there are factual circumstances which might meet the burden of affirmatively placing an individual who is already facing the dangers of homelessness in a more precarious situation, the Court finds it would not be futile to allow amendment to the Plaintiffs' second claim for relief for substantive due process violation. The second claim for relief is dismissed with leave to amend.

D. Fourth Amendment Claim.

Plaintiffs contend that, by adoption of a new City ordinance, Eureka's intended conduct will violate Plaintiffs' Fourth Amendment rights to be secure from government seizure and destruction of their personal property. The new ordinance, Eureka Municipal Code Section 130.14 ("Section 130.14"), entitled "Storage of Personal Property in Public Areas," states that the "unauthorized use of public areas for the storage of personal property interferes with the rights of other members of the public to use public areas for their intended purposes.... The purpose of this ordinance is to ... prevent the misappropriation of public areas and parks for personal use, and to promote the health and safety by ensuring the public areas remain readily accessible for their intended uses." (FAC at ¶ 222.)

Section 130.14 provides that " 'no Person shall Store Personal Property in Public Areas,' and 'All Stored Personal Property in Public Areas may be impounded by the City' pursuant to 24–hours written notice. Impounded personal property is to be stored by the City for ninety (90) days, and if not claimed within that time period, may be discarded. The ordinance further provides that 'bulky items'—except for tents, any item too large to fit in a closed 60–gallon bin—and those items deemed by Defendant to pose 'an immediate threat to the health or safety of the public' may be immediately removed without prior notice and summarily discarded." (*Id.* at ¶ 223.)

Plaintiffs contend that they have property rights in their personal possessions and belongings, even when they are stored in a public area. This property is not contraband or evidence of a crime, and therefore, they contend, Defendants' enforcement of the new municipal code "will result in the unreasonable seizure and destruction of their personal property in violation of their Fourth Amendment rights." (*Id.* at ¶ 224.)

1. Ripeness.

[9] **[10]** **[11]** First, Defendants contend that an as-applied challenge is not yet ripe as no particular Plaintiff complains of a current enforcement of the new municipal ordinance. However, the Court finds the pre-enforcement

challenge to the ordinance ripe where, as here, the government conduct poses a "real and immediate threat" to a plaintiff's constitutional rights. *See, e.g., Susan B. Anthony List v. Driehaus*, — U.S. —, 134 S.Ct. 2334, 2342–43, 189 L.Ed.2d 246 (2014) (holding that a plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."). Whether this Court views the question as one of standing or of ripeness, under Article III, a federal court only has jurisdiction to hear claims that present an actual "case or controversy." *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The issues presented must be "definite and concrete, not hypothetical or abstract." *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93, 65 S.Ct. 1483, 89 L.Ed. 2072 (1945). In order satisfy this prerequisite, a plaintiff must demonstrate that he has suffered an "injury-in-fact," *i.e.*, that he faces "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). The direct injury requirement, however, does not have to be fully consummated in order to obtain preventative relief. *See, e.g., Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 143, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). Rather, it is sufficient for standing purposes that "the plaintiff intends to engage in 'a course of conduct arguably affected with a constitutional interest' and that there is a credible threat that the challenged provision will be invoked against the plaintiff." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154–55 (9th Cir. 2000) (quoting *Babbitt,* 442 U.S. at 298, 99 S.Ct. 2301).

***7** Here, the Court finds that Plaintiffs have sufficiently alleged that they plan to store their personal belongings on public property and that they face a credible threat that Defendants will try to enforce Section 130.14 against them. Accordingly, the Court finds the Fourth Amendment challenge to be justiciable.

2. Fourth Amendment Protections.

[12] The Fourth Amendment protects Plaintiffs and other homeless individuals' retreats, regardless how ramshackle. "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable chunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *Silverman v. United States*, 365 U.S. 505, 511 n.4, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961).

[13] Although "our sane, decent, civilized society has failed to afford more of an oasis, shelter, or castle for the homeless ... than their [tents], it is in keeping with the Fourth Amendment's 'very core' for the same society to recognize as reasonable homeless persons' expectation that their [tents] are not beyond the reach of the Fourth Amendment." *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1028 n.6 (9th Cir. 2012) (citing *State v. Mooney*, 218 Conn. 85, 588 A.2d 145, 161 (1991) ("The interior of [the homeless defendant's duffel bag and cardboard box] represented, in effect, the defendant's last shred of privacy from the prying eyes of outsiders, including the police. Our notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy, and would recognize its assertion as reasonable under the circumstances of this case.").) "The government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking." *Id.* at 1032 (citing *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008)). "This simple rule holds regardless of whether the property in question is an Escalade or [a tent], a Cadillac or a cart." *Id.*

[14] This Court finds that the homeless Plaintiffs' property is entitled to Fourth Amendment protection. In that context, the question before the Court is whether the municipal ordinance and the methods in which Defendants carry out the City's efforts to enforce its ordinance amount to a violation of that Fourth Amendment protection. Litigants in similar cases have succeeded in challenging a city ordinance where "they showed that the city failed to provide sufficient notice to the plaintiffs before seizing the property." *Acosta v. City of Salinas*, 2016 WL 1446781, at *5 (N.D. Cal. April 13, 2016); *see also Lavan*, 693 F.3d at 1032 (finding a substantial likelihood of success on the merits of a Fourth and Fourteenth Amendment claim where city admitted that it had a policy and practice of seizing and destroying homeless individuals' unabandoned possessions without any notice or an opportunity to be heard either before or after the seizure of their property).

Here, according to Plaintiffs' allegations and the text of the municipal code, the ordinance includes procedural

safeguards to prevent the erroneous or unconstitutional deprivation of Plaintiffs' property. The ordinance gives 24–hour notice prior to the impounding of any personal property and requires that impounded personal property be stored by the City for ninety days prior to being discarded. (FAC at ¶ 223.) Accordingly, the Court finds that Plaintiffs fail to make out a claim for violation of the Fourth Amendment with regard to the provision in the City ordinance giving notice and storing personal property left in public areas.

***8** **[15]** However, with regard to the provision in the ordinance calling for the immediate destruction of bulky items or items deemed to pose an immediate threat to health and safety of the public, it is not clear what procedural safeguards are in place. There is no provision in the code as drafted explicating how a large item would be treated and whether its owner would get sufficient notice to find alternate storage elsewhere. There is no indication in the text of the ordinance or in the allegations made by Plaintiffs demonstrating what procedural safeguards would guide how Defendants would determine that any particular item poses an actual threat to the health or safety of the public or whether storage, rather than immediate destruction, may be feasible. However, the operative complaint contains no allegation that any particular Plaintiff currently owns either a bulky item or an item that may be considered to pose an immediate threat to the health and safety of the public. On this basis, the as-applied challenge to the second portion of the new municipal code is not ripe for adjudication.

Accordingly, the Court GRANTS the motion to dismiss the third claim for relief for violation of the Fourth Amendment. Because there are factual circumstances which the Court could adjudicate an as-applied challenge to the immediate destruction provision of Section 130.14, the Court finds it would not be futile to allow amendment to Plaintiffs' third claim for relief. The third claim for relief is dismissed with leave to amend.

E. Violation of Privacy Claim.

[16] Lastly, Plaintiffs allege a fourth claim for relief for violation of their right to privacy under the United States Bill of Rights and the California Constitution Article 1, Section 1. Plaintiffs allege that the enforcement of the City's anti-camping ordinance "has left Plaintiffs without any shelter or other place where they may exercise the right to privacy that they previously enjoyed in their tents, shelters and encampments." (FAC ¶ 230.) Further, Plaintiffs allege that "the restrictions and challenging conditions associated with [ ] emergency shelters preclude many Plaintiffs from accessing them." (*Id.* at ¶ 231.) Plaintiffs contend that "[e]xcept under very limited and extreme circumstances that are not present here, public entities in California are prohibited from conditioning the receipt of public benefits on the waiver of constitutional rights. Defendants violate this principle by conditioning the benefit of obtaining shelter and meals on Plaintiff giving up their constitutionally protected right to privacy." (*Id.* at ¶ 233.)

[17] **[18]** **[19]** **[20]** **[21]** Plaintiffs contend that they should be able to state a claim for violation of their privacy rights because homeless individuals are afforded privacy rights in their shelters "from the prying eyes of outsiders.... Our notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy...." (Opp. Br. at 14) (citing *Lavan*, 693 F.3d at 1028 n.6). In order to assert a violation of the right to autonomy privacy under the California Constitution, a plaintiff must possess a legally protected privacy interest. *See Hernandez v. Hillsides, Inc.*, 47 Cal.4th 272, 287, 97 Cal.Rptr.3d 274, 211 P.3d 1063 (2009) (citing *Hill v. NCAA*, 7 Cal.4th 1, 35, 26 Cal.Rptr.2d 834, 865 P.2d 633 (1994)). "These interests include 'conducting personal activities without observation, intrusion, or interference' as determined by 'established social norms.' " *Id.* (citing *Hill,* 7 Cal.4th at 36, 26 Cal.Rptr.2d 834, 865 P.2d 633). Second, "the plaintiff's expectations of privacy must be reasonable. This element rests on an examination of 'customs, practices, and physical settings surrounding particular activities' as well as the opportunity to be notified in advance and consent to the intrusion." *Id.* (citing *Hill*, 7 Cal.4th at 36–37, 26 Cal.Rptr.2d 834, 865 P.2d 633). Lastly, the plaintiff must be able to show that "the intrusion is so serious in 'nature, scope, and actual or potential impact as to constitute an egregious breach of the social norms." *Id.* (citing *Hill*, 7 Cal.4th at 37, 26 Cal.Rptr.2d 834, 865 P.2d 633). Further, no constitutional violation occurs "if the intrusion on privacy is justified by one or more compelling interests." *Id.* at 287–88, 97 Cal.Rptr.3d 274, 211 P.3d 1063 (citing *Hill*, 7 Cal.4th at 38, 26 Cal.Rptr.2d 834, 865 P.2d 633). The Court assesses the claim for violation of privacy "under the rubric of the common law and constitutional tests for establishing a privacy violation.... [the Court must] consider (1) the nature of any intrusion

upon reasonable expectations of privacy, and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant interests." *Id.* at 288, 97 Cal.Rptr.3d 274, 211 P.3d 1063.

***9** Plaintiffs do not allege that the police or state agents investigated inside or intruded upon the contents of their tents. Rather, Plaintiffs allege their rights to privacy were violated by their removal from the group encampment and by the imperative to set up tents in other places in the City during night-time hours or to sleep in one of the shelters offered to them. Whether or not Plaintiffs maintained a reasonable expectation of privacy in the location of their tents, those expectations are weighed against the state's interests. In this matter, the policy of affording even temporary shelter or a place for the homeless population to set up sleeping arrangements away from public, environmentally protected areas, must be taken into account in the analysis.

[22] **[23]** **[24]** **[25]** Furthermore, with regard to the rules and requirements of the shelters afforded to Eureka's homeless population and collective living arrangements, Plaintiffs do not allege that these restrictions are enforced by Eureka. Unlike the conditioning of rights upon abdication of their privacy, Plaintiffs' alternative to staying at the Palco Marsh encampment are not conditioned upon the enforcement of the shelters' restrictions by the City of Eureka. *Cf. Robbins v. Superior Court*, 38 Cal.3d 199, 207, 211 Cal.Rptr. 398, 695 P.2d 695 (1985). Rather, according to the Plaintiffs' allegations, such restrictions are enforced by the private groups that offer temporary shelter. In order to state a claim under Section 1983 for violation of the Constitution, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *see also Ketchum v. Alameda County*, 811 F.2d 1243, 1245 (9th Cir. 1987). Generally, private parties do not act under color of state law. *Price v. Hawaii*, 939 F.2d 702, 707–08 (9th Cir. 1991). The complaint, therefore, must allege facts tending to show that the private parties' conduct has caused a deprivation of federal rights that may be fairly attributable to the state actor. *Id.* at 708 (*quoting Jones v. Community Redevelopment Agency,* 733 F.2d 646, 649 (9th Cir. 1984) (holding that conclusionary allegations of action under color of state law, "unsupported by facts, [will be] rejected as insufficient to state a claim.")). A two-part test exists to determine whether private-party action causes a deprivation that occurs under color of state law. *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). First, the deprivation must be caused by the exercise of some right or privilege created by the State; by a rule of conduct imposed by the state; or by a person for whom the State is responsible. *Id.* Second, the party charged with the deprivation must be a state actor. *Id.* A person may become a state actor by performing a public function or being regulated to the point that the conduct in question is practically compelled by the State. *Vincent v. Trend Western Technical Corp.,* 828 F.2d 563, 569 (9th Cir. 1987).

It does not appear from the allegations in the current complaint that a state action is responsible for the alleged privacy intrusions compelled by the specific restrictions and conditions enforced by the alternative shelters offered to Plaintiffs. It is furthermore unclear whether Plaintiffs have stated a viable claim for privacy rights in the location, as opposed to the contents, of their temporary abodes. The Court finds, as currently drafted, the allegations in support of Plaintiff's fourth claim for relief for violation of their privacy rights do not state a claim upon which relief can be granted under the California Constitution Article 1, Section 1 or the penumbra of rights afforded by the United States Constitution. Accordingly, the Court GRANTS The motion to dismiss the fourth claim for relief, with leave to amend.

CONCLUSION

***10** For the reasons set forth herein, the Court GRANTS IN PART and DENIES IN PART Eureka's motion to dismiss the first amended complaint. The Court provides Plaintiffs with leave to amend. Plaintiffs shall file an amended complaint, if any, within twenty days of the date of this Order. If Plaintiffs file an amended complaint in accordance with this Order, Eureka shall file its response within twenty days of service of the amended complaint.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2017 WL 1488464

Footnotes

1 Although the opinion has been vacated and cannot be cited for any precedential value, the Court finds its reasoning persuasive here.

2 The Ninth Circuit reversed the district court opinion as moot because enforcement of statute had been specifically prohibited by special order of the Boise Police Department where a person was on public property when there is no available overnight shelter.

2016 WL 8738401
Only the Westlaw citation is currently available.
United States District Court,
S.D. Texas, Houston Division.

DNOW L.P., Plaintiff/Petitioner,
v.
Chidinma Chisimdi "Janet"
OKORO, Defendant/Respondent.

Civil Action No. 4:16–cv–2382
|
Signed 08/10/2016

Attorneys and Law Firms

Stephen Jose Quezada, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Houston, TX, for Plaintiff/Petitioner.

ORDER GRANTING APPLICATION FOR TEMPORARY RESTRAINING ORDER

Kenneth M. Hoyt, United States District Judge

***1** Pending before the Court is the plaintiff/petitioner's, DNOW, L.P. (the "plaintiff"), Verified Original Complaint and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction. (Dkt. No. 1). The plaintiff has sued one of its former employees, Chidinma Chisimdi "Janet" Okoro (the "defendant"), seeking to restrain and/or enjoin her use of funds wrongfully obtained from it during her tenure as a payroll accountant. The plaintiff specifically alleges claims for violation of the Computer Fraud and Abuse Act, breach of fiduciary duties, conversion, and fraud by non-disclosure against the defendant.

The Court has jurisdiction to resolve this matter pursuant to 28 U.S.C. § 1331, as this case involves, *inter alia*, claims arising under a federal statute, namely the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. Rule 65 of the Federal Rules of Civil Procedure authorizes a district court to issue injunctions and restraining orders. *See* Fed. R. Civ. P. 65. Rule 65(b) expressly provides for the issuance of a temporary restraining order without written or oral notice if both of the following requirements have been satisfied:

> (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
>
> (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

Fed. R. Civ. P. 65(b)(1).

A district court may grant the extraordinary relief of a temporary restraining order or preliminary injunction if the movant establishes four prerequisites: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer immediate and irreparable harm if the temporary restraining order or injunction does not issue; (3) that the threatened harm to the movant outweighs any injury or damage the temporary restraining order or preliminary injunction may cause to the defendant; and (4) that the granting of the temporary restraining order or preliminary injunction will not disserve the public interest. *See Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987) (citing *Canal Author. of the State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)); *see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008). The movant "must satisfy a cumulative burden of proving each of the four elements enumerated before a temporary restraining order or preliminary injunction can be granted." *Clark*, 812 F.2d at 993 (citing *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985)). The decision whether to grant or deny a request for a temporary restraining order or preliminary injunction, however, is left to the sound discretion of the district court. *Miss. Power & Light Co.*, 760 F.2d at 621.

This Court determines that the plaintiff has satisfied the procedural requirements of Rule 65(b) as well as each of the four prerequisites necessary for issuance of a temporary restraining order in this matter. Based on the Verified Complaint and Application, as well as the supporting materials attached thereto and the applicable law, the Court finds that the plaintiff has made the necessary showing that there is a substantial likelihood that its claims will succeed on the merits and, unless a temporary restraining order is issued in this case, the defendant is likely to further dissipate funds taken from the plaintiff before notice can be given and a hearing

can be held on the plaintiff's application for preliminary injunction, causing the plaintiff irreparable harm for which there is no adequate remedy at law. The granting of a temporary restraining order in this instance will not disserve the public interest.

***2** Further, Federal Rule of Civil Procedure 65(c) provides that a district court "may issue a ... temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). Nevertheless, "[t]he Fifth Circuit has acknowledged that the amount of the security [required] is within the discretion of the district court, who can elect to impose no security at all." *New Orleans Home for Incurables, Inc. v. Greenstein*, 911 F. Supp.2d 386, 412–13 (E.D. La. 2012) (citing *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. Unit B Feb. 13, 1981) (citing *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978)). Given the facts presented and the peculiar nature of the events giving rise to the claims alleged herein and discussed in the record, this Court declines to require that the plaintiff post security at this juncture.

Accordingly, the plaintiff's application for a temporary restraining order is hereby **GRANTED**. The Court, therefore, ORDERS the following:

1. The defendant is directed to produce to the plaintiff a declaration made under penalty of perjury identifying every bank account in her name and every bank account which she has directly or indirectly controlled, or to which she has had access or actually accessed, directly or indirectly, since September 1, 2014, to the present within 72 hours of service of process of the Complaint and this Temporary Restraining Order;

2. The defendant, including her relatives, agents, assigns and/or attorneys acting on her behalf, are hereby restrained from accessing any monies from any and all accounts owned, controlled or maintained by her or to which she has access, without first obtaining written permission from this Court;

3. The defendant is directed to disclose the names and last known contact information, including address, employer, any and all phone numbers, and email addresses of individuals whom she utilized to withdraw funds from accounts to which she transferred monies obtained from the plaintiff during her employment;

4. The defendant is directed to surrender any and all passports under her name and/or any assumed name held or used by her to this Court, until this Court determines that she may travel without expending funds rightfully belonging to the plaintiff; and

5. All banks and/or financial institutions listed in Exhibit C (filed under seal) to the plaintiff's Verified Complaint and Application for Temporary Restraining Order, including, but not limited to, Wells Fargo Bank, Bank of America, U.S. Bank, Members Choice Credit Union, Citibank NY, Park Sterling Bank, Union Bank, Chase, and Capital One Bank, shall freeze for 14 days from the date of this Temporary Restraining Order, the accounts listed in Exhibit C (filed under seal) such that funds may not be withdrawn from those accounts. Such freeze shall be effective upon service of the Complaint and this Temporary Restraining Order on each respective bank or financial institution.

It is FURTHER ORDERED that this matter is set for a preliminary injunction hearing on **Wednesday, August 24, 2016 at 9:00 a.m.** in Courtroom 11A. All other relief not expressly granted is hereby DENIED.

It is so **ORDERED**.

All Citations

Slip Copy, 2016 WL 8738401

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Vann v. State, Ala.Crim.App., December 20, 2013

91 So.3d 724
Court of Criminal Appeals of Alabama.

STATE of Alabama
v.
Thornal Lee ADAMS.

CR–08–1728.
|
Nov. 5, 2010.

Synopsis

Background: Defendant, who was a convicted sex offender, was indicted for failing to provide the actual address where he would live or reside after his release following completion of incarceration. The Circuit Court, Montgomery County, No. CC–08–1514, Truman M. Hobbs, Jr., J., dismissed indictment. State appealed.

Holdings: The Court of Criminal Appeals, Welch, J., held that:

[1] former version of Community Notification Act (CNA) required defendants to provide an actual address;

[2] former version of CNA violated Equal Protection Clause as applied to indigent homeless sex offenders; and

[3] former version of CNA was cruel and unusual punishment as applied to indigent homeless sex offenders.

Affirmed.

Windom, J., concurred in the result.

Wise, P.J., recused herself.

Certiorari denied, Ala., 91 So.3d 755.

West Headnotes (34)

[1] Criminal Law
Review De Novo

Where the facts of a case are essentially undisputed, appellate courts must determine whether the trial court misapplied the law to the undisputed facts, applying a de novo standard of review.

1 Cases that cite this headnote

[2] Criminal Law
Review De Novo

Where the appeal concerns only questions of law, there is no presumption of correctness in favor of the trial court's judgment; appellate court's review of legal issues is de novo.

1 Cases that cite this headnote

[3] Criminal Law
Statutory issues in general

Criminal Law
Constitutional issues in general

When an appellate court interprets a statute or considers the constitutionality of a statutory provision, no presumption of correctness attaches to the trial court's interpretation of the statute.

2 Cases that cite this headnote

[4] Criminal Law
Review De Novo

Appellate court's review of constitutional challenges to legislative enactments is de novo.

Cases that cite this headnote

[5] Constitutional Law
Presumptions and Construction as to Constitutionality

Statutes are presumed to be constitutional.

1 Cases that cite this headnote

[6] Constitutional Law
Presumptions and Construction as to Constitutionality

In passing upon the constitutionality of a legislative act, courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain, rather than strike down, the enactment of a coordinate branch of the government; all these principles are embraced in the simple statement that it is the recognized duty of the court to sustain the act unless it is clear beyond a reasonable doubt that it is violative of the fundamental law.

1 Cases that cite this headnote

[7] **Constitutional Law**
Encroachment on Legislature

Courts do not hold statutes invalid because they think there are elements therein that are violative of natural justice or in conflict with the court's notions of natural, social, or political rights of the citizen, not guaranteed by the constitution itself, nor even if the courts think the act is harsh or in some degree unfair, and presents chances for abuse, or is of doubtful propriety; all of these questions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative bodies and are matters with which the courts have no concern.

Cases that cite this headnote

[8] **Constitutional Law**
Presumptions and Construction as to Constitutionality

Courts must afford the Legislature the highest degree of deference, and construe its acts as constitutional if their language so permits.

2 Cases that cite this headnote

[9] **Constitutional Law**
Burden of Proof

In order to overcome the presumption of constitutionality, the party asserting the unconstitutionality of the statute bears the burden to show that it is not constitutional.

6 Cases that cite this headnote

[10] **Mental Health**
Registration and Community Notification

Purpose of the Community Notification Act (CNA) is to protect the public, particularly children, from sex offenders by gathering and disseminating information about sex offenders both to law-enforcement agencies and to the communities in which sex offenders are living and/or working. Code 1975, § 15–20–20.

3 Cases that cite this headnote

[11] **Statutes**
Penal Statutes

Absent any indication to the contrary, the words in a penal statute must be given their ordinary and normal meaning; penal statutes are to reach no further in meaning than their words.

2 Cases that cite this headnote

[12] **Statutes**
Reason, reasonableness, and rationality

Statutes
Extrinsic Aids to Construction

Only if there is no rational way to interpret the words stated will courts look beyond those words to determine legislative intent; courts should turn to extrinsic aids to determine the meaning of a piece of legislation only if they can draw no rational conclusion from a straightforward application of the terms of the statute.

2 Cases that cite this headnote

[13] **Statutes**
Statute as a Whole;Relation of Parts to Whole and to One Another

In determining whether judicial construction is required, the language of the entire statute

under review must be read together and the determination of any ambiguity must be made on the basis of the entire statute.

3 Cases that cite this headnote

[14] **Statutes**
Context

Statutes
Giving effect to entire statute and its parts;harmony and superfluousness

Because the meaning of statutory language depends on context, a statute is to be read as a whole; there is a presumption that every word, sentence, or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used.

4 Cases that cite this headnote

[15] **Administrative Law and Procedure**
Deference to agency in general

Absent a compelling reason not to do so, a court will give great weight to any agency's interpretations of a statute and will consider them persuasive.

Cases that cite this headnote

[16] **Mental Health**
Effect of assessment or determination; notice and registration

Former version of Community Notification Act (CNA) required registered sex offenders to provide an actual "address," which meant a fixed place where offender lived continuously for a period and where mail could be received. Code 1975, § 15–20–22(a)(1) (2008).

3 Cases that cite this headnote

[17] **Criminal Law**
Liberal or strict construction;rule of lenity

Rule of lenity requires that ambiguous criminal statutes be construed in favor of the accused.

1 Cases that cite this headnote

[18] **Constitutional Law**
Other particular issues and applications

Mental Health
Sex offenders

As applied to indigent homeless sex offenders, requirement in prior version of Community Notification Act (CNA) that sex offenders provide an actual address at which they would reside following their release from incarceration violated Equal Protection Clause; unintended consequence of requirement was that indigent homeless sex offenders were treated differently from nonindigent homeless sex offenders on basis of poverty and that indigent homeless sex offenders who had served their prison sentences remained incarcerated solely because they had no funds with which to secure lodging and to obtain an address upon release from prison. U.S.C.A. Const.Amend. 14; Const. Art. 1, §§ 1, 6, 22; Code 1975, § 15–20–22(a)(1) (2008).

10 Cases that cite this headnote

[19] **Constitutional Law**
Poverty or Wealth;the Homeless

Equal Protection Clause does not require State to equalize economic conditions; a man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[20] **Constitutional Law**
Criminal law

When a state deems it wise and just that convictions be susceptible to review by an appellate court, Equal Protection Clause does not permit it by force of its exactions to draw a

line that precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court that would upset the conviction were practical opportunity for review not foreclosed; to sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a state, would justify a latter-day Anatole France to add one more item to his ironic comments on the majestic equality of the law. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[21] **Mental Health**
Sex offenders
Sentencing and Punishment
Sex offenders

Requirement in prior version of Community Notification Act (CNA) that sex offenders provide an actual address at which they would reside following their release from incarceration was cruel and unusual punishment as applied to indigent, homeless sex offender; offender's failure to provide an actual address was not voluntary conduct merely related to, or derivative from, his homeless status, but was entirely involuntary conduct that was inseparable from his homelessness, and, thus, statute effectively punished him for being homeless. U.S.C.A. Const.Amend. 8; Const. Art. 1, § 15; Code 1975, § 15–20–22(a)(1) (2008).

9 Cases that cite this headnote

[22] **Sentencing and Punishment**
Purpose of prohibition

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man; while the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[23] **Sentencing and Punishment**
Scope of Prohibition

Words of the Eighth Amendment are not precise, and their scope is not static; Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[24] **Sentencing and Punishment**
Declaring Act Criminal
Sentencing and Punishment
Proportionality
Sentencing and Punishment
Methods of Punishment

Cruel and Unusual Punishments Clause circumscribes criminal process in three ways: first, it limits kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to severity of crime; and third, it imposes substantive limits on what can be made criminal and punished as such. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[25] **Sentencing and Punishment**
Declaring Act Criminal

Although Eighth Amendment's substantive limits of what can be made criminal and punished as such are applied sparingly because Cruel and Unusual Punishment Clause has always been considered, and properly so, to be directed at method or kind of punishment imposed for violation of criminal statutes, a distinction exists between applying criminal laws to punish conduct, which is constitutionally permissible, and applying them to punish status, which is not. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[26] **Sentencing and Punishment**
Declaring Act Criminal

Involuntariness of the act or condition that is criminalized is the critical factor delineating a constitutionally cognizable status, and incidental conduct that is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[27] **Criminal Law**
Criminal act or omission

State may not criminalize being; that is, the state may not punish a person for who he is, independent of anything he has done.

Cases that cite this headnote

[28] **Criminal Law**
Criminal act or omission

State cannot punish a person for certain conditions, either arising from his own acts or contracted involuntarily, or acts that he is powerless to avoid.

Cases that cite this headnote

[29] **Courts**
Number of judges concurring in opinion, and opinion by divided court

When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of a majority of the justices, the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds.

Cases that cite this headnote

[30] **Criminal Law**
Criminal act or omission

In determining whether the state may punish a particular involuntary act or condition, courts are guided by admonition that the proper subject of inquiry is whether volitional acts brought about the condition and whether those acts are sufficiently proximate to the condition for it to be permissible to impose penal sanctions on the condition.

Cases that cite this headnote

[31] **Criminal Law**
Criminal act or omission

Vagrancy
Nature and elements of offenses

State may not make it an offense to be idle, indigent, or homeless in public places; nor may the state criminalize conduct that is an unavoidable consequence of being homeless, namely, sitting, lying, or sleeping on the streets of skid row.

Cases that cite this headnote

[32] **Sentencing and Punishment**
Particular offenses

Just as Eighth Amendment prohibits infliction of criminal punishment on an individual for being a drug addict, or for involuntary public drunkenness that is an unavoidable consequence of being a chronic alcoholic without a home, it prohibits city from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[33] **Mental Health**
Effect of assessment or determination; notice and registration

An offender who sleeps one night on a park bench, the next under a bridge, the next at a bus stop, and so on, has no "actual address" at which he or she will reside or live and which

can be reported as required by former version of Community Notification Act (CNA). Code 1975, § 15–20–22(a)(1) (2008).

Cases that cite this headnote

[34] Mental Health

Effect of assessment or determination; notice and registration

Sex offender who lives in a shelter for three weeks or on a couch in a friend's apartment for six months has an "actual address" at which he or she will reside or live under prior version of Community Notification Act (CNA). Code 1975, § 15–20–22(a)(1) (2008).

2 Cases that cite this headnote

West Codenotes

Prior Version Held Unconstitutional
Code 1975, § 15–20–22(a)(1)

Attorneys and Law Firms

***728** Troy King, atty. gen., and Beth Slate Poe, asst. atty. gen., for appellant.

David I. Schoen, Montgomery, for appellee.

Opinion

WELCH, Judge.

The State of Alabama appeals the trial court's order declaring unconstitutional that portion of former § 15–20–22(a)(1), Ala.Code 1975—a part of the Community Notification Act ("CNA"), § 15–20–20 et seq., Ala.Code 1975—requiring an adult criminal sex offender to provide the Alabama Department of Corrections ("DOC"), at least 45 days prior to the offender's release from custody, [1] "the actual address at which he or she will reside or live upon release" and dismissing the indictment charging Thornal Lee Adams with violating that section. We affirm. [2]

Facts

The facts are undisputed. Adams was convicted in 2001 of first-degree rape and first-degree sodomy. Section 15–20–21(1), Ala.Code 1975, defines "adult criminal sex offender" as any "person convicted of a criminal sex offense" and § 15–20–21(4), Ala.Code 1975, lists first-degree rape and first-degree sodomy as criminal sex offenses. Therefore, Adams is an adult criminal sex offender subject to the provisions of the CNA. Adams was incarcerated in Kilby Correctional Facility ("Kilby") and scheduled for release in 2008, after completing his sentence. He failed to provide the DOC with an actual address where he would live or reside after his release and, on his scheduled release date, he was arrested and transported to the Montgomery County Detention Facility for violating § 15–20–22(a)(1), Ala.Code 1975. Adams was subsequently appointed counsel and was indicted for that offense.

Counsel filed a motion to dismiss the indictment, arguing that the portion of former § 15–20–22(a)(1) that required an adult criminal sex offender to provide the DOC the actual address at which he or she would live or reside upon release at least 45 days before the offender's release from custody was unconstitutional on various grounds. Specifically, counsel argued that that portion of § 15–20–22(a)(1) was unconstitutional under both the United States Constitution and the Alabama Constitution because: (1) it did not provide any notice as to how a homeless adult ***729** criminal sex offender could comply with the statute and, thus, was vague on its face and as applied to Adams; (2) it constituted cruel and unusual punishment as applied to Adams because it punished him for his status as a homeless person; (3) it violated Adams's right to due process because it required Adams to perform an act that he was incapable of performing; and (4) it violated Adams's right to equal protection of the law because it incarcerated him for his indigence when other offenders who were not indigent would not be punished under the statute.

The State filed a response to the motion, arguing that the portion of § 15–20–22(a)(1) at issue: (1) was not unconstitutionally vague because, it argued, the term "actual address" simply meant the location where the offender could be found after his or her release; (2) did not constitute cruel and unusual punishment because, it

argued, it did not punish Adams for his homelessness but solely for failing to provide the location where he could be found after his release; (3) did not violate Adams's right to due process because, it said, Adams could have provided a "real location" where he could be found after his release and, thus, could have complied with the statute but refused to do so; and (4) did not violate Adams's right to equal protection of the law because, it argued, the statute did not punish Adams for his indigence but punished him because he refused to comply with the statute when he could have done so.

Adams's case was assigned to Montgomery circuit judge Truman Hobbs, who conducted a hearing on the motion to dismiss on July 13, 2009. Judge Hobbs consolidated Adams's case with Richard Coppage's case (case no. CC–09–323) for purposes of the hearing; the circumstances surrounding Coppage's case were similar to Adams's case in all relevant aspects, and Coppage's motion to dismiss involved the same legal issue.[3] At the hearing, Judge Hobbs accepted as evidence a transcript of the hearing conducted before Judge Tracy McCooey in a similar case involving Jeffrey Lee Seagle (case no. CC–09–733), in which Judge McCooey dismissed the indictment against Seagle.[4] On August 21, 2009, Judge Hobbs entered a single order dismissing the indictments against Coppage and Adams on the same four grounds asserted in the motions to dismiss.

The following evidence was presented in the trial court. Adams testified that he was a convicted sex offender and that he had been incarcerated in Kilby for seven months, with a scheduled release date of June 7, 2008.[5] In early 2008, Adams said, his classification officer asked him for an address where he would be living after his release. Adams told the officer that he did not have a place to live, and he asked the officer for advice. The officer told Adams that he had to get an address and that the library would have the information he needed to do so. Adams said that he did not believe that he could list a park bench or other public place as an address, and that he was told that he could not invent an address or list an address that did not comply with the residency restrictions in the CNA because the address ***730** would be both verified as a true address and checked to determine whether it complied with the CNA. Adams testified that he went to the Kilby library and obtained a listing of halfway houses. He wrote to all the halfway houses on the list that indicated they accepted sex offenders, approximately 13 to 15, but he had received no responses within 45 days of his scheduled release. Adams said that Kilby did not have a listing of apartments, rental houses, or motels, but that even if it did, he was indigent and could not have afforded to rent an apartment, house, or even a motel room. He also said that he did not have access to the Internet at Kilby; that he was not permitted to make telephone calls around the state to search for a place to live; that he could not leave the prison to look for a place to live; and that Kilby did not have any listing of schools, housing projects, etc., in the state to enable him to determine where he could live after his release and be in compliance with the residency restrictions in the CNA. Adams further testified that he had no friends or family with whom he could live and be in compliance with the residency restrictions in the CNA.

Adams testified that approximately 45 days before his scheduled release date, he was asked to fill out a form and to provide an address where he would be living when he was released. Adams wrote on the form "I don't have an address" and signed it. Adams said, however, that he received a response from one halfway house three days before his scheduled release from Kilby informing him that he had been accepted to live there but that when he informed his classification officer, he was told "it was too late for an address" and he was transported to the Montgomery County Detention Facility on the day of his release from Kilby.[6]

Rosie Smith, a paralegal with the Southern Poverty Law Center, testified that in May 2009 she conducted extensive research on available housing for homeless sex offenders. According to Smith, she looked at the list of halfway houses provided by Kilby, contacted eight regional offices of the Alabama Homeless Coalition, and conducted exhaustive Internet searches. Smith ultimately contacted 60 homeless shelters and/or halfway houses in Alabama and found that only 4 of those shelters/halfway houses accepted sex offenders. At the time she conducted her research, Smith said, all four of the places that accepted sex offenders were full. With respect to the list of halfway houses provided by Kilby to its prisoners, Smith testified that "a lot" of the addresses on the list were incorrect; that the list incorrectly stated that certain shelters/halfway houses accepted sex offenders when they did not; and that she was unable to find valid telephone numbers or addresses for many of the shelters/halfway houses listed, suggesting that they were no longer open.

Of the places on the Kilby list, Smith found only one that accepted sex offenders, and the director of that shelter informed her that available spots were severely limited because of funding issues. Smith also testified that one of the other three places she had found that accepted sex offenders required a $200 application fee that would rarely be waived, as well as a fee to live there, again because of funding issues, and that acceptance was solely in the director's discretion; that another place she found that accepted sex offenders accepted only certain sex offenders (those whose offenses were committed ***731** against adults) and that acceptance was solely in the director's discretion; and that the fourth, and final, place that she found that accepted sex offenders was limited solely to those offenders who had HIV or AIDS.

At the hearing, a blank copy of the form Adams said he had been required to fill out before his release from Kilby was introduced into evidence. The form is entitled "Alabama Department of Corrections Sex Offender Notification Worksheet." It appears from the hearing that the form used by Kilby is a standardized form used by the DOC throughout the State prison system. The form requests the "intended living address" of the offender to be released and provides a space for the offender to supply his or her "street/city/state/zip," as well as his or her "county," "phone number," "contact (residency)," and "employer's name and address (if any)" and "phone number." The form also requires the signature of the offender to be released with the following acknowledgment:

> "I hereby acknowledge that upon my release, I must live and abide according to the laws of the State of Alabama governing my conviction as a sex offender and I understand that I must report and register with the Sheriff of the county of residency within 7 days of my release. I understand that failure to do so can result in a conviction of a Class C felony. I also acknowledge that if I reside in a state other than Alabama, I must abide by the laws of that state."

Also introduced at Adams's hearing was a copy of DOC Regulation No. 455. That regulation provides generally the procedure to be used by prisons to comply with the CNA, and specifically with § 15–20–22, Ala.Code 1975, before a sex offender's release from prison. The regulation requires that the classification supervisor at each prison instruct any sex offender scheduled for release to fill out the "Alabama Department of Corrections Sex Offender Notification Worksheet"; that within five days of receiving an offender's form, the classification supervisor shall provide, "by telephone," the "proposed living and employment address" provided by the offender "to the local law-enforcement authorities of the declared county of residence and employment, if any" so that the local authorities may verify and approve the addresses; and that, if the living address provided by the offender is not approved, the classification officer shall "[i]nform the inmate that the provided living address was not approved and a new address is required." The regulation further provides that, if a "living address ... is not provided and approved 45 days prior to release," the classification supervisor shall notify the warden of the prison, and the warden, or other designated officer in the prison, "shall obtain a warrant for the arrest of the offender, for violation of the Alabama Community Notification Act."

Standard of Review

[1] [2] [3] [4] "Where, as here, the facts of a case are essentially undisputed, this Court must determine whether the trial court misapplied the law to the undisputed facts, applying a de novo standard of review." *Continental Nat'l Indem. Co. v. Fields,* 926 So.2d 1033, 1035 (Ala.2005). "Where the appeal concerns only questions of law, 'there is no presumption of correctness in favor of the trial court's judgment; this court's review of legal issues is de novo.' " *L.B.S. v. L.M.S.,* 826 So.2d 178, 185 (Ala.Civ.App.2002) (quoting *Morgan Bldg. & Spas, Inc. v. Gillett,* 762 So.2d 366, 368 (Ala.Civ.App.2000)). "In addition, '[w]hen an appellate court interprets a statute or considers the constitutionality of a statutory provision, no presumption of correctness attaches to the trial court's interpretation of the statute.' ***732** " *Id.* (quoting *Monroe v. Valhalla Cemetery Co.,* 749 So.2d 470, 471–72 (Ala.Civ.App.1999)). An appellate court's "review of constitutional challenges to legislative enactments is de novo." *Richards v. Izzi,* 819 So.2d 25, 29 n. 3 (Ala.2001).

[5] [6] [7] [8] [9] Moreover, statutes are presumed to be constitutional. As the Alabama Supreme Court has explained:

> "[I]n passing upon the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government. All these principles are embraced in the simple statement that it is the recognized duty of the court to sustain the act unless it is clear beyond reasonable doubt that it is violative of the fundamental law. *State ex rel. Wilkinson v. Murphy,* 237 Ala. 332, 186 So. 487, 121 A.L.R. 283 [(1939)].
>
> "Another principle which is recognized with practical unanimity, and leading to the same end, is that the courts do not hold statutes invalid because they think there are elements therein which are violative of natural justice or in conflict with the court's notions of natural, social, or political rights of the citizen, not guaranteed by the constitution itself. Nor even if the courts think the act is harsh or in some degree unfair, and presents chances for abuse, or is of doubtful propriety. All of these questions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative bodies, and are matters with which the courts have no concern. This principle is embraced within the simple statement that the only question for the court to decide is one of power, not of expediency or wisdom. 11 Am.Jur. pp. 799–812; *A.F. of L. v. Reilly, District Court of Colorado,* 7 Labor Cases No. 61, 761."

Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 9–10, 18 So.2d 810, 815 (1944). Simply put, "[w]e must afford the Legislature the highest degree of deference, and construe its acts as constitutional if their language so permits." *Monroe v. Harco, Inc.,* 762 So.2d 828, 831 (Ala.2000). "[I]n order to overcome the presumption of constitutionality ... the party asserting the unconstitutionality of the [statute], bears the burden 'to show that [the statute] is not constitutional.' " *State ex rel. King v. Morton,* 955 So.2d 1012, 1017 (Ala.2006) (quoting *Board of Trs. of Employees' Retirement Sys. v. Talley,* 291 Ala. 307, 310, 280 So.2d 553, 556 (1973)).

Analysis

All 50 states, the District of Columbia, and the federal government have enacted statutes providing for registration of sex offenders and for community notification of some of the personal information—including the whereabouts—of such offenders when they are released from incarceration. *Smith v. Doe,* 538 U.S. 84, 89–90, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003).

[10] The CNA, originally enacted in 1996,[7] provides a system for law enforcement to monitor sex offenders who have been released from prison and to notify the public of the presence of a sex offender in a community; it also places residency and other restrictions on sex offenders who have been released from prison and ***733** imposes reporting requirements. The CNA coincides with the registration requirements for sex offenders found in § 13A–11–200, Ala.Code 1975. The primary purpose of the CNA is to protect the public, particularly children, from sex offenders by gathering and disseminating information about sex offenders both to law-enforcement agencies and to the communities in which sex offenders are living and/or working.[8] The CNA has been described as "one of the most far-reaching and restrictive sex offender registration laws in the United States." *Larkin v.* ***734** *King,* (Ms. No. 2:10–CV–460–MEF, June 8, 2010) (M.D.Ala.2010) (not published in F.Supp.2d) (footnotes and internal citations omitted).

One of the requirements imposed on sex offenders by the CNA—the requirement at issue here—is to provide to the DOC, before being released from prison, an address at which the sex offender will live or reside upon being released. Various versions of this requirement have been included in the CNA since its inception in 1996. See Act No. 96–793, Ala. Acts 1996 (requiring that "[t]hirty days prior to ... release" a sex offender provide "the address at which he or she will reside upon release from incarceration"); Act No. 98–489, Ala. Acts 1998 (requiring that "[t]hirty days prior to ... release" a sex offender provide "the actual living address at which he or she will reside upon release"); Act No. 99–572, Ala. Acts 1999 (requiring that "[t]hirty days prior to ... release" a sex offender provide "the actual living address at which he or she will reside upon release"); and Act No. 2001–1127, Ala. Acts 2001 (requiring that "[t]hirty days prior to ... release" a sex offender provide "the actual living address at which he or she will reside upon release"). At the times of the crime in this case, § 15–20–22(a)(1), as amended effective October 1, 2005, by Act No. 2005–301, Ala. Acts 2005, provided:

"(a) Forty-five days prior to the release of an adult criminal sex offender, the following shall apply:

"(1) The responsible agency [9] shall require the adult criminal sex offender to declare, in writing or by electronic means approved by the Director of the Department of Public Safety, the actual address at which he or she will reside or live upon release and the name and physical address of his or her employer, if any. Any failure to provide timely and accurate declarations shall constitute a Class C felony. Any adult criminal sex offender in violation of this section shall be ineligible for release on probation or parole. Any adult criminal sex offender in violation of this section who is to be released due to the expiration of his or her sentence shall be charged with violating this section and, upon release, shall immediately be remanded to the custody of the sheriff of the county in which the violation occurred. Any adult criminal sex offender charged with violating this section may only be released on bond on the condition that the offender is in compliance with this section before being released."

The State argues on appeal that the trial court's finding that the former version of § 15–20–22(a)(1) is unconstitutional on four grounds is erroneous because, it says, if § 15–20–22(a)(1) is properly construed, it is not unconstitutional. In this regard, the State appears to agree with the trial court that the phrase "actual address at which he or she will reside" is ambiguous, and it urges this Court to broadly construe the phrase "to mean any physical place where such a person will be making his residence, either temporarily or permanently, whether that be a private dwelling, a shelter, a boat, a park bench, a bridge, or some other geographical space." Such a construction, the State argues, would be consistent with the legislative intent behind ***735** the CNA and would render the statute constitutional in all respects.

We reject the State's proposed construction of former § 15–20–22(a)(1)—which essentially requests us to substitute the term "location" for the term "address"—because we find it unnecessary to even engage in judicial construction of the statute. The words in the phrase "actual address at which he or she will reside or live" are neither ambiguous nor undefinable, and their plain meaning is easily applied to former § 15–20–22(a)(1).

It is well settled that "[w]ords used in the statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says." *Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa County,* 589 So.2d 687, 689 (Ala.1991). "[T]he first rule of statutory construction [is] that where the meaning of the plain language of the statute is clear, it must be construed according to its plain language." *Ex parte United Serv. Stations, Inc.,* 628 So.2d 501, 504 (Ala.1993). "Principles of statutory construction instruct this Court to interpret the plain language of a statute to mean exactly what it says and to engage in judicial construction only if the language in the statute is ambiguous." *Ex parte Pratt,* 815 So.2d 532, 535 (Ala.2001).

"The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature *as manifested in the language of the statute.*" *Ex parte State Dep't of Revenue,* 683 So.2d 980, 983 (Ala.1996) (emphasis added). Although legislative intent "may be gleaned from the language used, the reason and necessity for the act, and the purpose sought to be obtained," *Ex parte Holladay,* 466 So.2d 956, 960 (Ala.1985), "[i]n construing [a] statute, this Court should gather the intent of the legislature from the language of the statute itself, if possible." *Pace v. Armstrong World Indus., Inc.,* 578 So.2d 281, 283 (Ala.1991). "Absent a clearly expressed legislative intent to the contrary, the language of the statute is conclusive," *id.,* and "the court must give effect to the clear meaning of that language." *Beavers v. County of Walker,* 645 So.2d 1365, 1376–77 (Ala.1994).

[11] This fundamental rule of statutory construction applies to penal statutes. "Absent any indication to the contrary, the words [in a penal statute] must be given their ordinary and normal meaning." *Walker v. State,* 428 So.2d 139, 141 (Ala.Crim.App.1982). " 'Penal statutes are to reach no further in meaning than their words,' " *Ex parte Bertram,* 884 So.2d 889, 891 (Ala.2003) (quoting *Clements v. State,* 370 So.2d 723, 725 (Ala.1979), overruled on other grounds by *Beck v. State,* 396 So.2d 645 (Ala.1980)), and "it is well established that criminal statutes should not be 'extended by construction,' " *Ex parte Evers,* 434 So.2d 813, 817 (Ala.1983) (quoting *Locklear v. State,* 50 Ala.App. 679, 282 So.2d 116 (1973)).

[12] In sum, "[i]f the language of [a] statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature [in the plain language of the statute] must be given effect." *Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen,* 714 So.2d 293, 296 (Ala.1998) (quoting *IMED Corp. v. Systems Eng'g Assocs. Corp.,* 602 So.2d 344, 346 (Ala.1992)). "[O]nly if there is no rational way to interpret the words stated will we look beyond those words to determine legislative intent." *DeKalb County LP Gas Co. v. Suburban Gas, Inc.,* 729 So.2d 270, 276 (Ala.1998). "We should turn to extrinsic aids to determine the meaning of a piece of legislation only if we can draw no rational conclusion from a ***736** straightforward application of the terms of the statute." 729 So.2d at 277.

[13] **[14]** **[15]** In determining whether judicial construction is required, "[t]he language of the entire statute under review must be read together and the determination of any ambiguity must be made on the basis of the entire statute." *Sheffield v. State,* 708 So.2d 899, 907 (Ala.Crim.App.1997). "Because the meaning of statutory language depends on context, a statute is to be read as a whole." *Ex parte Jackson,* 614 So.2d 405, 406 (Ala.1993). We must also bear in mind that " '[t]here is a presumption that every word, sentence, or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used.' " *Sheffield v. State,* 708 So.2d 899, 909 (Ala.Crim.App.1997) (quoting 82 C.J.S. *Statutes* § 316 at pp. 551–52 (1953)). Finally, "it is well established that in interpreting a statute, a court accepts an administrative interpretation of the statute by the agency charged with its administration, if the interpretation is reasonable." *Ex parte State Dep't of Revenue,* 683 So.2d at 983. "Absent a compelling reason not to do so, a court will give great weight to any agency's interpretations of a statute and will consider them persuasive." *Id.*

In examining the plain language of § 15–20–22(a)(1) in light of the entire CNA as well as the DOC's administrative regulation for implementing of the CNA, we simply can find no ambiguity in § 15–20–22(a)(1) that would require judicial construction, as urged by the State. The DOC's administrative regulation implementing the CNA clearly interprets the phrase "actual address at which he or she will reside or live" according to its plain meaning and requires that a sex offender provide a place where mail can be received by the offender, such as a house, apartment, or other fixed place, and not merely a geographical location or other public place. With respect to the CNA as a whole, we note that the legislature used several different terms in the various provisions of the CNA. Not only did the legislature use the term "address," see §§ 15–20–20.1, 15–20–22(a)(1), 15–20–24(a) and (b), 15–20–25.1(b), 15–20–26(e), 15–20–29(a) and (b), 15–20–30(a), (b), and (c), it also used the term "residence," see §§ 15–20–20.1, 15–20–22(a)(2) and (3), 15–20–23(a) and (b), 15–20–24(b), 15–20–25, 15–20–25.1(b), 15–20–25.3(e), 15–20–26(a), (b), and (c), § 15–20–28(g)(1) and (2), 15–20–29(b); "place of lodging," see § 15–20–25.1(a), (b), and (c); and "living accommodation," see § 15–20–26(a), (b), and (c). " '[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.... The use of different terms within related statutes generally implies that different meanings were intended.' " *Trott v. Brinks, Inc.,* 972 So.2d 81, 85 (Ala.2007) (quoting 2A Norman Singer, *Sutherland on Statutes and Statutory Construction* § 46:06, at 194 (6th ed.2000) (footnotes omitted)). Thus, we must presume that in using these various terms, the legislature intended for each to have its own meaning.

Applying the plain, ordinary, and commonly understood meaning of the terms "living" and "accommodation," this Court has held that "living accommodation" simply means "any overnight lodging, either temporary or permanent." *Sellers v. State,* 935 So.2d 1207, 1213 (Ala.Crim.App.2005). In doing so, this Court also recognized that the term "lodging" "is defined in *Merriam-Webster's Collegiate Dictionary* 731 (11th ed. 2003), as 'a place to live,' 'sleeping accommodations,' 'a temporary place to stay,' and 'a room in the house of ***737** another used as a residence.' " *Id.* The "actual address at which he or she will reside or live" must, therefore, mean something different than a temporary place where one stays or sleeps.

"Address" is defined as "[t]he place where mail or other communication is sent." *Black's Law Dictionary* 42 (8th ed. 2004).[10] See also *Merriam–Webster's Collegiate Dictionary* 15 (11th ed. 2003) (defining "address," in relevant part, as "a place where a person or organization may be communicated with"). *Merriam–Webster's Collegiate Dictionary* 728, 1060 (11th ed. 2003), defines "live," in relevant part, as "to occupy a home"

or "dwell," and "reside" as "to dwell permanently or continuously." Although *Black's Law Dictionary* does not specifically define "live" or "reside," it does define "residence," in relevant part, as follows:

> "The act or fact of living in a given place for some time ... The place where one actually lives, as distinguished from a domicile ... *Residence* usu[ally] just means bodily presence as an inhabitant in a given place; *domicile* usu [ally] requires bodily presence plus an intention to make the place one's home.... A house or other fixed abode; a dwelling."
>
> *Black's Law Dictionary* 1335 (8th ed. 2004). [11]

[16] **[17]** When these plain, ordinary, and commonly understood meanings of the terms "address," "reside" and "live" are applied to former § 15–20–22(a)(1), and when that statute is read in context of the entire CNA, including the express legislative intent, it is clear that the phrase "actual address at which he or she will live or reside" means a fixed place where one lives continuously for a period and where mail can be received. [12] Because the plain ***738** language of former § 15–20–22(a)(1) is clear and unambiguous, it is unnecessary to judicially construe that statute as requested by the State. [13]

We now turn to the trial court's determination that former § 15–20–22(a)(1) is unconstitutional on four different grounds: the statute was vague on its face and as applied to the defendant; it constituted cruel and unusual punishment as applied because it punished Adams for his status as a homeless person; it violated due-process rights because it punished Adams for his failure to perform an act it was impossible for him to perform; and it violated the right to equal protection of the law because it incarcerated Adams for his indigence when other offenders who were not indigent would not be punished under the statute. The trial court stated in its order:

> "This court takes no pleasure in invalidating a portion of the State's Community Notification Act ('CNA'). However, the statute as written creates a situation the legislature surely did not intend: that prisoners finish their sentences but face indefinite incarceration and a potentially unending string of prosecutions, not because of any new crimes against morality or an intentional choice to violate the law, but because they are indigent and homeless. The court urges the Legislature to revisit the issue of homeless sex offenders, review the approaches of other states that have tackled this issue, and develop an effective method of tracking homeless sex offenders that protects the public while not trampling on fundamental American notions of justice and fair play."

(C. 59–60.)

We agree with the trial court that former § 15–20–22(a)(1) is unconstitutional, and we address here two of the reasons: first, the statute violates the guarantee to equal protection under the law as provided in the Fourteenth Amendment to the United States Constitution, and in Article I, §§ 1, 6, and 22, of the Alabama Constitution of 1901 because it resulted in an unreasonable and discriminatory classification based on wealth; and, second, the statute is unconstitutional as applied to the defendant in this case, under the Eighth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and under Article I, § 15, Ala. Const.1901, because the requirement in former § 15–20–22(a)(1) that a sex offender provide an "actual address ***739** at which he or she will reside" punishes the defendant solely for his status of being homeless [14] and, thus, violates the prohibition against cruel and unusual punishment.

Equal protection violation

[18] Although we do not find that the Alabama Legislature intended to create classifications based on wealth when it enacted the CNA, it is clear that an unintended consequence of the legislation is that indigent homeless sex offenders are treated differently from nonindigent homeless sex offenders, and that indigent homeless sex offenders who have served their prison sentences remain incarcerated solely because they have no funds with which to secure lodging and to obtain an address upon release from prison. We have found no reported case addressing this precise issue in Alabama

or in any other jurisdiction. We first consider the well established doctrine of equal protection.

> "The essence of that doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated."

Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws,* 37 Cal. L.Rev. 341, 344 (1948–1949), cited with approval in 3 Ronald D. Rotunda and John E. Nowak, *Treatise on Const. L.—Substance & Procedure* § 18.1 (4th ed. 2007).

Concerns that indigents receive equal justice have frequently been addressed by all levels of courts, and the United States Supreme Court, in *Griffin v. Illinois,* 351 U.S. 12, 16–17, 76 S.Ct. 585, 100 L.Ed. 891 (1956), stated:

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: 'To no one will we sell, to no one will we refuse, or delay, right or justice. ... No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.' These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' *Chambers v. Florida,* 309 U.S. 227, 241, 60 S.Ct. 472, 479, 84 L.Ed. 716 [(1940)]."

(Footnote omitted.)

> "*Griffin's* principle of 'equal justice,' which the Court applied there to strike ***740** down a state practice of granting appellate review only to persons able to afford a trial transcript, has been applied in numerous other contexts. See, *e.g., Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (indigent entitled to counsel on first direct appeal); *Roberts v. LaVallee,* 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967) (indigent entitled to free transcript of preliminary hearing for use at trial); *Mayer v. Chicago,* 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971) (indigent cannot be denied an adequate record to appeal a conviction under a fine-only statute). Most relevant to the issue here is the holding in *Williams v. Illinois,* 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), that a State cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay the fine. *Williams* was followed and extended in *Tate v. Short,* 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), which held that a State cannot convert a fine imposed under a fine-only statute into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full. But the Court has also recognized limits on the principle of protecting indigents in the criminal justice system. For example, in *Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), we held that indigents had no constitutional right to appointed counsel for a discretionary appeal. In *United States v. MacColl[o]m,* 426 U.S. 317, 96 S.Ct. 2086,

> 48 L.Ed.2d 666 (1976) (plurality opinion), we rejected an equal protection challenge to a federal statute which permits a district court to provide an indigent with a free trial transcript only if the court certifies that the challenge to his conviction is not frivolous and the transcript is necessary to prepare his petition."

Bearden v. Georgia, 461 U.S. 660, 664–65, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). In *Bearden,* the United States Supreme Court held that a trial court erred "in automatically revoking probation because the [offender] could not pay his fine, without determining that [he] had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." 461 U.S. at 662, 103 S.Ct. 2064. *See also Rinaldi v. Yeager,* 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966) (holding that the Equal Protection Clause was violated by a statute requiring unsuccessful indigent criminal appellants who were incarcerated to reimburse the state for the costs of trial transcripts).

[19] **[20]** The application of equal-protection principles to indigents in criminal cases has been thoroughly considered by the United States Supreme Court. A plurality of the Court in *Griffin* acknowledged the importance of appellate review in criminal cases and stated: "[T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside." *Griffin,* 351 U.S. at 19. The plurality further stated: "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." 351 U.S. at 18. As Justice Frankfurter stated in *Griffin:*

> "Law addresses itself to actualities. It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity ***741** in material circumstances. Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion. But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.
>
> "To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' John Cournos, *A Modern Plutarch,* p. 27.
>
> "The State is not free to produce such a squalid discrimination."

351 U.S. at 23 (Frankfurter, J., concurring in the judgment).

The statutory scheme at issue here produces the same type of discrimination condemned by the United States Supreme Court in *Griffin* and its progeny—discrimination resulting in a deprivation of a fundamental right that is based, in actuality, on poverty. The record below demonstrates that Adams, an adult criminal sex offender who had completed his sentence, attempted to comply with the requirements of the CNA by securing approved living accommodations upon completion of his sentence, but because he was indigent and homeless, he was unable to do so. Upon completion of his original sentence, he was then transported immediately from prison to the Montgomery County jail and was charged with violating the CNA based on his failure to provide "the actual address" at which he would reside upon release. Adams had completed the sentence the trial court had imposed for his commission of his original crimes. His continued incarceration was not based directly on the underlying offenses but was, instead, the result of his homelessness and indigency and the concomitant inability to secure living accommodations and to provide an address to the DOC. Thus, Adams was no longer incarcerated as a result of the original sentence for the underlying sex crimes, nor

was he incarcerated for additional sex crimes or for any intentional, willful criminal act. Rather, Adams continued to be incarcerated and ultimately charged for reasons that were beyond his control—his indigency and resulting homelessness.

On its face the statute applies to all convicted sex offenders equally by requiring them to provide approved addresses in compliance with the CNA restrictions of the 45 days prior to their release from prison. On its face there is no classification of offenders—reasonable or unreasonable. All sex offenders can regain their liberty upon completion of their sentences simply by providing an address, so the State argues. In fact, however, the opportunity for an indigent homeless sex offender to secure release from confinement following completion of his sentence is virtually nil, as the testimony at the hearings in these cases demonstrated. Only homeless persons with access to funds to pay for a stay in a motel or other accommodation at an approved location will be freed from incarceration, and indigents without ***742** such funds will remain incarcerated. And, because the charge for violating this provision of the CNA is a felony, indigent offenders could eventually be sentenced as habitual felons to life imprisonment without the possibility of parole solely because they have no funds to secure a place to stay upon their release from prison. All homeless indigent offenders charged with this violation would, at the end of the term of incarceration for any conviction for a CNA violation, *again* be required to provide an approved address and if they could not on account of their indigent circumstances, they would *again* be transported to the county jail upon completion of that sentence. This cycle of incarceration is potentially endless for the indigent homeless sex offender—and ultimately each would be incarcerated for life as habitual felony offenders.

Thus, the State has created separate consequences for indigent homeless offenders and for nonindigent homeless offenders. The continued deprivation of liberty following the completion of the sentence for the original sex offense is suffered by those who have no resources. Adams was not truly punished for any willful failure to comply with the CNA, but for his indigency and homelessness—matters established by the record to have been beyond his control. It is significant to note, as has the United States Supreme Court, that "the condition at issue here—indigency—is itself no threat to the safety or welfare of society." *Bearden v. Georgia,* 461 U.S. 660, 669 n. 9, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). The statutory scheme thus creates a classification based on wealth, depriving a certain class of citizens indefinitely of their liberty as a result of their inability to pay. The law, though not discriminatory on its face, is discriminatory in its application. *See Griffin v. Illinois,* 351 U.S. at 17 n. 11. This discrimination based on wealth, as the United States Supreme Court has held in *Griffin* and its progeny, is constitutionally fatal. Therefore, the statute as it was written is unconstitutional.

We are aware, as was the trial court in this case, that the intent of the Alabama Legislature—to protect the public, particularly children, from convicted sex offenders—is a vital goal. The statute the legislature enacted, however, unconstitutionally subjects indigent homeless sex offenders to a denial of their liberty based solely on their inability to pay. The State is not powerless to monitor and track homeless indigent sex offenders, but it must turn to constitutional methods to do so—methods that do not deprive defendants of their liberty based only on their inability to pay, and particularly without a determination that a defendant made efforts to comply with the statute and failed to do so only because he or she was indigent. The State is free to develop many alternative means to avoid the inadvertent wealth classification it has created here and that still satisfy the goal of protecting the public.

While we recognize that it is not within this Court's scope of authority to provide these alternative means because that is entirely the prerogative of the Alabama Legislature, we note that the legislatures of other states have provided for the means to monitor the whereabouts of homeless indigent sex offenders. California's penal code includes a section providing for the registration of transient offenders; that section requires transients to register every 30 days and to report "the places where he or she sleeps, eats, works, frequents, and engages in leisure activities." Cal.Penal Code § 290.011(a) and (d).

The Florida Legislature has enacted statutory provisions defining "permanent ***743** residence," "temporary residence," and "transient residence," the latter being defined as:

> "a place or county where a person lives, remains, or is located for a period of 5 or more days in the aggregate during a calendar year and which is not the person's permanent or temporary address.

> The term includes, but is not limited to, a place where the person sleeps or seeks shelter and a location that has no specific street address."

Fla. Stat. § 775.21(2)(d)-(m). Sex offenders are required to report in person at the sheriff's office within 48 hours of being released from the Florida Department of Corrections and within 48 hours of establishing or vacating a permanent, temporary, or transient residence. Fla. Stat. § 943.0435.

The Illinois Legislature defines a "fixed residence" as "any and all places that a sex offender resides for an aggregate period of time of 5 or more days in a calendar year," 730 Ill. Comp. Stat. 150/2, and requires sex offenders without a fixed residence to report weekly, in person, to the local law-enforcement agency in the area in which he or she is located and to provide information about all the locations where the offender has stayed in the previous 7 days, 730 Ill. Comp. Stat. 150/3.

Indiana statutes define and include provisions for registration by sex offenders who reside in a "principal residence" or in a "temporary residence." Ind.Code §§ 11–8–8–3, –11, –12. Section 11–8–8–12(c) of the Indiana Code provides that a sex offender who does not have a principal residence or temporary residence shall report in person to the local law-enforcement authority in the county where the sex offender resides at least once each week and to report an address for the location where he or she will be staying.

The Massachusetts Legislature recently approved statutes requiring homeless sex offenders to present themselves at the local police department every 30 days to comply with the registration requirements and to wear a global positioning system or other similar device. Mass. Gen. Laws ch. 6, § 178F 1/2 and § 178F 3/4.

The Washington State Legislature enacted several provisions requiring sex offenders who have no fixed residence to report to the county sheriff's office in person, weekly, and provide to the sheriff, if requested, an accurate accounting of where the offender stays during the week. Wash. Rev.Code § 9A.44.130.

We note, also, that several courts have reversed convictions in cases involving statutory registration of homeless sex offenders on grounds of impossibility of compliance or insufficiency of the evidence: *Commonwealth v. Wilgus,* 975 A.2d 1183 (Pa.Super.Ct.2009) ("Because Wilgus's homeless existence precluded the possibility of a residence, or fixed place of habitation or abode, we are constrained to hold Wilgus was without a 'residence' to register, change or verify within the meaning of Pennsylvania's" sex-offender-registration statute); *Twine v. State,* 395 Md. 539, 910 A.2d 1132 (2006) (conviction for failing to provide written notice of change of residence reversed because defendant became homeless after he was evicted and, therefore, he had not acquired a "residence" or "address" within the contemplation of the registration statute); *Jeandell v. State,* 395 Md. 556, 910 A.2d 1141 (2006) (same); *State v. Iverson,* 664 N.W.2d 346 (Minn.2003) (sex-offender-registration statute did not apply to homeless defendants who did not know where they would be living at least 5 days in advance and who could not provide an address where mail could be received); *State v. Pickett,* 95 Wash.App. 475, 975 P.2d 584 (1999) ("Here, the evidence ***744** is undisputed that Pickett was living on the streets, sometimes staying in parks in Everett and Seattle, sometimes on the sidewalks of downtown Seattle. Pickett's situation is not contemplated by the statute. Because 'residence' and 'residence address' connote some permanence or intent to return to a place, it is impossible for Pickett to comply with the statute as written."); and *State v. Bassett,* 97 Wash.App. 737, 987 P.2d 119 (1999) (holding that the registration statute "does not require a convicted sex offender to give written notice of a 'change of address at least fourteen days before moving' where the offender does not know fourteen days in advance that he will be moving and he has no known residence into which to move" and holding that "living on the streets, homelessness, does not constitute a 'residence' within the meaning of the statute"). The Georgia Supreme Court held that a registration requirement that failed to provide direction to offenders who did not have a rural route or street address or to the authorities who would enforce the requirement was unconstitutionally vague and violated the Due Process Clauses of the Georgia and United States Constitutions. *Santos v. State,* 284 Ga. 514, 668 S.E.2d 676 (2008). So, too, a California Court of appeal struck down as violative of due-process principles a registration statute that required offenders who had no residence to register their "locations," without providing any specificity to the offenders or to the enforcing authorities for them to determine what the statute required. *People v. North,* 112 Cal.App.4th 621, 5 Cal.Rptr.3d 337 (2003).

Legislation providing for the registration of all sex offenders—including those who, like the defendant in this case, are homeless and indigent—must not violate constitutional principles, but the foregoing brief survey of other States' attempts to provide such legislation demonstrates that crafting such legislation is not a simple matter. We encourage Alabama's Legislature to enact registration requirements that do not unfairly impact the indigent homeless who are unable because of their indigency to provide an approved address upon completion of their prison terms for the sex offenses of which they were convicted.

Eighth Amendment violation

[21] **[22]** **[23]** **[24]** **[25]** Although we hold that the statute under which Adams was charged in this case violated equal-protection principles, we hold also that it violated the constitutional prohibitions against cruel and unusual punishment. The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Article I, § 15, Ala. Const.1901, provides "[t]hat excessive fines shall not be imposed, nor cruel and unusual punishments inflicted." The Cruel and Unusual Punishments Clause of the Eighth Amendment, and similarly of Article I, § 15, Ala. Const.1901, "proscribes more than physically barbarous punishments," it embodies " 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.' " *Estelle v. Gamble,* 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (quoting *Jackson v. Bishop,* 404 F.2d 571, 579 (8th Cir.1968)). As the United States Supreme Court recognized more than 50 years ago:

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. ... [T]he words of the Amendment are not precise, and ... their scope is not static. The Amendment must draw its meaning from the evolving ***745** standards of decency that mark the progress of a maturing society."

Trop v. Dulles, 356 U.S. 86, 100–01, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (footnote omitted). Thus:

> "[T]he Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes, e.g., *Estelle v. Gamble,* [429 U.S. 97 (1976)]; *Trop v. Dulles,* [356 U.S. 86 (1958)]; second, it proscribes punishment grossly disproportionate to the severity of the crime, e.g., *Weems v. United States,* [217 U.S. 349 (1910)]; and third, it imposes substantive limits on what can be made criminal and punished as such, e.g., *Robinson v. California,* [370 U.S. 660 (1962)]."

Ingraham v. Wright, 430 U.S. 651, 667, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). It is the third application—the substantive limits on what may be criminally punished—with which we deal here. Although we recognize that this third application is "one to be applied sparingly" because the Cruel and Unusual Punishments Clause of the Eighth Amendment "has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes," *id.,* we likewise recognize that "[a] distinction exists between applying criminal laws to punish conduct, which is constitutionally permissible, and applying them to punish status, which is not." *Joel v. City of Orlando,* 232 F.3d 1353, 1361 (11th Cir.2000) (citing *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)).

The United States Supreme Court has twice addressed whether criminal laws impermissibly criminalized status rather than conduct. First, in *Robinson,* supra, a majority of the Court struck down a California statute making it illegal to " 'be addicted to the use of narcotics,' " 370 U.S. at 660, as constituting cruel and unusual punishment because the statute punished the defendant solely for the status of being an addict and not for any conduct on the part of the defendant. Six years later, in a plurality opinion in *Powell v. Texas,* 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), the Court upheld a Texas statute

making it illegal to " 'be in a state of intoxication in any public place,' " 392 U.S. at 516, despite evidence indicating that the defendant was a chronic alcoholic, on the ground that the statute punished the defendant's conduct of being intoxicated in public and not his status as an alcoholic.

[26] [27] [28] [29] [30] [31] [32] Since then, courts have grappled with these two opinions in an attempt to ascertain their meaning in Eighth Amendment jurisprudence. In *Jones v. City of Los Angeles,* 444 F.3d 1118 (9th Cir.2006), vacated on other grounds, 505 F.3d 1006 (9th Cir.2007), the United States Court of Appeals for the Ninth Circuit engaged in a lengthy, and persuasive, analysis of *Robinson* and *Powell* to conclude that a Los Angeles municipal ordinance criminalizing "sitting, lying, or sleeping on public streets and sidewalks at all times and in all places within Los Angeles's city limits" violated the Cruel and Unusual Punishments Clause of the Eighth Amendment as applied to six homeless individuals who had sought injunctive relief barring enforcement of the ordinance against them. 444 F.3d at 1120. We quote extensively from that opinion:

> "The district court erred by not engaging in a more thorough analysis of Eighth Amendment jurisprudence under *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), and *Powell v. Texas,* 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), when it held that the only relevant inquiry is ***746** whether the ordinance at issue punishes status as opposed to conduct, and that homelessness is not a constitutionally cognizable status.
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> "The district court relied exclusively on the analysis of *Robinson* and *Powell* by another district court in *Joyce v. City and County of San Francisco,* in which plaintiffs challenged certain aspects of San Francisco's comprehensive homelessness program on Eighth Amendment grounds. 846 F.Supp. 843 (N.D.Cal.1994). *Joyce,* however, was based on a very different factual underpinning than is present here. Called the 'Matrix Program,' the homelessness program was ' "an interdepartmental effort ... [utilizing] social workers and health workers ... [and] offering shelter, medical care, information about services and general assistance." ' *Id.* at 847 (alterations and omissions in original). One element of the program consisted of the 'Night Shelter Referral' program conducted by the Police Department, which handed out 'referrals' to temporary shelters. *Id.* at 848. The City demonstrated that of 3820 referral slips offered to men, only 1866 were taken and only 678 used. *Id.*
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> "The *Joyce* plaintiffs made only the conclusory allegation that there was insufficient shelter, *id.* at 849; they did not make the strong evidentiary showing of a substantial shortage of shelter Appellants make here. Moreover, the preliminary injunction plaintiffs sought in *Joyce* was so broad as to enjoin enforcement of prohibitions on camping or lodging in public parks and on ' "life-sustaining activities *such as* sleeping, sitting or remaining in a public place," ' which might also include such antisocial conduct as public urination and aggressive pan handling. *Id.* at 851 (emphasis added). Reasoning that plaintiffs' requested injunction was too broad and too difficult to enforce, and noting the preliminary nature of its findings based on the record at an early stage in the proceedings, the district court denied the injunction. *Id.* at 851–53. The *Joyce* court also concluded that homelessness was not a status protectable under the Eighth Amendment, holding that it was merely a constitutionally noncognizable 'condition.' *Id.* at 857–58.
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> "We disagree with the analysis of *Robinson* and *Powell* conducted by both the district court in *Joyce* and the district court in the case at bar. The City could not expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment, nor can it criminalize acts that are an integral aspect of that status. Because there is substantial and undisputed evidence that the number of homeless persons in Los Angeles far exceeds the number of available shelter beds at all times, including on the nights of their arrest or citation, Los Angeles has encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless. A closer analysis of *Robinson* and *Powell* instructs that the involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable status, and incidental conduct which is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment.
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> "Our analysis begins with *Robinson,* which announced limits on what the state can criminalize consistent with the Eighth Amendment. In *Robinson,* the Supreme

Court considered whether a state may convict an individual for violating a statute making it a criminal ***747** offense to ' "be addicted to the use of narcotics." ' 370 U.S. at 660, 82 S.Ct. 1417 (quoting Cal. Health & Safety Code § 11721). The trial judge had instructed the jury that

> " '[t]o be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms.... All that the People must show is ... that while in the City of Los Angeles [Robinson] was addicted to the use of narcotics....'

"*Id.* at 662–63, 82 S.Ct. 1417 (second alteration and third omission in original). The Supreme Court reversed Robinson's conviction, reasoning:

> " 'It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease.... [I]n the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.
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> " 'We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.'

"*Id.* at 666–67, 82 S.Ct. 1417 (citation and footnotes omitted).

"The Court did not articulate the principles that undergird its holding. At a minimum, *Robinson* establishes that the state may not criminalize 'being'; that is, the state may not punish a person for who he is, independent of anything he has done. *See, e.g., Powell,* 392 U.S. at 533, 88 S.Ct. 2145 (Marshall, J., plurality opinion) (stating that *Robinson* requires an actus reus before the state may punish). However, as five Justices would later make clear in *Powell, Robinson* also supports the principle that the state cannot punish a person for certain conditions, either arising from his own acts or contracted involuntarily, or acts that he is powerless to avoid. *Powell,* 392 U.S. at 567, 88 S.Ct. 2145 (Fortas, J., dissenting) (endorsing this reading of *Robinson*); *id.* at 550 n. 2, 88 S.Ct. 2145 (White, J., concurring in the judgment) (same, but only where acts predicate to the condition are remote in time); *see Robinson,* 370 U.S. at 666–67, 82 S.Ct. 1417 (stating that punishing a person for having a venereal disease would be unconstitutional, and noting that drug addiction 'may be contracted innocently or involuntarily').

"Six years after its decision in *Robinson,* the Supreme Court considered the case of Leroy Powell, who had been charged with violating a Texas statute making it a crime to ' "get drunk or be found in a state of intoxication in any public place." ' *Powell,* 392 U.S. at 517, 88 S.Ct. 2145 (Marshall, J., plurality opinion) (quoting Tex. Penal Code Ann. art. 477 (Vernon 1952)). The trial court found that Powell suffered from the disease of chronic alcoholism, which ' "destroys the afflicted person's will" ' to ***748** resist drinking and leads him to appear drunk in public involuntarily. *Id.* at 521, 88 S.Ct. 2145. Nevertheless, the trial court summarily rejected Powell's constitutional defense and found him guilty. *See id.* at 558, 88 S.Ct. 2145 (Fortas, J., dissenting). On appeal to the United States Supreme Court, Powell argued that the Eighth Amendment prohibited 'punish[ing] an ill person for conduct over which he has no control.' Brief for Appellant at 6, *Powell,* 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254.

"In a 4–1–4 decision, the Court affirmed Powell's conviction. The four Justices joining the plurality opinion interpreted *Robinson* to prohibit only the criminalization of pure status and not to limit the criminalization of conduct. *Powell,* 392 U.S. at 533, 88 S.Ct. 2145 (Marshall, J., plurality opinion). The plurality then declined to extend the Cruel and Unusual Punishment Clause's protections to any involuntary conduct, citing slippery slope concerns, *id.* at 534–35, 88 S.Ct. 2145, and considerations of federalism and personal accountability, *id.* at 535–36, 88 S.Ct. 2145. Because Powell was convicted not for his status as a chronic alcoholic, but rather for his acts of becoming

intoxicated and appearing in public, the *Powell* plurality concluded that the Clause as interpreted by *Robinson* did not protect him. *Id.* at 532, 88 S.Ct. 2145.

"In contrast, the four Justices in dissent read *Robinson* to stand for the proposition that '[c]riminal penalties may not be inflicted on a person for being in a condition he is powerless to change.' *Id.* at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). Applying *Robinson* to the facts of Powell's case, the dissenters first described the predicate for Powell's conviction as 'the mere *condition* of being intoxicated in public' rather than any '*acts,*' such as getting drunk and appearing in public. *Id.* at 559, 88 S.Ct. 2145. Next and more significantly, the dissenters addressed the involuntariness of Powell's behavior, noting that Powell had ' "an uncontrollable compulsion to drink" to the point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places.' *Id.* at 568, 88 S.Ct. 2145. Having found that the Cruel and Unusual Punishment Clause, as interpreted by *Robinson,* protects against the criminalization of being in a condition one is powerless to avoid, *see id.* at 567, 88 S.Ct. 2145, and because Powell was powerless to avoid public drunkenness, the dissenters concluded that his conviction should be reversed, *see id.* at 569–70, 88 S.Ct. 2145.

"In his separate opinion, Justice White rejected the plurality's proposed status-conduct distinction, finding it similar to 'forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion.' *Id.* at 548–49, 88 S.Ct. 2145 (White, J., concurring in the judgment). Justice White read *Robinson* to stand for the principle that 'it cannot be a crime to have an irresistible compulsion to use narcotics,' *id.* at 548, 88 S.Ct. 2145, and concluded that '[t]he proper subject of inquiry is whether volitional acts [sufficiently proximate to the condition] brought about the' criminalized conduct or condition, *id.* at 550 n. 2, 88 S.Ct. 2145.

"Justice White concluded that given the holding in *Robinson,* 'the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or being drunk.' *Id.* at 549, 88 S.Ct. 2145. For those chronic alcoholics who lack homes

> " 'a showing could be made that resisting drunkenness is impossible and ***749** that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.'

"*Id.* at 551, 88 S.Ct. 2145. This position is consistent with that of the *Powell* dissenters, who quoted and agreed with Justice White's standard, *see id.* at 568 n. 31, 88 S.Ct. 2145 (Fortas, J., dissenting), and stated that Powell's conviction should be reversed because his public drunkenness was involuntary, *id.* at 570, 88 S.Ct. 2145.

"Justice White's *Powell* opinion also echoes his prior dissent in *Robinson.* In *Robinson,* Justice White found no Eighth Amendment violation for two reasons: First, because he did 'not consider [Robinson's] conviction to be a punishment for having an illness or for simply being in some status or condition, but rather a conviction for the regular, repeated or habitual use of narcotics immediately prior to his arrest,' *Robinson,* 370 U.S. at 686, 82 S.Ct. 1417 & nn. 2–3 (White, J., dissenting) (discussing jury instructions regarding addiction and substantial evidence of Robinson's frequent narcotics use in the days prior to his arrest); and second, and most importantly, for understanding his opinion in *Powell,* because the record did not suggest that Robinson's drug addiction was involuntary, *see id.* at 685, 82 S.Ct. 1417. According to Justice White, 'if [Robinson] was convicted for being an addict who had lost his power of self-control, I would have other thoughts about this case.' *Id.*

"Justice White and the [four] *Powell* dissenters shared a common view of the importance of involuntariness to the Eighth Amendment inquiry. They differed only on two issues. First, unlike the dissenters, Justice White believed Powell had not demonstrated that his public drunkenness was involuntary. *Compare Powell,* 392 U.S. at 553, 88 S.Ct. 2145 (White, J., concurring in the judgment) ('[N]othing in the record indicates that [Powell] could not have done his drinking in private.... Powell had a home and wife, and if there were reasons why he had to drink in public or be drunk there, they do not appear in the record.'), with *id.* at 568 n. 31, 88 S.Ct. 2145 (Fortas, J., dissenting) ('I believe these findings must fairly be read to encompass facts that my Brother White agrees would require reversal, that is, that for appellant Powell, "resisting drunkenness"

and "avoiding public places when intoxicated" on the occasion in question were "impossible." ').

"Second, Justice White rejected the dissent's attempt to distinguish conditions from acts for Eighth Amendment purposes. *See id.* at 550 n. 2, 88 S.Ct. 2145 (White, J., concurring in the judgment). We agree with Justice White that analysis of the Eighth Amendment's substantive limits on criminalization 'is not advanced by preoccupation with the label "condition." ' *Id.* One could define many acts as being in the condition of engaging in those acts, for example, the act of sleeping on the sidewalk is indistinguishable from the condition of being asleep on the sidewalk. ' "Being" drunk in public is not far removed in time from the acts of "getting" drunk and "going" into public,' and there is no meaningful 'line between the man who appears in public drunk and that same man five minutes later who is then "being" drunk in public.' *Id.* The dissenters themselves undermine their proposed distinction by suggesting that criminalizing involuntary acts that 'typically flow from ... the disease of chronic ***750** alcoholism' would violate the Eighth Amendment, as well as by stating that '[i]f an alcoholic should be convicted for criminal conduct which is *not* a characteristic and involuntary part of the pattern of the disease as it afflicts him, nothing herein would prevent his punishment.' *Id.* at 559 n. 2, 88 S.Ct. 2145 (Fortas, J., dissenting) (emphasis added).

"Notwithstanding these differences, five Justices in *Powell* understood *Robinson* to stand for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being. *See id.* at 548, 550 n. 2, 551, 88 S.Ct. 2145 (White, J., concurring in the judgment); *id.* at 567, 88 S.Ct. 2145 (Fortas, J., dissenting); *see also* Robert L. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment,* 33 Stan. L.Rev. 201, 219 (1981) ('[T]he consensus [of White and the dissenters apparently] was that an involuntary act does not suffice for criminal liability.'). Although this principle did not determine the outcome in *Powell,* it garnered the considered support of a majority of the Court. Because the conclusion that certain involuntary acts could not be criminalized was not dicta, see *United States v. Johnson,* 256 F.3d 895, 915, 914–16 (9th Cir.2001) (en banc) (Kozinski, J., concurring) (narrowly defining dicta as 'a statement [that] is made casually and without analysis, ... uttered in passing without due consideration of the alternatives, or ... merely a prelude to another legal issue that commands' the court's full attention), we adopt this interpretation of *Robinson* and the Cruel and Unusual Punishment Clause as persuasive authority. We also note that in the absence of any agreement between Justice White and the plurality on the meaning of *Robinson* and the commands of the Cruel and Unusual Punishment Clause, the precedential value of the *Powell* plurality opinion is limited to its precise facts. 'When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....' *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (omission in original) (internal quotation marks omitted); *see also* Kent Greenawalt, *'Uncontrollable' Actions and the Eighth Amendment: Implications of Powell v. Texas,* 69 Colum. L.Rev. 927, 931 (1969) ('[T]he dissent comes closer to speaking for a majority of the Court than does the plurality opinion.').

"Following *Robinson's* holding that the state cannot criminalize pure status, and the agreement of five Justices in *Powell* that the state cannot criminalize certain involuntary conduct, there are two considerations relevant to defining the Cruel and Unusual Punishment Clause's limits on the state's power to criminalize. The first is the distinction between pure status—the state of being—and pure conduct—the act of doing. The second is the distinction between an involuntary act or condition and a voluntary one. Accordingly, in determining whether the state may punish a particular involuntary act or condition, we are guided by Justice White's admonition that '[t]he proper subject of inquiry is whether volitional acts brought about the "condition" and whether those acts are sufficiently proximate to the "condition" for it to be permissible to impose penal sanctions on the "condition." ' ***751** *Powell,* 392 U.S. at 550 n. 2, 88 S.Ct. 2145 (White, J., concurring in the judgment); *see also Bowers v. Hardwick,* 478 U.S. 186, 202 n. 2, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (Blackmun, J., dissenting) (quoting and endorsing this statement in discussing whether the Eighth Amendment limits the state's ability to criminalize homosexual acts).

"The *Robinson* and *Powell* decisions, read together, compel us to conclude that enforcement of [the

municipal ordinance at issue] at all times and in all places against homeless individuals who are sitting, lying, or sleeping in Los Angeles's Skid Row because they cannot obtain shelter violates the Cruel and Unusual Punishment Clause. As homeless individuals, Appellants are in a chronic state that may have been acquired 'innocently or involuntarily.' *Robinson,* 370 U.S. at 667, 82 S.Ct. 1417. Whether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human. It is undisputed that, for homeless individuals in Skid Row who have no access to private spaces, these acts can only be done in public. In contrast to Leroy Powell, Appellants have made a substantial showing that they are 'unable to stay off the streets on the night [s] in question.' *Powell,* 392 U.S. at 554, 88 S.Ct. 2145 (White, J., concurring in the judgment).

"In disputing our holding, the dissent veers off track by attempting to isolate the supposed 'criminal conduct' from the status of being involuntarily homeless at night on the streets of Skid Row. Unlike the cases the dissent relies on, which involve failure to carry immigration documents, illegal reentry, and drug dealing, *the conduct at issue here is involuntary and inseparable from status—they are one and the same,* given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping. The cases the dissent cites do not control our reading of *Robinson* and *Powell* where, as here, an Eighth Amendment challenge concerns the involuntariness of a criminalized act or condition inseparable from status. *See Johnson,* 256 F.3d at 915 ('Where it is clear that a statement ... is uttered in passing without due consideration of the alternatives, ... it may be appropriate to re-visit the issue in a later case.'). The City and the dissent apparently believe that Appellants can avoid sitting, lying, and sleeping for days, weeks, or months at a time to comply with the City's ordinance, as if human beings could remain in perpetual motion. That being an impossibility, by criminalizing sitting, lying, and sleeping, the City is in fact criminalizing Appellants' status as homeless individuals.

"Similarly, applying *Robinson* and *Powell,* courts have found statutes criminalizing the status of vagrancy to be unconstitutional. For example, *Goldman v. Knecht* declared unconstitutional a Colorado statute making it a crime for ' "[a]ny person able to work and support himself" ' to ' "be found loitering or strolling about, frequenting public places, ... begging or leading an idle, immoral or profligate course of life, or not having any visible means of support." ' 295 F.Supp. 897, 899 n. 2, 908 (D.Colo.1969) (three-judge court); *see also Wheeler v. Goodman,* 306 F.Supp. 58, 59 n. 1, 62, 66 (W.D.N.C.1969) (three-judge court) (striking down as unconstitutional under *Robinson* a statute making it a crime to, inter alia, be able to work but have no property or ' "visible and known means" ' of earning a livelihood), vacated on other grounds, 401 U.S. 987, 91 S.Ct. 1219, 28 L.Ed.2d 524 (1971). These cases establish that the ***752** state may not make it an offense to be idle, indigent, or homeless in public places. Nor may the state criminalize conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets of Los Angeles's Skid Row. ...

"....

"Homelessness is not an innate or immutable characteristic, nor is it a disease, such as drug addiction or alcoholism. But generally one cannot become a drug addict or alcoholic, as those terms are commonly used, without engaging in at least some voluntary acts (taking drugs, drinking alcohol). Similarly, an individual may become homeless based on factors both within and beyond his immediate control, especially in consideration of the composition of the homeless as a group: the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable. That Appellants may obtain shelter on some nights and may eventually escape from homelessness does not render their status at the time of arrest any less worthy of protection than a drug addict's or an alcoholic's.

"Undisputed evidence in the record establishes that at the time they were cited or arrested, Appellants had no choice other than to be on the streets. Even if Appellants' past volitional acts contributed to their current need to sit, lie, and sleep on public sidewalks at night, those acts are not sufficiently proximate to the conduct at issue here for the imposition of penal sanctions to be permissible. *See Powell v. Texas,* 392 U.S. 514, 550 n. 2, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) (White, J., concurring in the judgment). In contrast, we find no Eighth Amendment protection for conduct that a person makes unavoidable based on their own immediately proximate voluntary acts, for example, driving while drunk, harassing others, or camping

or building shelters that interfere with pedestrian or automobile traffic.

"Our holding is a limited one. We do not hold that the Eighth Amendment includes a *mens rea* requirement, or that it prevents the state from criminalizing conduct that is not an unavoidable consequence of being homeless, such as pan handling or obstructing public thoroughfares. *Cf. United States v. Black,* 116 F.3d 198, 201 (7th Cir.1997) (rejecting convicted pedophile's Eighth Amendment challenge to his prosecution for receiving, distributing, and possessing child pornography because, inter alia, defendant 'did not show that [the] charged conduct was involuntary or uncontrollable').

"We are not confronted here with a facial challenge to a statute, *cf. Roulette v. City of Seattle,* 97 F.3d 300, 302 (9th Cir.1996) (rejecting a facial challenge to a municipal ordinance that prohibited sitting or lying on public sidewalks); *Tobe v. City of Santa Ana,* 9 Cal.4th 1069, 1080, 40 Cal.Rptr.2d 402, 892 P.2d 1145 (1995) (finding a municipal ordinance that banned camping in designated public areas to be facially valid); nor a statute that criminalizes public drunkenness or camping, *cf. Joyce v. City and County of San Francisco,* 846 F.Supp. 843, 846 (N.D.Cal.1994) (program at issue targeted public drunkenness and camping in public parks); or sitting, lying, or sleeping only at certain times or in certain places within the city. And we are not called upon to decide the constitutionality of punishment when there are beds available for the homeless in shelters. *Cf. Joel v. City of Orlando,* 232 F.3d 1353, 1357 (11th Cir.2000) (affirming summary judgment for the City where '[t]he shelter has never ***753** reached its maximum capacity and no individual has been turned away for lack of space or for inability to pay the one dollar fee').

"We hold only that, just as the Eighth Amendment prohibits the infliction of criminal punishment on an individual for being a drug addict, *Robinson v. California,* 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); or for involuntary public drunkenness that is an unavoidable consequence of being a chronic alcoholic without a home, *Powell,* 392 U.S. at 551, 88 S.Ct. 2145 (White, J., concurring in the judgment); *id.* at 568 n. 31, 88 S.Ct. 2145 (Fortas, J., dissenting); the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles."

444 F.3d at 1131–38 (some emphasis added). But see *Lehr v. City of Sacramento,* 624 F.Supp.2d 1218 (E.D.Cal.2009) (rejecting the *Jones* analysis as "strain[ed]" and holding that punishing the homeless for violating a municipal ordinance that prohibited " 'any person to camp, occupy camp facilities, or use camp paraphernalia' " or to " 'store personal property, including camp paraphernalia' " on public or private property did not violate the Eighth Amendment).

We agree with the Ninth Circuit Court of Appeals' well reasoned analysis of *Robinson* and *Powell.* Read together, these opinions stand for the proposition that the Cruel and Unusual Punishments Clause of the Eighth Amendment forbids punishing criminally not only a person's pure status, but also a person's involuntary conduct that is inseparable from that person's status. This is not to say that voluntary conduct that is merely closely related to or derivative of a person's status cannot constitutionally be punished. Indeed, that is, in our view, the critical difference between *Powell* and *Robinson.* In *Robinson,* the statute punished the pure status of being addicted to narcotics, without regard to whether the accused had used or even been in possession of narcotics. In contrast, in *Powell,* the statute punished, not the status of being a chronic alcoholic, but the voluntary conduct, even though obviously related to and even derivative of the status of being a chronic alcoholic, of appearing in public while in an intoxicated state. As Justice White noted in his opinion concurring in the judgment in *Powell,* had the defendant in that case not only been a chronic alcoholic, but also homeless with no place to live, the statute would have constituted cruel and unusual punishment as applied to the defendant because it would have been "impossible" for the defendant to avoid either getting drunk or being in public. 392 U.S. at 551, 88 S.Ct. 2145 (White, J., concurring in the judgment).

The *Jones* court found the circumstances in that case to be more akin to the circumstances in *Robinson* than the circumstances in *Powell* because the ordinance in that case, as applied to the six homeless individuals involved, punished them for conduct—sitting, lying, or sleeping in public—that it was not possible for them to avoid because of their homeless status. Significant to the holding in *Jones,* we think, was that the evidence established

that the six individuals involved were unable to obtain shelter and that there was a critical lack of available shelter space in Los Angeles, which is what rendered it impossible for those individuals to avoid sitting, lying, or sleeping in public in violation of the ordinance. See *Joel,* supra (upholding against cruel-and-unusual-punishment challenge a municipal ordinance making it illegal, among other things, to sleep in public, as applied to homeless, ***754** where evidence established that city had homeless shelter that had never reached maximum capacity).

The circumstances here are remarkably similar to those in *Jones.* Former § 15–20–22(a)(1) required that all sex offenders provide an "actual address at which he or she will reside or live" upon release from prison and provided that "[a]ny" failure to do so constituted a Class C felony. As noted above, an "actual address at which he or she will reside or live" is a fixed place where a person is going to live continuously for some period after his or her release from prison and where the person can receive mail. However, for someone who does not have a fixed place where he or she lives continuously for some period and where mail can be received, it is impossible to comply with the statute. The undisputed evidence presented at the hearing in this case established that Adams was indigent, that he had no family or friends with whom he could live, and that, despite his efforts, he had not been accepted to any homeless shelter or halfway house in time to comply with the requirements of the CNA. The undisputed evidence further established that there are only four shelters and/or halfway houses in the entire state of Alabama that accept sex offenders and that those shelters/halfway houses are virtually always full to capacity. For Adams, then, the failure to provide an "actual address at which [he would] reside or live" under § 15–20–22(a)(1) was not voluntary conduct merely related to, or derivative of, the status of homelessness, but was entirely involuntary conduct that was inseparable from his status of homelessness and, thus, as applied to this defendant, § 15–20–22(a)(1) constitutes cruel and unusual punishment. [15]

We caution that we are presented here with an "as applied" challenge to § 15–20–22(a)(1) and not a "facial" challenge to § 15–20–22(a)(1). A " 'facial challenge' ... is defined as '[a] claim that a statute is unconstitutional on its face—that is, that it *always* operates unconstitutionally.' " *Board of Water & Sewer Comm'rs of Mobile v. Hunter,* 956 So.2d 403, 419 (Ala.2006) (quoting *Black's Law Dictionary* 244 (8th ed.2004)). To prevail on a facial challenge to the constitutionality of a statute, it must be established "that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). In contrast, an "as-applied challenge" is "a claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party." *Black's Law Dictionary* 244 (8th ed. 2004).

[33] **[34]** We do not hold that § 15–20–22(a)(1) always operates unconstitutionally or that there are no set of circumstances under which the statute would be valid. Rather, we hold only that § 15–20–22(a)(1) ***755** is unconstitutional under the specific facts in this case and as applied to this defendant. As the Supreme Court of Minnesota recognized in *State v. Iverson,* 664 N.W.2d 346, 353 (Minn.2003): "[A]n offender who sleeps one night on a park bench, the next under a bridge, the next at a bus stop, and so on, is in a significantly different position from an offender who lives in a shelter for three weeks or on a couch in a friend's apartment for six months." The first of these offenders clearly has no "actual address at which he or she will reside or live" under § 15–20–22(a)(1). On the other hand, the second of these offenders has an "actual address at which he or she will reside or live" pursuant to § 15–20–22(a)(1), whether it be a shelter or the residence of a friend of family member. The first of these offenders cannot comply with § 15–20–22(a)(1), while the second of these offenders can and must comply.

The undisputed evidence in this case established that the defendant falls within the first class of homeless offenders —those who cannot comply with the statute because they are unable to find a fixed place to live continuously for some period of time where they can receive mail. Therefore, applying § 15–20–22(a)(1) to Adams effectively punishes him for his status as a homeless individual.

Conclusion

As to Adams, § 15–20–22(a)(1) violates the principles of equal protection and it constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article I, § 15, of the Alabama Constitution of 1901. Therefore, dismissal of the indictment in this case was proper, and the trial court's judgment is affirmed.

AFFIRMED.

All Citations

91 So.3d 724

KELLUM and MAIN, JJ., concur. WINDOM, J., concurs in the result. WISE, P.J., recuses herself.

Footnotes

1 Section 15–20–22(a)(1) was amended effective May 21, 2009. The amendment, among other things, changed the number of days from 45 to 180 days before release from incarceration and provides that the adult criminal sex offender must declare "the actual physical address" at which he or she will reside or live upon release.

2 In doing so, we express no opinion as to the constitutional validity of any other portion of former § 15–20–22(a)(1) or of the current version of § 15–20–22(a)(1).

3 This Court's unpublished memorandum in the *Coppage* case is also being released on this date. *State v. Coppage,* (No. CR–08–1726, November 5, 2010) —— So.3d —— (Ala.Crim.App.2010) (table).

4 This Court's unpublished memorandum in the *Seagle* case is also being released on this date. *State v. Seagle,* (No. CR–08–1489, November 5, 2010) —— So.3d —— (Ala.Crim.App.2010) (table).

5 At the time of the hearing, Adams had posted bond and was living in a halfway house for sex offenders.

6 Seagle and Coppage also testified about their unsuccessful attempts to locate a place to live upon their release from Kilby so they would be in compliance with the residency restrictions in the CNA.

7 See Act No. 96–793, Ala. Acts 1996. The original act was later repealed in its entirety and reenacted. See Act No. 99–572, Ala. Acts 1999. Several provisions in the CNA have since been amended. See Act No. 2000–728, Ala. Acts 2000; Act No. 2001–1127, Ala. Acts 2001; Act No. 2005–301, Ala. Acts 2005.

8 Section 15–20–20.1, Ala.Code 1975, provides:

> "The Legislature finds that the danger of recidivism posed by criminal sex offenders and that the protection of the public from these offenders is a paramount concern or interest to government. The Legislature further finds that law enforcement agencies' efforts to protect their communities, conduct investigations, and quickly apprehend criminal sex offenders are impaired by the lack of information about criminal sex offenders who live within their jurisdiction and that the lack of information shared with the public may result in the failure of the criminal justice system to identify, investigate, apprehend, and prosecute criminal sex offenders.
>
> "The system of registering criminal sex offenders is a proper exercise of the state's police power regulating present and ongoing conduct. Comprehensive registration and periodic address verification will provide law enforcement with additional information critical to preventing sexual victimization and to resolving incidents involving sexual abuse and exploitation promptly. It will allow them to alert the public when necessary for the continued protection of the community.
>
> "Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in safety and in the effective operation of government. In balancing offender's due process and other rights, and the interests of public security, the Legislature finds that releasing information about criminal sex offenders to law enforcement agencies and, providing access to or releasing such information about criminal sex offenders to the general public, will further the primary government interest of protecting vulnerable populations and in some instances the public, from potential harm. The Legislature further finds that residency and employment restrictions for criminal sex offenders provide additional protections to vulnerable segments of the public such as schools and child care facilities.
>
> "Juvenile sex offenders, like their adult counterparts, pose a danger to the public. Research has shown, however, that there are significant differences between adult and juvenile criminal sexual offenders. Juveniles are much more likely to respond favorably to sexual offender treatment. Juvenile offenders have a shorter history of committing sexual offenses. They are less likely to have deviant sexual arousal patterns and are not as practiced in avoiding responsibility for their abusive behavior. Juveniles are dependent upon adults for food and shelter, as well as the emotional and practical support vital to treatment efforts. Earlier intervention increases the opportunity for success in teaching juveniles how to reduce their risk of sexually re-offending. The Legislature finds that juvenile criminal sex offenders should be subject to the Community Notification Act, but that certain precautions should be taken to target the juveniles that pose the more serious threats to the public.

"Therefore, the state policy is to assist local law enforcement agencies' efforts to protect their communities by requiring criminal sex offenders to register, record their address of residence, to be photographed, fingerprinted, to authorize the release of necessary and relevant information about criminal sex offenders to the public, to mandate residency and employment restrictions upon criminal sex offenders, and to provide certain discretion to judges for application of these requirements as provided in this article.

"The Legislature declares that its intent in imposing certain reporting and monitoring requirements on criminal sex offenders and requiring community notification of the residence and workplace of criminal sex offenders is to protect the public, especially children, from convicted criminal sex offenders."

9 "Responsible agency" is defined, in relevant part, in § 15–20–21(11), Ala.Code 1975, as "[t]he person or government entity whose duty it is to obtain information from a criminal sex offender before release and to transmit that information to police departments or sheriffs responsible for providing community notification." Because Adams was incarcerated at Kilby, the responsible agency is the DOC.

10 Although there is no dispute here that § 15–20–22(a)(1) requires an address that, in fact, exists, we note that "actual" is defined in *Black's Law Dictionary* 38 (8th ed. 2004) as "[e]xisting in fact, reality." See also *Merriam–Webster's Collegiate Dictionary* 13 (11th ed. 2003) (defining "actual," in relevant part, as "existing in act and not merely potentially" and "existing in fact or reality").

11 The definition of "residence" is relevant here because although the term "address" must be presumed to have a different meaning than any of the other terms in the CNA, including the term "residence," a review of the entire CNA reveals that the legislature often used the term "address" in conjunction with the term "residence." For example, in expressing its intent to aid law enforcement in protecting communities, the legislature specifically noted that a sex offender's "*address of residence* " must be supplied to law enforcement. § 15–20–20.1 (emphasis added). In requiring the DOC to notify local law enforcement of a sex offender's information provided in compliance with § 15–20–22(a)(1), i.e., the sex offender's "actual address at which he or she will reside," the legislature required the DOC to provide all information available to the DOC that would be necessary to monitor the sex offender, including "the offender's *declared places of residence.*" § 15–20–22(b) and (c) (emphasis added). In addition, in § 15–20–25, the legislature required local law-enforcement agencies to provide notification to those persons living within a certain distance of "the *declared residence* of the adult criminal sex offender." (Emphasis added.) The repeated use of the term "residence" in conjunction with the term "address" in the CNA is consistent with the express qualification of the term "address" in § 15–20–22(a)(1) that the "address" be where the offender "will reside or live." Additionally, this express qualification clearly precludes the use of a post-office box as an "address" under § 15–20–22(a)(1) because a person obviously cannot reside or live at a post-office box or at a post office. This comports with the legislative intent behind the CNA to monitor sex offenders—monitoring would be impossible if only a post-office box, and not the actual place where the offender is residing or living, could be reported as an address.

12 We note that this meaning is consistent with § 15–20–24, which provides that, 60 days after a sex offender's release from custody and at various times thereafter, the Department of Public Safety "shall *mail* a non-forwardable verification form to the *address* " of the offender, § 15–20–24(a) (emphasis added), and that the verification form must be completed by the offender and "shall state that the adult criminal sex offender still *resides at that address,*" but that if the offender does not receive the form, the offender must report in person to the appropriate law-enforcement agency and "verify his or her *residence*." § 15–20–24(b) (emphasis added).

13 We also note that, even if we were to find it necessary to construe the phrase "actual address at which he or she will live or reside," which we do not, we would still reject the State's proposed construction because it is so broad that it defies one of the most basic rules of statutory construction—the rule of lenity. "The 'rule of lenity' requires that "ambiguous criminal statute[s] ... be construed in favor of the accused." ' " *Ex parte Bertram,* 884 So.2d 889, 892 (Ala.2003) (quoting *Castillo v. United States,* 530 U.S. 120, 131, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000) (paraphrasing *Staples v. United States,* 511 U.S. 600, 619 n. 17, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994))). See also *Ex parte Hyde,* 778 So.2d 237, 239 n. 2 (Ala.2000) ("[C]riminal statutes are construed strictly against the State."). Thus, even if we were to construe former § 15–20–22(a)(1), we would be required to do so strictly, and likely would reach the same result we have reached by simply applying the plain language of that statute.

14 The State argues that the trial court erred in finding the former § 15–20–22(a)(1) constituted cruel and unusual punishment as applied to the defendant because, it says, the defendant is not being punished for his status as being homeless, but for refusing to provide a location of any public place where he could be found by law enforcement. The State's argument in this regard is based entirely on its previous argument that this Court should construe the term "address" to mean "location"—an argument we have already rejected and need not further discuss.

15 We note that our holding today and our interpretation of *Robinson* and *Powell* is buttressed by the basic law regarding criminal responsibility. Section 13A–2–3, Ala.Code 1975, specifically provides that "[t]he minimum requirement for criminal liability is the performance by a person of conduct which includes *a voluntary act or the omission to perform an act which he or she is physically capable of performing.*" (Emphasis added.) See also W. LaFave and A. Scott, *Substantive Criminal Law,* § 3.3(c) (1986) ("[O]ne cannot be criminally liable for failing to do an act which he is physically incapable of performing." (footnote omitted)). The defendant here was not physically capable of performing the required act, i.e., providing an "actual address at which he or she [would] reside or live" after release from prison, because he did not have any fixed place where he could dwell and receive mail.

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JAMES R. MCGUIRE (CA SBN 189275)
JMcguire@mofo.com
LAUREN WROBLEWSKI (CA SBN 291019)
LWroblewski@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000

STEPHEN A. ROSENBAUM (CA SBN 98634)
SRosenbaum@crla.org
CALIFORNIA RURAL LEGAL ASSISTANCE, INC.
145 E. Weber Avenue
Stockton, CA 95202
Telephone: 209.946-0605
Facsimile: 209.956-5730

ILENE J. JACOBS (CA SBN 126812)
IJacobs@crla.org
CALIFORNIA RURAL LEGAL ASSISTANCE, INC.
511 D Street
Marysville, CA 95901
Telephone: 530.742.7235
Facsimile: 530.741.0854

Attorneys for Plaintiffs
JUSTIN LIGHTSEY, ROBERT SCHUKNECHT, MARIO ACOSTA, AND JAMES ESCOBAR

DALE L. ALLEN, JR., State Bar No. 145279
dallen@aghwlaw.com
MARK F. HAZELWOOD, State Bar No. 136521
mhazelwood@aghwlaw.com
KIMBERLY Y. CHIN, State Bar No. 271333
kchin@aghwlaw.com
ALLEN, GLAESSNER, HAZELWOOD & WERTH, LLP
180 Montgomery Street, Suite 1200
San Francisco, CA 94104
Telephone: (415) 697-2000
Facsimile: (415) 813-2045

Attorneys for Defendant
CITY OF MANTECA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

JUSTIN LIGHTSEY, ROBERT SCHUKNECHT, MARIO ACOSTA, AND JAMES ESCOBAR

Plaintiffs,

v.

CITY OF MANTECA,

Defendant.

Case No. 2:15-cv-02368 MCE-DB

NOTICE OF SETTLEMENT IN PRINCIPLE

Trial: None Set

TO THE HONORABLE COURT:

A settlement in principle has been reached to resolve all claims alleged in the complaint against Defendant, subject to the parties' agreement being memorialized in a formal settlement agreement and the completion of other standard terms and conditions to effect the settlement.

The parties will keep the Court informed of any further developments.

Dated: December 13, 2016

MORRISON & FOERSTER LLP

By: */s/James R. McGuire*
JAMES R. MCGUIRE

Attorneys for Justin Lightsey, Robert Schuknecht, Mario Acosta, and James Escobar

ALLEN, GLAESSNER, HAZELWOOD & WERTH, LLP

By: */s/Mark Hazelwood* (as authorized on 12/12/2016)
MARK HAZELWOOD

Attorneys for City of Manteca

STEPHEN P. WILEY, City Attorney
Tom R. Shapiro, Assistant City Attorney
State Bar Nos. 84517, 127383
Post Office Box 1990
Santa Barbara, California 93102-1990
(t) (805) 564-5326 (f) (805) 897-2532
(e) tshapiro@santabarbaraca.gov

Attorneys for Defendants City of Santa Barbara

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES RYDEN, RODNIE EWING, MICHAEL WHITE, JAMES TOOHEY, individually, and on behalf of all those similarly situated, Petitioners, vs. CITY OF SANTA BARBARA, SANTA BARBARA POLICE DEPARTMENT, Respondents.	CASE NO. CV 09-1578 SVW (SSx) **STIPULATION DISMISSING ACTION**

Pursuant to Federal Rule of Civil Procedure 41(a), Plaintiffs James Ryden, Rodnie Ewing, Michael White, James Toohey, and Defendants, City of Santa Barbara and Santa Barbara Police Department, by and through their undersigned counsel, have agreed to settle this matter and dismiss the above-captioned lawsuit. Plaintiffs and Defendants hereby stipulate and agree to dismiss this lawsuit without prejudice and also stipulate and agree that each side shall bear its own costs and attorney fees.

DATED: September 4, 2009

STEPHEN P. WILEY, City Attorney

By _____

Tom R. Shapiro
Assistant City Attorney
Attorneys for City of Santa Barbara
And Santa Barbara Police Department

DATED: September 10, 2009

ACLU of Southern California

By _____

Mark Rosenbaum
Attorneys for Plaintiffs

EXHIBIT 1

SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT (the "Agreement") is entered into by and between Plaintiffs Mark Sipprelle, Helene Ayres, Felipe Ruiz, Robert Carmichael, and Paul Ishak ("Plaintiffs") and the City of Laguna Beach, the Laguna Beach Police Department, and the City Council of the City of Laguna Beach (collectively "Defendants"). Each Plaintiff and Defendant is a "Party" and collectively, Plaintiffs and Defendants are the "Parties."

RECITALS

WHEREAS, on December 23, 2008, Plaintiffs filed a complaint (the "Complaint") against Defendants in U.S. District Court (the "Action"). The Complaint alleges, among other things, that Defendants' enforcement of Laguna Beach Municipal Code (hereinafter "LBMC") section 18.04.020 violated the Eighth Amendment's ban on cruel and unusual punishment by criminalizing the involuntary condition of homelessness.

WHEREAS, Defendants filed an Answer to the Complaint that, among other things, denies all allegations of wrongdoing.

WHEREAS, the Parties wish to avoid the costs, burdens, time and uncertainties associated with protracted litigation and they desire to compromise and settle their differences, fully and completely, on the terms set forth in this Agreement.

NOW, THEREFORE, for good and valuable consideration, including the mutual promises and covenants herein, the Parties agree to settle their disputes on the following terms:

AGREEMENT

1. Effective Date. The "Effective Date" of this Agreement shall be the date upon which the last signatory Party executes this Agreement.

2. Effective Period. This agreement will remain in effect for three (3) years from the Effective Date ("Effective Period").

3. Laguna Beach Municipal Code.

A. The Parties acknowledge that on March 3, 2009, Defendant City Council of the City of Laguna Beach adopted an ordinance repealing those portions of LBMC section 18.04.020 relating to camping and sleeping in public places within the City.

B. For a period of three (3) years following the Effective Date of this Agreement, Defendants agree to furnish Plaintiffs' counsel with written notice at least thirty (30) days prior to any City Council public meeting at which action is proposed to add or revise provisions of the Laguna Beach Municipal Code pertaining to the prohibition of, or restriction on, camping or sleeping in public places within the City.

C. Nothing in this Agreement shall prohibit Defendants (including their officers, employees and agents) from stopping, detaining, issuing citations or making arrests, or threatening to issue citations or make arrests, to persons reasonably believed to be in violation of the current provisions of Laguna Beach Municipal Code section 18.04.020 with respect to awnings, canopies, umbrellas, and other such covers.

4. Disposition of Prior Arrests and Citations.

A. Plaintiffs intend, within twenty-one (21) days of the Effective Date of this Agreement, to move the Court for an order directing Defendants to seal, expunge or destroy permanently all records created on and after June 18, 2007 relating to arrests of or citations to Plaintiffs and other persons for violation of the former provisions of Laguna Beach Municipal Code section 18.04.020 with regard to camping or sleeping on public property. Plaintiffs further intend to move the Court for an order directing Defendants to seal, expunge or destroy permanently all records created on and after January 1, 2004 relating to arrests of or citations to Plaintiffs, or any of them, for violation of the former provisions of Laguna Beach Municipal Code section 18.04.020 with regard to camping or sleeping on public property.

B. Defendants agree not to oppose such motion by Plaintiffs, provided that the order requested and obtained substantially conforms to the following:

i. Defendants shall have thirty (30) days of the receipt of the order to undertake and complete the sealing, expungement or destruction of the described records and to furnish Plaintiffs' counsel with written notice of such completion.

ii. Defendants shall have thirty (30) days from the receipt of the order to request in writing to their City Attorney and the Orange County District Attorney that any copies of the described records in their possession either be sealed, expunged or destroyed or be returned to the City. Such requests shall include a copy of the Court's order. Defendants shall furnish Plaintiffs' counsel with a copy of such requests and any written response to such requests.

C. During the Effective Period of this Agreement, Defendants will not oppose the petition to the Superior Court of Orange County of any person to expunge a conviction, occurring on or after December 23, 2006, of a violation of the former provisions of Laguna Beach Municipal Code section 18.04.020 with regard to camping or sleeping on public property. Defendants will not oppose the petition of any Plaintiff to expunge a conviction, occurring on or after January 1, 2004, of a violation of the former provisions of Laguna Beach Municipal Code section 18.04.020 with regard to camping or sleeping on public property.

5. California Penal Code section 647(e).

A. Except as otherwise provided below, and for a period of two (2) years following the Effective Date of this Agreement, Defendants agree to furnish Plaintiffs' counsel with written notice at least thirty (30) days prior to the City's resumption of enforcement of California Penal

Code section 647(e) with respect to lodging in any City public building, structure or place without the permission of the City.

B. Prior to such time as Defendants may determine to resume enforcement of California Penal Code section 647(e), Defendants (including their officers, employees and agents), except as otherwise provided below, shall not issue citations or make arrests, or threaten to issue citations or make arrests, for violation of California Penal Code section 647(e) with respect to lodging in any City public building, structure or place without the permission of the City.

C. Prior to such time as Defendants may determine to resume enforcement of California Penal Code section 647(e), Defendants (including their officers, employees and agents), except as otherwise provided below, shall not rely on a violation of California Penal Code 647(e) with respect to lodging in any City public building, structure or place without the permission of the City for the purpose of establishing probable cause to believe that a person is engaged in or is about to engage in criminal activity.

D. Nothing in this Agreement shall prohibit Defendants (including their officers, employees and agents) from issuing citations or making arrests, or threatening to issue citations or make arrests, for violation of California Penal Code section 647(e) with respect to lodging in any private building, structure or place within the City without the permission of the private owner, or with respect to lodging in any building, structure or place owned by a public entity other than the City without the permission of that other public entity.

E. Nothing in this Agreement shall prohibit Defendants (including their officers, employees and agents) from issuing citations or making arrests, or threatening to issue citations or make arrests, for violation of California Penal Code section 647(e) with respect to lodging in any City public building, structure or place without the permission of the City in circumstances presenting reasonable public health, safety and welfare concerns with respect to possible harm or injury to persons and/or damage to property (e.g., fire hazard).

F. Nothing in this Agreement shall prohibit consensual encounters between Defendants (including their officers, employees and agents) and persons who are reasonably believed to be in violation of California Penal Code section 647(e) with respect to lodging in any City public building, structure or place without the permission of the City, provided that such encounters are not used unlawfully for the purpose of harassing or intimidating any such person, and provided further that Defendants shall have specific, articulable facts regarding a sleeping person's health, safety or welfare to justify awakening the person and initiating a consensual encounter.

G. Nothing in this Agreement shall prohibit Defendants (including their officers, employees and agents) from stopping, detaining, issuing citations or making arrests, or threatening to issue citations or make arrests, or taking other law enforcement action when there is probable cause to believe that a person is violating some local law or other provision of state law.

6. Dismissal of Action.

A. Within seven (7) days of the Effective Date of this Agreement, Plaintiffs agree to file a motion for voluntary dismissal of the Action with prejudice.

B. Defendants acknowledge and agree that upon entry, such voluntary dismissal shall not operate as a bar or estoppel to any future legal proceedings arising from any acts or omissions of Defendants subsequent to the date of this Agreement.

7. Enforcement of the Agreement.

A. Notwithstanding the voluntary dismissal of this Action, the Parties agree that the Court shall retain jurisdiction for the purpose of enforcement of the terms of this Agreement.

B. The Court shall retain jurisdiction for the Effective Period of the Agreement.

C. No party may seek to enforce the Agreement without first providing the other side notice of any alleged violation and a reasonable opportunity to cure the alleged violation and without meeting and conferring in good faith.

8. Attorneys' Fees.

A. Within thirty (30) days of the Effective Date of this Agreement, Defendants agree to pay, and Plaintiffs and their counsel agree to accept, the total sum of $9,000.00 to Plaintiffs for attorneys' fees incurred in connection with the initiation, prosecution and resolution of the Action, including but not limited to the negotiation, drafting and effectuation of this Agreement, and any related proceedings, efforts and activities that preceded the commencement of the Action.

B. Except as expressly provided above, the Parties and their respective counsel agree to bear their own attorneys' fees, costs and other expenses incurred in connection with the initiation, prosecution and resolution of the Action, including but not limited to the negotiation, drafting and effectuation of this Agreement, and any related proceedings, efforts and activities that preceded the commencement of the Action.

9. Time of Essence. Time is of the essence with respect to each and every provision of this Agreement.

10. Full Settlement and Release. The Parties agree that this Agreement is in full settlement and release of all claims outlined in the Complaint.

11. Civil Code Section 1542. To the extent that the foregoing release is a release to which Section 1542 of the California Civil Code applies, it is the intention of the Parties that the foregoing release shall be effective as a bar to any and all actions, fees, damages, losses, claims, liabilities and demands of whatsoever character, nature and kind, known or unknown, suspected or unsuspected, related in any way to the Complaint or the litigation of the Action.

12. Non-Admission of Liability. This Agreement is entered into as a compromise of disputed claims. This Agreement does not constitute, nor shall it be construed as, an admission of any liability or wrongdoing by any party.

13. Notification. Any notice or communication to any Party permitted or required by this Agreement shall be made in writing, and shall be addressed to the following:

A. Plaintiffs:

i. Andra Greene
Irell & Manella, LLP
840 Newport Center Drive
Suite 400
Newport Beach, CA 92660
Facsimile: 949-760-5200

ii. Mark Rosenbaum
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017
Facsimile: 213-977-5297

B. Defendants:

Philip Kohn
611 Anton Boulevard
Suite 1400
Costa Mesa, California 92626
Facsimile: 714-546-9035

14. Applicable law. The provisions of this Agreement shall be governed by the laws of the State of California.

15. Counterparts. This Agreement may be executed in separate counterparts, each of which is deemed to be an original and all of which taken together constitute one and the same agreement.

16. Facsimile Signatures. The signatures to this Agreement may be evidenced by facsimile copies reflecting the signatures hereto, and any such facsimile copy shall be sufficient to evidence the signature just as if it were an original signature.

17. Authority. Each individual executing this Agreement on behalf of an entity represents and warrants that he or she is a duly authorized representative of that entity with full authority to bind it to each and every term and condition thereof.

18. Voluntary Action With Advice of Counsel: Each Party represents that it has been represented throughout all negotiations that preceded execution of this Agreement by counsel of its own independent choice. The Parties have entered into this Agreement freely and voluntarily

and after having consulted with legal counsel and having had the terms contained in this Agreement explained to each of them by counsel. The Parties have read, appreciate and understand the terms contained in this Agreement and are fully satisfied with those terms as set forth herein.

19. Entire Agreement. Each of the Parties acknowledges that no person has made any promise, representation or warranty whatsoever, express or implied, not contained herein concerning the subject matter hereof, to induce the execution of this Agreement, and each signatory hereby acknowledges that said signatory has not executed this Agreement in reliance upon any such promise, representation or warranty. This Agreement constitutes the entire understanding between the Parties and supersedes all prior negotiations, representations or agreements between the Parties, either written or oral, on the subject hereof.

20. Modifications. There shall be no modifications or amendments to this Agreement unless they are in writing, signed by the Parties.

21. Severability Clause. If any provision or provisions of this Agreement shall be held to be invalid, illegal, unenforceable or in conflict with the law of any jurisdiction, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

APPROVED AND AGREED:

PLAINTIFFS

MARK SIPPRELLE

Dated: 02/06, 2009 By: Mark Sipprelle

HELENE AYRES

Dated: _____, 2009 By: _____

FELIPE RUIZ

Dated: _____, 2009 By: _____

ROBERT CARMICHAEL

Dated: _____, 2009 By: _____

and after having consulted with legal counsel and having had the terms contained in this Agreement explained to each of them by counsel. The Parties have read, appreciate and understand the terms contained in this Agreement and are fully satisfied with those terms as set forth herein.

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APPROVED AND AGREED:

PLAINTIFFS

MARK SIPPRELLE

Dated: _____, 2009 By: _____

HELENE AYRES

Dated: 5/27, 2009 By: Helene M. Ayres

FELIPE RUIZ

Dated: _____, 2009 By: _____

ROBERT CARMICHAEL

Dated: _____, 2009 By: _____

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APPROVED AND AGREED:

PLAINTIFFS

MARK SIPPRELLE

Dated: _____, 2009 By: _____

HELENE AYRES

Dated: _____, 2009 By: _____

FELIPE RUIZ

Dated: 5-27, 2009 By: Felipe Ruiz

ROBERT CARMICHAEL

Dated: _____, 2009 By: _____

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APPROVED AND AGREED:

PLAINTIFFS

MARK SIPPRELLE

Dated: _____, 2009 By: _____

HELENE AYRES

Dated: _____, 2009 By: _____

FELIPE RUIZ

Dated: _____, 2009 By: _____

ROBERT CARMICHAEL

Dated: 5/22, 2009 By: _____

PAUL ISHAK

Dated: 6 19, 2009

By: Paul Ishak

DEFENDANTS:

CITY OF LAGUNA BEACH

Dated: _____, 2009

By: _____

LAGUNA BEACH POLICE DEPARTMENT

Dated: _____, 2009

By: _____

CITY COUNCIL OF THE CITY OF LAGUNA BEACH

Dated: _____, 2009

By: _____

APPROVED AS TO FORM:

_____

Andra Greene

_____

Philip Kohn

Counsel for Defendants

_____

Mark Rosenbaum

Counsel for Plaintiffs

. . . .

PAUL ISHAK

Dated: _____, 2009 By: _____

DEFENDANTS:

CITY OF LAGUNA BEACH

Dated: 5-19, 2009 By: Kelly A Boyd

LAGUNA BEACH POLICE DEPARTMENT

Dated: 5/19, 2009 By: Kenneth Tarr

CITY COUNCIL OF THE CITY OF LAGUNA BEACH

Dated: 5-19, 2009 By: Kelly A Boyd

APPROVED AS TO FORM:

_____ _____

Andra Greene Philip Kohn

Counsel for Defendants

_____

Mark Rosenbaum

Counsel for Plaintiffs

130/053733-0551
1009687.05 a05/15/09

PAUL ISHAK

Dated: _____, 2009 By: _____

DEFENDANTS:

CITY OF LAGUNA BEACH

Dated: _____, 2009 By: _____

LAGUNA BEACH POLICE DEPARTMENT

Dated: _____, 2009 By: _____

CITY COUNCIL OF THE CITY OF LAGUNA BEACH

Dated: _____, 2009 By: _____

APPROVED AS TO FORM:

_____
Andra Greene

_____
Philip Kohn
Counsel for Defendants

_____
Mark Rosenbaum
Counsel for Plaintiffs

130/053733-0551

PAUL ISHAK

Dated: _____, 2009 By: _____

DEFENDANTS:

CITY OF LAGUNA BEACH

Dated: _____, 2009 By: _____

LAGUNA BEACH POLICE DEPARTMENT

Dated: _____, 2009 By: _____

CITY COUNCIL OF THE CITY OF LAGUNA BEACH

Dated: _____, 2009 By: _____

APPROVED AS TO FORM:

_____ _____

Andra Greene Philip Kohn

Counsel for Defendants

Mark Rosenbaum

Counsel for Plaintiffs

130/053733-0551

SAN DIEGO VOLUNTEER LAWYER PROGRAM
625 Broadway, Ste. 925
San Diego, CA 92101
619-235-5656 / fax 619-235-5668

COHELAN, KHOURY & SINGER
Timothy D. Cohelan (CSB No. 60827)
Kimberly D. Neilson (CSB No. 216571)
605 C Street, Ste. 200
San Diego, CA 92101
619-595-3001 / fax 619-595-3000

DREHER LAW FIRM
Robert Scott Dreher (CSB No. 120527)
835 Fifth Avenue, Suite 202
San Diego, CA 92101
619-230-8828 / fax 619-687-0136

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GREG SPENCER; RANDALL FRENCH; MARGARET ARMSTRONG; JIMMY WARD; JEFFREY MILES; SYLVIA LIEVANOS; JUAN ALEJO; STEVEN GREER; and ROBERT YBARRA, individually and on behalf of themselves and all others similarly situated, Plaintiffs, vs. The CITY OF SAN DIEGO; CITY OF SAN DIEGO POLICE DEPARTMENT; and CHIEF OF POLICE WILLIAM LANSDOWNE, in his official capacity only, Defendants.	Civil Case No.: 04 CV-2314 BEN (WMC) **JOINT STIPULATION FOR DISMISSAL PURSUANT TO SETTLEMENT AGREEMENT.**

The parties, by and through their attorneys, hereby stipulate and agree as follows:

1. The parties, with the Court's assistance, reached a Settlement of all issues in this case, effective March 27, 2007, and at that time therein stipulated to the continuing jurisdiction of the District Court, Hon. William McCurine, over all issues relating to the matter;

2. That Settlement has been subject to Court monitoring and review on a regular basis from that time, with regular reports from the parties on its effectiveness;

3. It now appears that the Settlement is having its desired effect, and that continued active monitoring and review by the Court are no longer necessary.

Thus, the Parties ask the Court for an Order dismissing this case with prejudice.

IT IS SO STIPULATED:

SAN DIEGO VOLUNTEER LAWYER PROGRAM

COHELAN, KHOURY & SINGER

- and -

DREHER LAW FIRM

By: s/Robert Scott Dreher
Attorneys for Plaintiffs

OFFICE OF THE CITY ATTORNEY OF THE CITY OF SAN DIEGO

By: s/Daniel Bamberg
Daniel Bamberg, Esq.
Attorneys for Defendants

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GREG SPENCER; RANDALL FRENCH; MARGARET ARMSTRONG; JIMMY WARD; JEFFREY MILES; SYLVIA LIEVANOS; JUAN ALEJO; STEVEN GREER; and ROBERT YBARRA, individually and on behalf of themselves and all others similarly situated, Plaintiffs, vs. The CITY OF SAN DIEGO; CITY OF SAN DIEGO POLICE DEPARTMENT; and CHIEF OF POLICE WILLIAM LANSDOWNE, in his official capacity only, Defendants.	Civil Case No.: 04 CV-2314 BEN (WMC) **ORDER FOR DISMISSAL PURSUANT TO SETTLEMENT AGREEMENT.**

In accordance with the foregoing stipulation of the parties, and good cause appearing, the Court dismisses this action with prejudice and reserves jurisdiction should a further need arise.

Dated: March ____, 2009

HON. WILLIAM McCURINE, Jr.
United States Magistrate Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GREG SPENCER, et al, v. CITY OF SAN DIEGO, et al
Case No. 04 CV-2314 BEN (WMC)

PROOF OF SERVICE

I, the undersigned, declare:

I am over the age of eighteen years and not a party to the case. I am employed in the County of San Diego, California, where the service occurs; and my business address is 835 Fifth Ave, Suite 202, San Diego, CA 92101.

On **March 17, 2009**, I caused to be served copies of the documents described as:

1. **JOINT STIPULATION FOR DISMISSAL PURSUANT TO SETTLEMENT AGREEMENT;**
2. **ORDER FOR DISMSISAL PURSUANT TO SETTLEMENT AGREEMENT.**

on the following party in this action:

Daniel Bamberg, Esq.
OFFICE OF THE CITY ATTORNEY
OF THE CITY OF SAN DIEGO
1200 Third Avenue, Suite 1100
San Diego, CA 92101
Attorneys for Defendants City of San Diego, San Diego Police Department and William Lansdowne

[ ] BY PERSONAL SERVICE. I hand-delivered the above referenced document to the designated person referenced above.

[X] BY EMAIL PERSUANT TO THE CM / ECF SYSTEM.
dbamberg@sandiego.gov

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and was executed **March 17, 2009** at San Diego, California.

s/ Yassarette A. Valdivia
Yassarette A. Valdivia

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GREG SPENCER; RANDALL FRENCH; MARGARET ARMSTRONG; JIMMY WARD; JEFFREY MILES; SYLVIA LIEVANOS; JUAN ALEJO; STEVEN GREER; and ROBERT YBARRA, individually and on behalf of themselves and all others similarly situated, Plaintiffs, vs. The CITY OF SAN DIEGO; CITY OF SAN DIEGO POLICE DEPARTMENT; and CHIEF OF POLICE WILLIAM LANSDOWNE, in his official capacity only, Defendants.	Civil Case No.: 04 CV-2314 BEN (WMC) **STIPULATION AND ORDER MODIFYING SETTLEMENT AGREEMENT.**

On September 1, 2010, at 4:30 p.m., the parties through their attorneys appeared telephonically before the Honorable William McCurine, to discuss with the Court an agreement to modify the 2007 Settlement and Order dismissing this action. Based on these discussions, the files, records and pleadings in this matter, and for good cause appearing, the parties, by and through their attorneys, hereby stipulate and agree as follows:

1. In consideration of the City of San Diego having increased the availability of shelter beds and services for homeless persons, to include its expected approval of a new permanent shelter in the downtown area with wrap-around services, the parties have agreed to modify the existing Settlement and Order prohibiting the issuance of citations for Illegal lodging arising out of the above-referenced matter. The specifics of the modification of the existing order will be

incorporated into the SDPD Training Bulletin re: ILLEGAL LODGING – Penal Code 647(e), which is attached hereto as Exhibit A and incorporated by reference herein.

2. As described in the departmental Training Bulletin, members of the San Diego Police Department may hereafter enforce the illegal lodging law between the hours of 2100 (9:00 p.m.) and 0530 (5:30 a.m.) in the area bounded by Laurel Street to the north, by I-5 to the east, by San Diego Bay to the west, and by Sigsbee Street to the south (hereinafter, the "Downtown Area") if, and only if:

a) A member of the San Diego Police Department has first confirmed that there is a shelter bed available for that person within the Downtown Area or within a 5 mile radius of 25th Street and Market Street;

b) A member of the San Diego Police Department offers a shelter bed to that person; and,

c) That person refuses to accept the available shelter bed, with appropriate documentation of the offer and refusal.

3. The parties shall meet and confer to determine the details and objective characteristics of the identification of "available" shelter, the offer of shelter, its location and method of documentation.

4. The parties will further meet and confer in an effort to have or create a program using the community court model or other appropriate model under auspices of the Superior Court of San Diego County to hear and determine issues related to Penal Code 647(e) citations issued pursuant to this stipulation.

5. If no shelter bed is available in the "Downtown Area" for such person, or the individual is turned down by the services provider for an available bed, the present terms and procedures of the 2007 Settlement and Order will remain in effect.

6. The present terms of the 2007 Settlement and Order remain in effect throughout the City of San Diego, except to the extent it is hereby modified in the Downtown Area.

7. The parties agree to continue to negotiate over the terms of the 2007 settlement.

8. The Court reserves jurisdiction to interpret and enforce this Order.

IT IS SO STIPULATED:

Dated:

SAN DIEGO VOLUNTEER LAWYER PROGRAM

COHELAN, KHOURY & SINGER

-and-

DREHER LAW FIRM

By: s/Robert Scott Dreher
Attorneys for Plaintiffs

OFFICE OF THE CITY ATTORNEY OF THE CITY OF SAN DIEGO

By: s/Daniel Bamberg
Daniel Bamberg, Esq.
Attorneys for Defendants

In accordance with the foregoing stipulation of the parties, the files, records and pleadings in this matter, and for good cause appearing,

IT IS SO ORDERED:

November 10, 2010

HON. WILLIAM McCURINE, Jr.
United States Magistrate Judge
United States District Court

CERTIFICATE OF SERVICE

On the 17th day of August, 2017, pursuant to Federal Rules of Civil Procedure, a true copy of the instrument to which this Certificate is attached was duly served upon each party to this cause on the CM/ECF system, which will automatically serve a Notice of Electronic Filing on the respective attorneys.

Connica Lemond
Attorney-in-Charge
P.O. Box 368
Houston, Texas 77001-0368
900 Bagby, 3rd Floor
Houston, Texas 77002

Deidra Norris Sullivan
P.O. Box 368
Houston, Texas 77001-0368
900 Bagby, 3rd Floor
Houston, Texas 77002

Attorneys for Defendant

/s/ Joseph M. Abraham
Joseph M. Abraham