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

REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs Eugene Stroman, Janelle Gibbs, and putative class members are unsheltered homeless residents of Houston. Plaintiffs are at imminent risk of being arrested by Houston Police Department officers, in violation of their Eighth Amendment rights, solely for attempting to meet their basic human need for shelter.

The City appears to be set on a plan to force residents out of the Wheeler encampment in downtown Houston while avoiding judicial review, and their opposition does nothing to contest the series of misrepresentations they made to Plaintiffs. Contrary to the City's prior representations, Houston Police Department officers visited the Wheeler encampment to threaten prosecutions on Wednesday, August 16, and began issuing tickets to people for using tents on Thursday, August 17. The night before police began issuing tickets, like every night, the emergency shelter beds in Houston were full, leaving Houston's unsheltered homeless population with nowhere to turn.

Plaintiffs filed this action on May 12, 2017 (Dkt. No. 1). Defendants moved to dismiss the operative complaint on August 9 (Dkt. Nos. 22, 24), and Plaintiffs' response is due September 8 (Dkt. No. 30). The parties are scheduled to appear before the Court for their Initial Pretrial and Scheduling Conference on September 11 (Dkt. No. 2). Plaintiffs filed this application for a temporary restraining order on Thursday, August 17, (Dkt. Nos. 27, 29, 31–32), and the City filed its opposition on Friday, August 18 (Dkt. Nos. 33–35).

SUMMARY OF ISSUES

Plaintiffs seek a temporary restraining order prohibiting the City from prosecuting unsheltered homeless people for using tents.[1] Plaintiffs' application merits a temporary restraining order because they have shown "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011)

ARGUMENT

Plaintiffs' application merits entry of a temporary restraining order to protect the status quo until this Court can hold a full preliminary injunction hearing. The City's opposition does nothing to contest their series of misrepresentations to Plaintiffs, and instead focuses on public health interests that are tangential to the criminal ordinance the City is attempting to enforce. These interests do not outweigh the Plaintiffs' Eighth Amendment rights.

I. Plaintiffs Are Very Likely to Succeed on the Merits, Because Houston Threatens to Violate Basic Constitutional Limitations on Punishment

The City has explicitly threatened Plaintiffs with enforcement of laws criminalizing camping in public. Plaintiffs are likely to succeed on the merits of their Eighth Amendment claim, because criminalizing camping in public effectively criminalizes the status of homelessness.

[1] The City's opposition makes repeated references to accumulation of property. Plaintiffs have sought a temporary restraining order only as to enforcement of Houston Code of Ordinances §§ 21-61(a), 21-62, which are the provisions banning the use of tents or other temporary structures.

A. Houston Has Effectively Criminalized the Status of Homelessness in Violation of Plaintiffs' Eighth Amendment Rights

As Plaintiffs set forth in their opening brief, it is unconstitutionally cruel to criminalize a status, like homelessness, that "may be contracted innocently or involuntarily." *Robinson v. California*, 370 U.S. 660, 666–67 (1962). The City cannot circumvent this principle by criminalizing the innocent "act" of sheltering oneself in public as a proxy for the status of homelessness. Cities enforcing sleeping and camping bans have capitulated or lost, repeatedly, because of their lack of emergency shelter beds. *See, e.g. Jones v. City of Los Angeles*, 444 F.3d 1118, 1131–32 (9th Cir. 2006), *vacated pursuant to settlement agreement*, 505 F.3d 1006 (9th Cir. 2007) (affirming injunction); *Cross v. City of Sarasota*, 2016 WL 3476421 (M.D. Fla. settled June 22, 2017) (agreeing to limit enforcement in settlement); *Johnson v. City of Dallas*, 860 F. Supp. 344, 349–350 (N.D. Tex. 1994), *rev'd in part on other grounds*, 61 F.3d 442 (5th Cir. 1995) (enjoining enforcement); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563–65 (S.D. Fla. 1992) (enjoining enforcement). It is inconsistent with *Robinson* to punish unsheltered homeless people for meeting their basic human needs in public if there is no place else to go.

None of the City's arguments give this Court a reason to hold otherwise. First, remarkably, the City claims that its ordinance "does not prohibit an individual from . . . sheltering him or herself in public." Def.'s Opp. at 4, Dkt. No. 33. The City's ordinance specifically prohibits "unauthorized use of . . . a tent or other temporary structure for living accommodation purposes or human habitation" in public. Houston Code of Ordinances §§ 21-61(a), 21-62. The City does not (and could not) explain how Plaintiffs can legally shelter themselves consistent with this ordinance.

Second, the City points to its police power, claiming the authority to "absolutely prohibit" the use of public property in any manner that is not, in the City's opinion, in the public

interest. Def.'s Opp. at 4. Of course, the City's police power is subject to limits set by the United States Constitution. *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958). The camping ban violates Plaintiffs' rights under the Eighth Amendment.

Third, the City argues that banning shelter is distinguishable from banning sleep. Def.'s Opp. at 5–6. There is no material difference: shelter, like sleep, is a basic human need. *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Palmer v. Johnson*, 193 F.3d 346, 349 (5th Cir. 1999).

Fourth, the City argues that "the City has made agreements with several shelters throughout the City to accept homeless individuals." Def.'s Opp. at 6. The City asks the Court to ignore the facts: the City has already ticketed Wheeler encampment residents on-site, without any apparent effort to determine whether they could access alternative shelter. *See* Decl. of Shere Dore dated Aug. 17, 2017, ¶¶ 2–3, Dkt. No. 31. And as Plaintiffs demonstrated in their opening papers, there is no alternative shelter available. Houston's emergency shelter beds are full. *See* Decl. of Shere Dore dated Aug. 16, 2017, ¶ 22, Dkt. No. 29 at 64; Kucifer Decl. ¶¶ 3-4, Dkt. No. 29 at 73. Notably, the City has not committed to refrain from ticketing anyone who cannot access a bed.[2]

Finally, the City claims that the Eighth Amendment "does not extend protection to involuntary conduct." Def.'s Opp. at 5. Here again, the City is wrong on the law. The City quotes from the nonbinding plurality opinion in *Powell v. Texas*, 392 U.S. 514, 533 (1968), failing to recognize that a majority of the justices agreed in principle that a homeless person cannot be punished for performing unavoidable acts in public if he has "no place else to go." *Id.* at 551 (White, J., concurring in the judgment); *see id.* at 570 (Fortas, J., dissenting) (describing one who

[2] Even if the City made such a representation, voluntary cessation of the City's challenged conduct would not affect the merits of Plaintiffs' claims. The Ninth Circuit rejected similar promises made by the City of Boise in an attempt to avoid a legal challenge to its camping ban. *Bell v. City of Boise*, 709 F.3d 890, 898–901 (9th Cir. 2013).

"does not appear in public by his own volition"). The weight of subsequent authority, including Fifth Circuit authority, bears out the Plaintiffs' reading of *Powell* as correct: the Eighth Amendment extends protection to some involuntary conduct. *United States v. Flores-Alejo*, 531 F. App'x 422, 426 (5th Cir. 2013) (per curiam) ("[W]e must view as a whole the voluntary acts he committed . . . and his purportedly involuntary act . . . ."). *Accord Jones*, 444 F.3d at 1132; *Cobine v City of Eureka*, No. 16-cv-2239, 2017 WL 1488464, *4 (N.D. Cal. Apr. 25, 2017); *Johnson*, 860 F. Supp. at 350 ("[T]hey must be in public. And it is also clear that they must sleep."); *Pottinger*, 810 F. Supp. at 1565 (S.D. Fla. 1992); *State v. Adams*, 91 So.3d 724, 753–54 (Ala. Crim. App. 2010).[3]

The reason that courts reject the City's rigid status/act distinction is clear: under the City's rubric, *Robinson* would prohibit criminalization of "being homeless", but permit criminalization of clothing oneself, eating, or even breathing while homeless. The *Robinson* Court meant to do more than engage lawmakers in this semantic game. Instead, the Court held that it is unconstitutionally cruel to define crimes that make a person "continuously guilty" of an offense, "whether or not he has been guilty of any antisocial behavior." *Robinson*, 370 U.S. at 666. The City's camping ban is just such an ordinance. By prohibiting homeless people from using tents when they have no other shelter to turn to, the City "effectively penalizes the homeless simply for . . . engaging in innocent activity . . . that does not warrant punishment under the Eighth Amendment and, in effect, criminalizes the status of being homeless." *Cobine*, 2017 WL 1488464 at *4.

[3] The City cites just three cases in support of its view—two of which were resolved on evidentiary grounds, making their interpretations of *Powell* dicta, and one of which the Department of Justice explicitly rejected as an incorrect interpretation of *Powell*. Def.'s Opp. at 5 (citing *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000) (resolving appeal on evidentiary grounds); *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1167 (Cal. 1995) (same); *Joyce v. City and County of San Francisco*, 846 F. Supp. 843, 857 (N.D. Cal. 1994) (explicitly rejected by the Department of Justice); Statement of Interest of the United States at 13 n.15, *Bell v. City of Boise*, No. 09-cv-0540 (D. Idaho Aug. 6, 2015), ECF No. 276 (attached to Abraham Decl. as Ex. 4).

B. Plaintiffs Have Standing to Seek Relief from the City's Direct Threats of Imminent Prosecution

The City has credibly threatened to prosecute Plaintiffs for sheltering themselves with a tent, which is all that is necessary to confer standing. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014). The City's one-paragraph argument to the contrary relies exclusively on *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995), failing to engage whatsoever with *Driehaus* as superseding and controlling Supreme Court precedent. Def.'s Opp. at 4. As Plaintiffs made clear in their opening brief, *Johnson* was abrogated by *Driehaus*, and *Johnson*'s reasoning has been rejected by both the Ninth and Eleventh Circuits. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1129–30 (9th Cir. 2006) (criticizing *Johnson* and collecting contrary district court cases from the Ninth and Eleventh Circuits); *Church v. City of Huntsville*, 30 F.3d 1332, 1338–39 (11th Cir. 1994) (affirming homeless plaintiffs' Eighth Amendment standing to seek preliminary relief based on "substantial likelihood" of future harassment: "Logically, a prospective remedy will provide no relief for an injury that is, and likely will remain, entirely in the past." (quotation marks and citation omitted)). Having met the *Driehaus* standard, Plaintiffs have standing to seek relief from the City's threatened prosecution.

The City makes two further jurisdictional points, neither of which merit extended discussion. One is a fleeting reference to *Younger* abstention. Def.'s Opp. at 3 (citing *Younger v. Harris*, 401 U.S. 37 (1971)). *Younger* abstention is inappropriate because Plaintiffs do not seek to enjoin any proceedings that were ongoing at the time this action was filed. *See DeSpain v. Johnston*, 731 F.2d 1171, 1178 (5th Cir. 1984). The other is a reference to the City's efforts to procure housing for Mr. Stroman. Def.'s Opp. at 5. The City was careful to say only that Mr. Stroman "signed a lease" because, pending an inspection, Mr. Stroman still does not have keys to his apartment or access to any other shelter. Stroman Decl. ¶¶ 3, 8–9, Dkt. No. 29. Nor would

any City-procured change to Mr. Stroman's individual standing affect that of the putative class. This Court has jurisdiction to grant Plaintiffs relief pending a full preliminary injunction hearing.

II. Plaintiffs Will Suffer Deprivation of a Constitutional Right in the Absence of a Temporary Restraining Order

The City's argument on irreparable harm comes down to a dispute about the merits. As Plaintiffs have shown, the ban will violate their constitutional rights, which, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (addressing First Amendment harms). *Accord Dixon v. Vanderbilt*, 122 F. App'x 694, 695 (5th Cir. 2004) (holding Eighth Amendment violation would be an irreparable harm); *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 630 n.12 (5th Cir 1985) (noting that harm is irreparable "where the rights at issue are noneconomic, particularly constitutional rights"). The City argues that prosecution under the camping ban would not be an irreparable harm because the "ordinance is not unconstitutional." Def.'s Opp. at 7. This reduces to an argument on the merits, not an independent argument on irreparable harm.

In addition, the City perversely argues that granting a restraining order "would harm [Plaintiffs] more than it would help them" because "[t]he City's agreements with the shelters to provide beds . . . are tied to the ordinance." Def.'s Opp. at 8. This argument is doubly disingenuous: no matter what the City's agreement says, the camping ban does not create capacity to house the hundreds of unsheltered homeless people in Houston. *See* Dore Decl. dated Aug. 16, 2017, ¶ 22; Kucifer Decl. ¶¶ 3–4. Moreover, the City is free to "agree[] with the shelters to provide beds" without conditioning its agreement on an ordinance criminalizing homelessness. If the City reacts to an injunction by abandoning an agreement to improve shelter access, it will be the City, and not this Court's injunction, that causes Plaintiffs additional harm.

III. Vindicating Plaintiffs' Constitutional Rights is in the Public Interest, and Will Not Harm the City

Plaintiffs face the prospect of prosecution in violation of their constitutional rights, and accordingly, the balance of hardships in this case weighs heavily in favor of an order protecting the status quo. The City has not identified any reason why leaving tents up until a preliminary injunction hearing will cause a harm justifying violation of Plaintiffs' constitutional rights. And of course, an injunction protecting constitutional rights is always in the public interest. *See Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992).

The City argues, disingenuously, that the camping ban is necessary to "reduce the public health concerns that were generated by the encampments." Def.'s Opp. at 8. The public health concerns cited by the City—"no running water, no bathroom facilities" and "mattresses, sofas, and other items . . . often infested with . . . insects," *id.*, have nothing to do with whether a tent is up or down. Enforcing a ban on tents will not give anyone access to bathroom facilities or clean mattresses. Unsheltered homeless people will remain in public, without reliable access to proper sanitation, whether or not this ban is enforced.

Other courts agree that evidence intended to make the court squeamish about homeless peoples' living conditions is not a sound basis for depriving homeless people of their constitutional rights. For example, a district court enjoined the city of Fresno from seizure and destruction of homeless persons' property based on "[t]he City's purported desire for clean and safe streets." *Kincaid v. City of Fresno*, No. 1:06-cv-1445, 2006 WL 3542732, at *37 (E.D. Cal. Dec. 8, 2006). Here, as in *Kincaid*, "the City's interest in reducing health and safety concerns . . . can be protected against without" infringing upon Plaintiffs' constitutional rights. *Id.* at *40. Even when a city "may be slowed in [its] efforts to keep the City . . . clean and safe," which is not the case here, Plaintiffs would "risk a greater harm if the injunction is not granted: the

violation of their [constitutional] rights." *Justin v. City of Los Angeles*, No. 00-cv-12352, 2000 WL 1808426, at *11 (C.D. Cal. Dec. 5, 2000) (enjoining city from, *inter alia*, citing homeless people for loitering); *see also Lavan v. City of Los Angeles*, No. 11-cv-2874, 2011 WL 1533070 (C.D. Cal. Apr. 22, 2011) (enjoining city from seizing and immediately destroying homeless persons' property).

Here, the City has not shown that its proposed actions would actually accomplish its stated goal of addressing health concerns. Instead, the net effect of prosecuting people under the camping ban is likely to be the displacement of homeless people from one encampment to another, which will hardly improve public health. Moreover, the City has proven its ability to address health concerns without burdening Plaintiffs' constitutional rights, such as by the recent cleanings the City itself cites in its papers. Def.'s Opp. at 9.[4]

To be clear, Plaintiffs do not contest that the City is entitled to take reasonable steps to deal with "unsanitary conditions." Def.'s Opp. at 8–9. But the City's strategy to combat these issues—criminalization of sheltering oneself in public, when there is no available alternative—is an unnecessary burden on Plaintiffs' constitutional rights. The City has not shown that other available tools, like cleanings by the Health Department, are insufficient to address the interests it identifies. *Cf., e.g.*, *Kincaid*, 2006 WL 3542732, at *40 (noting that the city "can otherwise enforce public health and safety laws" without violating plaintiffs' rights). And, more importantly, enforcement of a ban on tents will do nothing to advance the City's identified interests in public health.

[4] The City presents no evidence for the claim that encampments "go[] back to the same, if not a worse state of health" within weeks of cleaning. Def.'s Opp. at 9. Moreover, the City's arguments that the cleanings allegedly cost "thousands of tax-payer dollars", *id.*, are no justification for prosecuting people in violation of the Eighth Amendment.

CONCLUSION

As applied against unsheltered homeless people, the City's camping ban criminalizes the status of homelessness in violation of the Eighth Amendment. The City has not identified any sufficient justification for prosecuting Plaintiffs before this Court can hold a preliminary injunction hearing. Plaintiffs respectfully request that this Court enjoin the City from enforcing Houston Code of Ordinances Sections 21-61(a) and -62, as outlined in Plaintiffs' proposed temporary restraining order, until the Court holds a preliminary injunction hearing.

Respectfully Submitted,

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