



LITIGATION MANUAL SUPPLEMENT:

Criminalization of Homelessness Case Summaries 2022



ABOUT THE NATIONAL HOMELESSNESS LAW CENTER

The National Homelessness Law Center (Law Center) is a 501(c)(3) nonprofit organization based in Washington, D.C. that seeks to serve as the legal arm of the national movement to end and prevent homelessness.

We believe that the human rights to adequate housing, healthcare, food, and education lie at the heart of human dignity, and we envision a world where no one has to go without the basics of human survival. While seeking universal enjoyment of human rights, we also understand that homelessness disparately impacts Black, Indigenous, and other people of color, women, members of the LGBTQ+ community, and people with disabilities, and those living at the intersections of multiple forms of marginalization, and our policy responses must consciously and affirmatively address those inequities.

Since 1989, we have leveraged the power of the public and private bar to amplify the voices and concerns of those directly impacted by homelessness & poverty. Through policy advocacy, public education, and impact litigation, the Law Center's national programs address the root causes of homelessness and meet the immediate and long-term needs of those who are homeless or at risk of becoming homeless. Through training, technical support, and network building, the Law Center also enhances the capacity of local and national groups to become more effective partners in advocating for the needs and rights of people experiencing homelessness.

Today, our team includes attorneys with lived expertise of homelessness, poverty, racism and other forms of discrimination, as well as substantive expertise in housing, civil rights, human rights, public benefits, and youth issues, and other staff with expertise in communications, non-profit development, and operations. Though the Law Center's staff is small, we leverage four to six times our budget each year in volunteer pro bono legal services, multiplying our impact on behalf of people experiencing homelessness.

For more information about the Law Center and to access publications such as this report, please visit its website at www.homelesslaw.org.

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Eric Tars
Legal Director

EXECUTIVE SUMMARY

Despite a lack of affordable housing and shelter space, governments have chosen to threaten, arrest, and ticket homeless persons for performing life-sustaining activities – such as sleeping or sitting down – in outdoor public space.¹ In addition to an increasing number of laws that civilly and criminally punish homelessness, governments also regularly displace people experiencing homelessness from public space – a practice commonly called “sweeps” – and seize their personal property. We refer to these punitive policies collectively as the criminalization of homelessness.

Because people experiencing homelessness are not on the street by choice but because they lack choices, criminal and civil punishment serves no constructive purpose. Instead, criminalizing homelessness creates acute harm and wastes precious public resources on policies that do not work to reduce homelessness. Indeed, arrests, unaffordable tickets, and displacement from public space for doing what any human being must do to survive can make homelessness more difficult to escape.

Key Finding: Litigation is an effective tool in fighting the criminalization of homelessness.

There has been significant litigation challenging the criminalization of homelessness. Favorable results in these cases, including orders of preliminary relief, repeals or revisions of challenged policies and practices, findings of unconstitutionality, overturned convictions, and/or settlement agreements, are more common than not. Broken down by category, favorable results were obtained in:

- 60% of cases challenging panhandling bans (and 100% since 2015)
- 60% of cases challenging camping bans and/or sweeps of encampments
- 77% of cases challenging loitering, loafing, and/or vagrancy bans
- 66% of cases challenging food sharing bans

Key Finding: 100% of lawsuits challenging panhandling bans have been successful since the U.S. Supreme Court decided *Reed v. Town of Gilbert* in 2015.

For many people experiencing homelessness who have inadequate income from employment or government benefits, panhandling may be the best option for survival. Unfortunately, instead of finding ways to help them obtain income, housing, and social services, many governments seek to prohibit panhandling.

In 2019, 83% of cities had at least one ordinance prohibiting panhandling.² As of 2021, 6 states had at least one ordinance restricting panhandling state-wide, and 24 states had at least one ordinance restricting panhandling in particular places.³

In 2015, the U.S. Supreme Court decided *Reed v. Town of Gilbert* and clarified that a speech regulation is content based when the face of the ordinance draws regulatory distinctions based on the message a speaker conveys. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”) If a speech restriction, such as a restriction on panhandling, is content based, then it must be narrowly tailored to achieve a compelling governmental interest to survive strict judicial scrutiny. *Id.*

The first case to apply that test to a panhandling ban was *Norton v. City of Springfield*, in which the Seventh Circuit held that that an ordinance restricting oral requests for donations was content based and presumptively unconstitutional. *Norton*, 806 F.3d 411 (7th Cir. 2015). Since that case was decided, 18 lawsuits challenging panhandling or solicitation bans have been filed, and all have resulted in outcomes favorable to the plaintiffs. See e.g. page 11.













Challenges to bans on panhandling constituted the second largest category of cases, behind challenges to camping bans and encampment sweeps. The majority of cases were filed in federal court.

1 Nat'l L. Ctr. On Homelessness & Poverty, Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities (2019), HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf (homelesslaw.org)
Nat'L Homelessness L. Ctr., Housing Not Handcuffs 2021: State Supplement (2021), 2021-HNH-State-Crim-Supplement.pdf (homelesslaw.org)

2 Nat'l L. Ctr. On Homelessness & Poverty, Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities (2019), HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf (homelesslaw.org)

3 Nat'L Homelessness L. Ctr., Housing Not Handcuffs 2021: State Supplement (2021), 2021-HNH-State-Crim-Supplement.pdf (homelesslaw.org)

Of the 16 state court cases,

1 was in the District of Columbia Superior Court 	3 were in Florida 	1 was in Indiana 
1 was in Kentucky 	1 was in Massachusetts 	1 was in Minnesota 
1 was in Nevada 	1 was in New Mexico 	2 were in New York 
2 were in Ohio 	1 was in Texas 	and 1 was in Washington 

Of the 48 cases in federal courts,

4 were in the 1st Circuit	3 were in the 2nd Circuit	5 were in the 4th Circuit
2 were in the 5th Circuit	7 were in the 6th Circuit	6 were in the 7th Circuit
10 were in the 9th Circuit	1 was in the 10th Circuit	9 were in the 11th Circuit
	and 1 was in the District of Columbia Circuit	

Key Finding: The majority of successful litigation challenging criminalization policies are against camping bans and/or sweeps of encampments.

“Camping” bans are often written to cover a broad range of activities, including merely sleeping outside. They also often prohibit the use of any “camping paraphernalia” which can make it illegal for unhoused people to use even a blanket.

In 2019, 72% of our 187 surveyed cities had at least one law restricting camping in public.⁴ In 2021, 4 states had statewide camping bans and 15 states have laws restricting camping in particular public places.⁵

Of 281 total cases, over half (144 cases) were challenges to laws and practices punishing people for resting outside and/or sweeps of encampments. Sixty percent of these cases achieved favorable results for plaintiffs. The vast majority of these challenges were filed in federal court, and most often in the western United States. For example, over half of all cases were filed within the jurisdiction of the Ninth Circuit.

Most of these cases were brought on behalf of individual plaintiffs, however, over one-third of these cases resulted in class certification. Twenty-four percent had at least one organizational plaintiff.












Challenges to camping bans and/or sweeps of encampments raised a variety of constitutional claims:

- 25% challenged camping restrictions under the First Amendment. In *Clark v. Community for Creative Non-Violence*, the U.S. Supreme Court held that sleeping and symbolic tents can be expression protected by the free speech clause of the First Amendment. *Clark*, 468 U.S. 288 (1984). Camping restrictions have also been challenged as infringing upon free religious exercise. The Second Circuit held in *Fifth Avenue Presbyterian Church v. City of New York* that a church’s use of its own property to allow people experiencing homelessness to sleep is protected religious exercise under the First Amendment. *Fifth Avenue Presbyterian Church*, 117 Fed. Appx. 198 (2d. Cir. 2006), cert. denied, 127 S. Ct. 387 (2006).












4 Nat’l L. Ctr. On Homelessness & Poverty, *Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities* (2019), [HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf](https://homelesslaw.org/FILES/2019/HNH-2019-FINAL.pdf) (homelesslaw.org)

5 Nat’l Homelessness L. Ctr., *Housing Not Handcuffs 2021: State Supplement* (2021), [2021-HNH-State-Crim-Supplement.pdf](https://homelesslaw.org/FILES/2021/HNH-2021-State-Crim-Supplement.pdf) (homelesslaw.org)










In total,

4 cases in state courts	 of total state court cases in this category) brought First Amendment claims
1 case in the Supreme Court	 of total Supreme Court cases in this category) brought a First Amendment claim
1 case in the 1st Circuit	 of total 1st Circuit cases in this category) brought a First Amendment claim
2 cases in the 2nd Circuit	 of total 2nd Circuit cases brought in this category) brought First Amendment claims
1 case in the 3rd Circuit	 of total 3rd Circuit cases brought in this category) brought a First Amendment claim
2 cases in the 4th Circuit	 of total 4th Circuit cases brought in this category) brought First Amendment claims
1 case in the 5th Circuit	 of total 5th Circuit cases brought in this category) brought a First Amendment claim
4 cases in the 6th Circuit	 of total 6th Circuit cases brought in this category) brought First Amendment claims
1 case in the 8th Circuit	 of total 8th Circuit cases brought in this category) brought a First Amendment claim
15 cases in the 9th Circuit	 of total 9th Circuit cases brought in this category) brought First Amendment claims
and 4 cases in the 11th Circuit	 of total 11th Circuit cases brought in this category) brought First Amendment claims

- 51% challenged unreasonable property seizures during encampment sweeps under the Fourth Amendment. This represents the most common type of claim brought among cases in this category. In *Lavan v. City of Los Angeles*, the Ninth Circuit held that unhoused people have a protected property interest in belongings that they keep in makeshift or temporary housing in public areas, even when that property is temporarily left unattended. *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012).

5 cases in state court	 of total state court cases brought in this category) brought Fourth Amendment claims
2 cases in the 2nd Circuit	 of total 2nd Circuit cases brought in this category) brought Fourth Amendment claims
2 cases in the 3rd Circuit	 of total 3rd Circuit cases brought in this category) brought Fourth Amendment claims
2 cases in the 4th Circuit	 of total 4th Circuit cases brought in this category) brought Fourth Amendment claims
1 case in the 5th Circuit	 of total 5th Circuit cases brought in this category) brought a Fourth Amendment claim
4 cases in the 6th Circuit	 of total 6th Circuit cases brought in this category) brought Fourth Amendment claims
2 cases in the 7th Circuit	 of total 7th Circuit cases brought in this category) brought Fourth Amendment claims
1 case in the 8th Circuit	 of total 8th Circuit cases brought in this category) brought a Fourth Amendment claim
44 cases in the 9th Circuit	 of total 9th Circuit cases brought in this category) brought Fourth Amendment claims
2 cases in the 10th Circuit	 of total 10th Circuit cases brought in this category) brought Fourth Amendment claims
and 1 case in the D.C. Circuit	 of total D.C. Circuit cases brought in this category) brought a Fourth Amendment claim

- 47% challenged camping bans under the Eighth Amendment's prohibition against cruel and unusual punishment. In *Martin v. City of Boise*, the Ninth Circuit held that states and municipalities impose cruel and unusual punishment when they criminalize people experiencing homelessness for sleeping, lying, or sitting down in public places when they have nowhere else to go. *Martin*, 920 F.3d 584 (9th Cir. 2019). Some cases have also challenged penalties imposed against people living outside as violating the Eighth Amendment's excessive fines clause. See e.g. *Blake v. Grants Pass*, No. 1:2018-CV-01823 (D. Or. 2020).

9 cases in state court	 43% of total state court cases brought in this category) brought Eighth Amendment claims
1 case in the 2nd Circuit	 20% of total 2nd Circuit cases brought in this category) brought an Eighth Amendment claim
1 case in the 3rd Circuit	 33% of total 3rd Circuit cases brought in this category) brought an Eighth Amendment claim
2 cases in the 4th Circuit	 50% of total 4th Circuit cases brought in this category) brought Eighth Amendment claims
3 cases in the 5th Circuit	 100% of total 5th Circuit cases brought in this category) brought Eighth Amendment claims
2 cases in the 6th Circuit	 29% of total 6th Circuit cases brought in this category) brought Eighth Amendment claims
1 case in the Eighth Circuit	 33% of total 8th Circuit cases brought in this category) brought an Eighth Amendment claim
41 cases in the 9th Circuit	 53% of total 9th Circuit cases brought in this category) brought Eighth Amendment claims
and 7 cases in the 11th Circuit	 64% of total 11th Circuit cases brought in this category) brought Eighth Amendment claims

- 52% brought procedural Due Process claims under the Fourteenth Amendment. Procedural due process concerns the minimum procedural safeguards that the government must follow before it deprives an individual of life, liberty, or property. These cases have established minimum notice requirements before sweeps and property seizure, such as the length of advance notice. See e.g. *Moe v. City of Akron*, No. 5:14-cv-2197 (N.D. Ohio, Oct. 3, 2014) (holding that the city may not remove any personal items of unhoused individuals unless the owner of the items is given 48 hours' notice, and the city then holds the property for at least 30 days and provides a mechanism through which the owner of

the belongings can retrieve the property). These cases have also established property storage requirements following government seizure during sweeps. See e.g. *Engle v. Anchorage*, No. 3AN-10-7047-CI (Sup. Ct. Alaska. 2011) (holding that any personal belongings worth more than \$50 must be stored for at least ten days before the city may destroy them).

- 31% brought substantive Due Process claims under the Fourteenth Amendment. Substantive due process protects against the deprivation of certain fundamental rights (regardless of the procedures used) and against arbitrary and oppressive government action. The majority of cases in this category raised Equal Protection claims, arguing that people experiencing homelessness comprise a suspect class or that the challenged policies infringe on a fundamental right. These claims have a low rate of success, as federal courts have found that unhoused persons do not constitute a suspect or quasi-suspect class for Fourteenth Amendment Equal Protection purposes. See *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), *cert. denied*, 149 L.Ed.2d 480 (2001). However, some cases arguing that laws penalizing the fundamental right to travel violate Equal Protection have been successful. See e.g. *Johnson v. Bd. Of Police Comm'rs*, 351 F.Supp.2d 929,949 (E.D. Mo. 2004). Also, Equal Protection claims may succeed if there is proof of discriminatory animus, selective or arbitrary enforcement, or if the challenged policy or practice is completely unrelated to any governmental interest. See e.g. *Allen v. City of Sacramento*, 234 Cal. App.4th 41 (2015).
- A small number of recent cases have raised State-Created Danger claims under the Fourteenth Amendment. The State-Created Danger doctrine protects the fundamental right to life and bodily integrity. This claim is highly fact specific and is established when a plaintiff can prove that a state actor affirmatively placed a person experiencing homelessness in danger, such as by seizing her shelter during inclement weather, and the state actor was deliberately indifferent to that danger. See e.g. *Jeremiah v. Sutter Cty.*, 2018 WL 1367541 at 5 (E.D. Cal. Mar. 16, 2018) (finding that Defendants would "knowingly place the homeless at increased risk of harm if it confiscates and seizes Plaintiffs' shelters and possessions" during "the recent wind, rain, and cold weather"). All but one of these cases were brought after 2016.
- 11% brought claims under the Americans with Disabilities Act (ADA.) Most often, these claims were based on Title II of the ADA, which requires that state and local governments give people with disabilities an equal opportunity to benefit from all governmental programs and services, and requires state and local

governments to make reasonable modifications to all policies and practices where such modifications are necessary to avoid discrimination.

Key Finding: Loitering, loafing, and vagrancy laws are often unconstitutionally vague.

Similar to historical Jim Crow, Anti-Okie, and Ugly laws, these modern-day versions of those discriminatory ordinances grant police a broad tool for excluding visibly poor and unhoused people from public places.

As of 2019, 60% of cities had one or more laws prohibiting loitering, loafing, and/or vagrancy in particular public places.⁶ As of 2021, 16 states had laws restricting loitering, loafing and/or vagrancy statewide.⁷

In total, 77% of cases challenging loitering, loafing, and vagrancy laws have been successful. Many of the positive outcomes in this category were based on findings of unconstitutional vagueness. *See e.g. Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997) (holding that the phrase “loiter, wander, idle, stroll or play” was unconstitutionally vague). Challenged laws among this category were also overturned because they unconstitutionally burdened the right to move freely and/or the freedom to associate. *See e.g. Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002) (finding that there is a constitutional right to travel through public spaces and roadways); *Hodgkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004) (holding that juvenile curfew laws may unconstitutionally chill First Amendment freedom of association rights for minors); *Rodgers and Dillback v. Bryant*, No. 17-3219 (8th Cir. 2019) (holding that loitering ordinances that affect First Amendment rights in some way automatically trigger strict scrutiny, and that when there are other laws in place to achieve the stated government interest, the challenged ordinance is unlikely to survive strict scrutiny).

Key Finding: Food sharing bans often violate free religious exercise and/or free speech.

People experiencing homelessness often lack reliable access to food, in part due to a lack of any place to refrigerate or store food supplies. Despite the fact that food access is extremely limited for homeless people, a growing number of cities have restricted free food sharing. 9% of cities prohibit or restrict sharing free food in public.⁸

All 15 cases challenging food sharing bans brought First Amendment claims. Some cases also brought claims under the Religious Land Use and Institutionalized Persons Act, a federal law that provides that the government may not impose any land use regulations that place a substantial burden on the religious exercise of a person or religious entity. The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. Cases have also successfully raised claims under state Religious Freedom Restoration Act (RFRA) statutes which impose a strict standard of review for government actions that “substantially burden” religious exercise. *See e.g. Big Hart Ministries Ass’n., Inc. v. City of Dallas*, 2011 WL 5346109 (N.D. Tex., Nov. 4, 2011.)

Even among the cases in which the challenged ordinances were ultimately upheld, the courts reiterated that food sharing is a protected form of speech and political/religious expression. Any restrictions on food sharing must be content-neutral, narrowly tailored to serve a compelling government interest, and must leave open ample alternative channels of communication. *See e.g. McHenry v. Agnos*, 983 F.2d 1076 (9th Cir. 1993).

The Law Center summarized 15 cases challenging bans on food sharing.

All 15 were in federal court

1 in the 3rd Circuit	1 in the 4th Circuit	1 in the 5th Circuit
2 in the 6th Circuit	1 in the 7th Circuit	1 in the 8th Circuit
4 in the 9th Circuit	and 4 in the 11th Circuit	

6 Nat’l L. Ctr. On Homelessness & Poverty, Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities (2019), HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf (homelesslaw.org)

7 Nat’l Homelessness L. Ctr., Housing Not Handcuffs 2021: State Supplement (2021), 2021-HNH-State-Crim-Supplement.pdf (homelesslaw.org)

8 Nat’l L. Ctr. On Homelessness & Poverty, Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities (2019), HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf (homelesslaw.org)

CONCLUSION

The Law Center has reported since 2006 on ineffective, harmful, and expensive policies that criminalize homelessness. Along with being cruel and wasteful public policy, laws punishing homelessness often violate the legal rights of people without housing and make homelessness harder to escape. These policies also invite litigation which, more often than not, results in positive outcomes for unhoused plaintiffs, but wastes tax dollars, time, and energy that is better focused on solving the crisis of homelessness.

Yet, punitive policy approaches to homelessness are growing around the country. Political pressure to “do something” about visible homelessness has led communities to punish people for living outside, forcibly commit people to mental institutions, and/or concentrate unhoused people into segregated spaces, like congregate shelters or sanctioned encampments, so that they are hidden from public view. But, temporarily hiding homelessness helps no one. Rather, this strategy produces acute harm by wasting precious public resources on systems of punishment and segregation that will inevitably fail to reduce homelessness, and its visibility, while the crisis worsens.

We are living in an era when housing is unaffordable to people living at the lowest income brackets, a disproportionate number of whom are people of color. To solve the crisis of homelessness, we must address its root causes - a lack of affordable housing and systemic racism - rather than its visible symptoms. We can end homelessness through sensible, cost-effective policies that implement the human right to housing. We all wish to end homelessness in our communities—and the best, most cost-effective, and permanent way to achieve that is to ensure that all who are unsheltered can access adequate, alternative housing. We need housing, not handcuffs.

CASE SUMMARIES

I. CHALLENGES TO BANS ON CAMPING AND/OR SLEEPING IN PUBLIC AND ENCAMPMENT EVICTIONS

U.S. Supreme Court

Federal Court Cases

SUPREME COURT OF THE UNITED STATES

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)

In 1982, Plaintiff Community for Creative Non-Violence ("CCNV") held a round-the-clock protest demonstration on national park property near the White House, and was granted a permit to erect a symbolic campsite but denied permission to sleep at the campsite. CCNV challenged the applicable Park Service Regulation as unconstitutionally vague on its face and discriminatorily enforced in violation of the protesters' rights under the First Amendment. The U.S. Supreme Court reversed the holding of the Court of Appeals for the D.C. Circuit and found that the regulation advanced a substantial government interest unrelated to the suppression of expression and was narrowly tailored to advance that interest. The Court held that even if sleeping in connection with the demonstration is expressive conduct that is protected to some degree under the First Amendment, the challenged regulation was facially neutral and constituted a reasonable time, place, and manner restriction.

FIRST CIRCUIT

Freeman v. Morris, 2011 WL 6139216, at *1 (D. Me. Dec. 9, 2011)

Plaintiff Occupy Augusta and associated individuals occupied Capitol Park in Augusta, Maine 24 hours a day and sought to enjoin the State Commissioner of Public Safety from: (1) preventing them from maintaining a tent city, and (2) requiring them to apply for a permit for their encampment. According to Plaintiffs, the Occupy movement, including Occupy Augusta, sought to expose how the wealthiest 1% of society promulgate an unfair global economy that is harming people and destroying communities worldwide. Plaintiffs claimed the 24-hour-a-day physical occupation of the park was a core component of their message and that their First and Fourteenth Amendment rights would be violated if they were prohibited from maintaining indefinitely a round-the-clock tent city at the park. Ultimately, the Court denied Plaintiffs' request for preliminary injunction.

In denying Plaintiff's request for preliminary injunction, the Court explained that while Plaintiffs' demonstration is protected by the First Amendment, the State may impose reasonable time, place and manner restrictions on

conduct or speech protected by the First Amendment. As such, the Court found that the State's permit requirement, its closing-hours regulation, and its long-standing no-camping rule were reasonable time, place and manner restrictions that were narrowly tailored to further the significant government interests of public safety and of ensuring that the Park was adequately preserved and available for all comers.

Whiting v. Town of Westerly, 942 F.2d 18 (1st Cir. 1991)

Two out-of-state residents with housing challenged the constitutionality of two Westerly, Rhode Island town Ordinances banning sleeping outdoors after being arrested. Plaintiffs challenged the Ordinances on overbreadth, vagueness, and equal protection grounds. The U.S. Court of Appeals for the First Circuit affirmed the District Court's finding that—absent expressive activity possibly covered by the First Amendment—sleeping in public is not constitutionally protected, neither Ordinance was vague or overbroad as applied to Plaintiffs' conduct, and enforcement procedures did not violate the equal protection rights of non-residents of Westerly.

SECOND CIRCUIT

Croteau v. City of Burlington, No. 5:17-CV-00207 (D. Vt., 2018)

Brian Croteau Sr., Larry Priest and Richard Pursell on behalf of themselves and all other similarly situated individuals filed suit against the city of Burlington, Vermont in the U.S. District Court for the District of Vermont under 42 U.S.C. § 1983, arguing that the city's application of Vermont's trespass statute violated their rights under the Fourth and Eighth Amendments to the U.S. Constitution.

Under the trespass statute, when the city of Burlington identified a camp of unhoused residents, it evaluated the camp on four criteria: impact on health and safety; impact on the intended use of the property; repeated violations of law resulting from the camp; and inappropriate location. If a camp violated one of the four criteria, the city's practice was to post a notice to vacate, threatening arrest and seizure of property for any person remaining after a specified date, and then to enter the area on the specified date and remove and discard any remaining property. The city of Burlington did not initially have a policy of retaining or allowing retrieval of any seized property, but later informally indicated that seized property "of value" would be stored and eligible to be retrieved.

In response to a notice to vacate issued on a portion of city property being occupied by the named Plaintiffs the Plaintiffs filed suit seeking a temporary restraining order ("TRO") and preliminary injunction enjoining the city of Burlington from removing the Plaintiffs or their property from city property.

The U.S. District Court granted the TRO during the pendency of the preliminary injunction. The Plaintiffs argued that the city of Burlington's practice violated (1) the Eighth Amendment of the U.S. Constitution because it criminalized the "status" of homelessness and (2) the Fourth Amendment of the U.S. Constitution because Burlington city officials engaged in unreasonable seizures of property from unhoused persons located at camp sites.

The U.S. District Court held that the application of the Vermont trespass statute did not violate the Eighth Amendment because the city of Burlington selectively chose locations of encampments at which they issued notices to vacate based on the criteria above. The Court found that the Plaintiffs had the option to move to other camp sites where the city of Burlington was not forcing unhoused persons to vacate. Accordingly, the application of the Vermont trespass statute did not criminalize the status of homelessness because the Plaintiffs could remain undisturbed on certain city property. The U.S. District Court further held that the seizure of property from the encampment sites was not unreasonable because seizure is the only available remedy to the city of Burlington and the Court found that the city of Burlington held property for thirty days during which the owners could retrieve property.

For these reasons, the U.S. District Court vacated the temporary restraining order and denied Plaintiffs' preliminary injunction motion.

Fifth Avenue Presbyterian Church v. City of New York, 177 Fed. Appx. 198 (2d Cir. 2006), cert. denied, 127 S. Ct. 387 (2006)

Plaintiff Fifth Avenue Presbyterian Church ("Church") sought an injunction preventing the City of New York from dispersing unhoused persons whom the Church invited to sleep on its outdoor property. In January 2002, the District Court granted a preliminary injunction against the Defendants with respect to the church property, finding that the Church's use of its own property was a protected religious activity. However, the Court denied the injunction as to the public sidewalk bordering the Church's property. The city appealed to the Second Circuit. The Law Center filed an amicus brief in the Second Circuit supporting the Church. It argued that the Church's activity was protected by the First Amendment, and that the activities of the Church were traditional forms of effective core outreach to people experiencing homelessness. The Law Center also argued that the city's actions were plainly arbitrary and therefore violated the due process clause of the Fourteenth Amendment.

The city's practice of forced removal of unhoused people from the area around the Church also infringed on the unhoused individuals' constitutionally protected freedom of movement. In affirming the District Court's decision to grant a preliminary injunction, the Second Circuit agreed that the Church's provision of sleeping space to people experiencing homelessness was the manifestation of a sincerely held religious belief deserving of protection under the free exercise clause. After the grant of the preliminary injunction, the Church moved, and the city cross-moved, for summary judgment.

The Church requested that the District Court reconsider its decision that denied an injunction as to the Church's sidewalk, and asked for the preliminary injunction to be made permanent as to the Church staircases and sidewalk area. The Church claimed that the city's actions violated its rights under the free exercise clause of the First Amendment and that, therefore, the city's actions must be subject to strict scrutiny. In October 2004, the District Court granted the permanent injunction with respect to the Church staircases, based on the Church's First Amendment claim. The Court rejected the city's claim that its actions were necessary to address a public nuisance. The city appealed to the Second Circuit. In April 2006, the Second Circuit affirmed the lower Court's decision, and the U.S. Supreme Court denied the city's petition for writ of certiorari in October 2006.

BetanCourt v. Giuliani, 448 F.3d 547 (2d Cir. 2006), cert. denied, 127 S. Ct. 581 (2006)

Plaintiff Augustine BetanCourt brought suit against the Mayor, Police Commissioner, and the City of New York for his arrest under a New York law that makes it "unlawful for any person[s] . . . to leave . . . or permit to be left, any box, barrel, bale of merchandise or other movable property whether or not owned by such person[s], upon any . . . public place, or to erect or cause to be erected thereon any shed, building or other obstruction."

After his arrest, he was strip-searched and placed in a holding cell. He was not prosecuted. BetanCourt brought a number of claims against the city, including a claim that the statute was unconstitutionally vague and overbroad as applied to his arrest. He also alleged that the strip search violated his Fourth Amendment rights because he was arrested for a minor offense and the police did not have reasonable suspicion that he was concealing a weapon or other contraband. BetanCourt asserted the statute should be analyzed for vagueness using an "especially stringent" standard because the statute involved his fundamental right to travel and imposed criminal penalties without requiring a finding of criminal intent.

The Court, reasoning that the statute did not penalize "merely occupying" public space but rather obstructing public space, held that the statute did not penalize the right to travel and was not void for vagueness. The Court found BetanCourt had sufficient notice that his conduct

was prohibited, and there are sufficient guidelines in place to limit police discretion in its application. The Court granted BetanCourt summary judgment on his illegal strip search claim, but granted summary judgment in favor of Defendants on all other claims. BetanCourt appealed and the appellate Court affirmed the lower Court's judgment, holding that the code provision was not unconstitutionally vague as applied. Judge Calabresi dissented, finding that the statute did not sufficiently "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and did not "provide explicit standards for those who apply them." In Judge Calabresi's view, the word "erect" does not reasonably mean "fitting together of materials or parts," as the majority posited.

Judge Calabresi further stated that BetanCourt's boxes were not an "obstruction," rather BetanCourt was "occupying [a] public place with a few of [his] personal belongings." Judge Calabresi also criticized the majority's dismissal of the right-to-travel question, but did not pursue this issue since he found the statute undeniably void for vagueness even under the moderately stringent test that the majority applied. Finally, Judge Calabresi also pointed out in his dissent that the statutory context also made the statute difficult to understand, as the surrounding sections and the statement of legislative intent all pertain to abandoned automobiles.

Picture the Homeless v. City of New York, No. 02 Civ. 9379 (S.D.N.Y. March 31, 2003)

In November 2002, Plaintiff, Picture the Homeless, Inc., an organization established for the purpose of protecting and advancing the civil and human rights of the homeless, filed a Complaint in the U.S. District Court for the Southern District of New York against the City of New York (the "Court"). Plaintiff contended that the New York Police Department ("NYPD") and its Commissioner, Raymond Kelly, had adopted a policy of singling out and targeting unhoused persons for arrest for offenses for which housed persons generally were not arrested. Plaintiffs contended that this unhoused-arrest initiative violated the Constitution and sought declaratory judgment, preliminary and permanent injunctive relief against further implementation of the alleged policy, and attorney's fees. The Defendants denied the allegations in the Complaint.

On March 27, 2003, the Court entered a Stipulation and Order (which was agreed to by the parties in order "to resolve the matter without further litigation") pursuant to which the Defendants agreed to issue a directive to each of the NYPD Homeless Outreach Unit and the NYPD Transit Bureau, to keep those directives in effect, to read the directives at 10 consecutive roll calls, and to provide a copy of the directives to each member of the Homeless Outreach Unit and the NYPD Transit Bureau. The directives provide that violations of law are to be

enforced even-handedly regardless of whether a person is experiencing homelessness. Based on the settlement, the action was dismissed by the Court with prejudice.

Metropolitan Council Inc. v. Safir, 99 F. Supp. 2d 438 (S.D.N.Y. 2000)

In *Metropolitan Council Inc. v. Safir*, *Metropolitan Council Inc.*, a tenants' advocacy organization ("Plaintiff"), filed a motion for preliminary injunctive relief enjoining Howard Safir, Commissioner of the New York City Police Department, Henry Stern, Commissioner of the New York City Parks Department, and the City of New York ("Defendant") from preventing vigil participants in political protests from lying or sleeping on city sidewalks, arguing that the ban on public sleeping on city sidewalks violated their rights under the First Amendment to the U.S. Constitution in this particular circumstance. Plaintiff sought to hold a three-part protest that would include a "sidewalk phase" wherein Plaintiff planned to have no more than twenty-five vigil participants lie side by side, perpendicular on a stretch of sidewalk from 1 a.m. to 8 a.m.

The protesters agreed to occupy only 7.5 feet of the sidewalk leaving the remaining 8.5 feet of the sidewalk clear for pedestrian use and not block any of the entrances on the stretch of sidewalk. The City Police Department has an absolute policy of preventing persons from lying and sleeping on public sidewalks and makes no exception for expressive activity. The District Court granted Plaintiff's motion for preliminary injunction holding that, in this particular circumstance, the City's policy was not narrowly tailored and thus infringed upon the Plaintiff's First Amendment right to an orderly political protest using public sleeping as a means of symbolic expression.

Considering the First Amendment claim, the Court first found that the City's policy is content-neutral and that the proposed activity of lying and sleeping on the City sidewalks has an expressive component in the context of that specific vigil. As such, the Court reviewed whether the City's ban (i) advances a "significant governmental interest", (ii) is "narrowly tailored" to serve that interest, and (iii) "leaves open ample alternative channels for communication." On "significant governmental interest" prong, the City put forward, and the Court and Plaintiff did not dispute, two general interests it asserted were advanced by the ban on sleeping on public sidewalks: (1) protecting sleeping individuals, and (2) preventing sleeping individuals from obstructing the sidewalks. On the "narrowly tailored" prong, the Court held that the absolute ban on public sleeping in any manner, on all sidewalks, at all times and by all people as part of any activity was overbroad and not narrowly tailored to the City's asserted interests because the suppression of any such protest is "utterly unnecessary" to further the City's significant governmental interest. The Court did not present any findings on the "leaves open ample

alternative” prong given their finding that the City’s ban was not narrowly tailored to the asserted interests.

The Court specifically emphasized that the case did not involve, and the Court did not express any opinion concerning, the broader question of whether the City may prohibit lying and sleeping on public sidewalks when such conduct is not an integral part of a large, planned, publicized protest and is not accompanied by incidents of speech such as signs and literature explaining the protests. Nothing in the Court’s ruling can be construed to limit Defendant’s authority to regulate the conduct of person sleeping in public under other circumstances.

THIRD CIRCUIT

Murray v. City of Philadelphia, 481 F. Supp. 3d 461 (E.D. Pa. 2020).

Plaintiffs Irvin Murray, Maurice Scott, Dolores McFadden, Faith Anne Burdick, and Edwin Jones are residents of Philadelphia encampments. Plaintiffs brought this civil rights action against city, alleging various claims, including violation of the First Amendment right to freedom of speech, and violation of procedural and substantive due process under the Fourteenth Amendment, arising from city seeking to dissolve the encampments.

The encampments formed during the summer of 2020, and Plaintiffs alleged that they constituted protests advocating for fair housing for people experiencing homelessness. Approximately 230 people resided in the encampments.

The land on which the encampments were located was not equipped to provide access to running water, electricity, or sanitary facilities. Outside supporters of the encampments supplied food donations to encampment residents.

City officials and outreach workers were not permitted to visit the encampments, and general public access to the encampments had ceased. Neighbors had complained that specific encampments, and the way they were structured, denied the general public access to the surrounding parks and to other facilities. Neighbors also complained of aggressive panhandling and criminal activity in the area.

On July 10, 2020, the City posted written notices at one encampment informing residents that their occupancy was unlawful and that they must leave the location and remove their personal property by July 17, 2020. Encampment residents did not vacate by the deadline. On August 17, 2020, the City sent additional notices informing residents that they must vacate.

On August 17, 2020, Plaintiffs filed a motion for temporary restraining order (“TRO”) and preliminary injunction seeking to bar Defendants from disbanding

the encampments. On August 20, 2020, the Court held a hearing on the fully briefed motion.

At the conclusion of the August 20, 2020, hearing, Defendants voluntarily placed the planned encampment dissolutions on hold pending the outcome of this motion.

When assessing the likelihood Plaintiffs would succeed on the merits of their First Amendment claim, the Court found that the City had a significant interest in exercising its police powers to ensure the health, safety, and welfare of all City residents. The Court further held that City officials had reasonably determined that the encampments posed health and safety risks to encampment residents and to other community members, and Plaintiffs had not offered evidence indicating how the City could ameliorate these risks without dissolving the encampments. Defendants represented that encampment residents were free to exercise the same First Amendment rights all City protestors enjoyed, including accessing the parks where the encampments were located, provided they did so in a manner consistent with existing law. For these reasons, Plaintiffs had not established that they were likely to succeed on their claim that dissolving the encampments would violate their First Amendment rights.

As to Plaintiffs’ claim for violation of their Fourth Amendment rights, the Court found that Plaintiffs had not demonstrated that they were likely to prevail on their claim that Defendants’ seizure of their property following encampment dissolution would be unreasonable. Defendants had provided notice of planned property removal and instituted procedural safeguards to protect against property loss.

As to Plaintiffs’ claim for violation of their Fourteenth Amendment rights, Plaintiffs challenged a non-legislative action, Defendants’ planned encampment dissolution. To prevail on a non-legislative action substantive due process claim, a Plaintiff must establish a protected property interest to which the Fourteenth Amendment’s due process protection applies, and thus show that the property interest is “fundamental under the United States Constitution.” The Court held that Plaintiffs had not demonstrated that they were likely to prevail on their claim that their personal effects constituted fundamental property interests of which Defendants sought to deprive them.

The Court also held that Plaintiffs did not demonstrate that they were likely to succeed on the merits of their claim that dissolving the encampments would violate the ADA.

The Court also held that Plaintiffs had not demonstrated that they were likely to satisfy the prongs of the state-created danger analysis, foreseeable and direct harm, because Defendants represented that they had shelter available for Plaintiffs and that they would comply with

procedural safeguards governing any storage of Plaintiffs' property. Given the above findings, the Court denied Plaintiffs' motion for a temporary restraining order and preliminary injunction.

Sager v. City of Pittsburgh, No. 03-0635 (W.D. Pa. 2003)

A class of unhoused Plaintiffs brought a § 1983 action against the City of Pittsburgh alleging violations of their Fourth, Fifth, and Fourteenth Amendment rights when the city asked the Pennsylvania Department of Transportation ("PennDOT") to conduct repeated sweeps of unhoused peoples' property located on PennDOT land.

The parties reached a settlement agreement that provided procedures for pre-collection notification, collection of personal items during clean-ups, and for the return of property collected. The city agency responsible for the clean-up was required under the agreement to give seven days' written notice to unhoused persons by posting the notice at each encampment or at each identifiable group of possessions, and by faxing the notice to service providers for people experiencing homelessness. The agreement also stipulated that all items that are not health/safety hazards or refuse are to be placed in large, transparent trash bags and properly tagged and itemized, and that notice as to recovery procedures must be posted. The agreement outlined specific days and times that a secure storage area must be available to persons reclaiming their belongings.

Project Share v. City of Philadelphia, No. 93-CV-6003 (E.D. Pa. 1993)

Project Share sought a temporary restraining order and permanent injunction to prevent the City of Philadelphia from carrying out a proposed plan to seize, arrest, and remove unhoused persons from Center City concourses in the absence of alternative shelter. The Plaintiffs alleged that the city's actions would violate their rights under the Fourth, Eighth, and Fourteenth Amendments. The motion was voluntarily dismissed after the city agreed to find shelter for the unhoused people who were likely to be affected by the proposed plan.

FOURTH CIRCUIT

Manning v. Caldwell for City of Roanoke, 930 F.3d 264 (4th Cir. 2019)

In March 2016, six unhoused Plaintiffs filed a putative class action against the cities of Roanoke and Richmond, Virginia arising from each city's practice of prosecuting and incarcerating unhoused individuals as "habitual drunkards" under the Commonwealth of Virginia's "Interdiction Statute." The Interdiction Statute permitted any person "shown to be an habitual drunkard" to be interdicted for mere possession, consumption or the purchase of alcohol, punishable by up to 12 months in jail, a fine of \$2,500, or both.

Plaintiffs' Complaint detailed several instances where the Plaintiffs, all unhoused, suffering from alcohol use disorder and previously having been labeled "habitual drunkards" under the Interdiction Statute, were arrested for (i) possessing, consuming or purchasing alcohol, (ii) attempting to possess, consume or purchase alcohol, or (iii) being drunk in public. In some instances, constructive possession of alcohol (e.g., proximity to open alcohol containers, smelling of alcohol, or being in a store where alcohol was also sold) was sufficient for the Defendants to arrest and jail the named Plaintiffs.

Plaintiffs sued in federal Court for effectively criminalizing homelessness and alcohol use disorder in violation of their Eighth Amendment right to be free from cruel and unusual punishment and their Fourteenth Amendment right to equal protection and due process. The Complaint alleged that the Plaintiffs were found to be "habitual drunkards" under the Interdiction Statute in a quasi-criminal proceeding where they were denied right to counsel and trial by jury, and where the government was not required to prove all elements of its case beyond a reasonable doubt. Once labeled as "habitual drunkards," the Plaintiffs' homelessness and alcohol use disorder made them particularly vulnerable to arrest and incarceration for criminally possessing and consuming alcohol, even where there was no allegation of intoxication.

In contrast, a non-"habitual drunkard" would not be at risk of criminal prosecution for possessing or consuming alcohol, and any such person found of being publicly intoxicated would only be subject to a misdemeanor fine, rather than incarceration. Further, the Complaint alleged that the Interdiction Statute deprived the Plaintiffs of their due process rights by being "unconstitutionally vague" by failing to define the standard for being a "habitual drunkard."

Defendants filed a motion to dismiss arguing, amongst other things, that Plaintiffs failed to state a claim upon which relief could be granted. The motion to dismiss was granted by the District Court and affirmed by the Circuit Court panel. Upon rehearing en banc, the Fourth Circuit reversed the dismissal. The Court considered the vagueness challenge despite it not being argued to the panel and found the statute void for vagueness under the Fifth and Fourteenth Amendments.

The Court reasoned that there was no objective standard for determining whether an individual was a "habitual drunkard" since that term was not defined in the statute. Although the Plaintiffs admitted difficulty in maintaining sobriety, the Court ruled that the statute was still impermissibly vague as applied to them because the record lacked indication as to what conduct led to their interdictions. The Court also found that the Plaintiffs had stated a valid Eighth Amendment claim. Relying on Supreme Court decisions *Robinson v. California* and *Powell v. Texas*, which ruled that the Eighth Amendment

prohibits punishing addicts simply for their status as such, the Court ruled that the Virginia statute punished an involuntary manifestation of alcoholism. The Court wrote that its Eighth Amendment ruling was narrow, since the Plaintiffs only challenged the statute as-applied to them for punishing otherwise legal behavior that uncontrollably arises from their condition.

Cutright v. Jones, No. 2:16-6436 (S.D. West Va. 2017)

In July 2016, Plaintiffs Terry Cutright and John Wilson (as well as certain other interested parties) filed a Complaint in the U.S. District Court for the Southern District of West Virginia ("the Court") against Danny Jones, individually and in his official capacity as Mayor of the City of Charleston, West Virginia (the "City of Charleston" or the "City"), and against the City of Charleston and its police department. Plaintiffs (including Cutright and Wilson, both unhoused residents of Charleston) contended that Defendants destroyed or lost Plaintiffs' personal property in connection with the destruction of "Tent City," a camp of unhoused persons that had been located on the bank of the Elk River in the City. Specifically, Plaintiffs contended that the City destroyed the Plaintiff's property without notice or an opportunity to be heard, and without a warrant, in violation of the Fourth, Fifth and Fourteenth Amendments and certain articles of the West Virginia Constitution. Plaintiffs contended that Tent City had been inhabited by unhoused persons in the City of Charleston for over ten years until the mayor ordered its destruction and the eviction of its unhoused residents in January 2016 without prior notice to the inhabitants.

On May 26, 2017, the parties and their counsel attended a mediation session, with a U.S. Magistrate Judge serving as the mediator. On September 1, 2017, the parties signed a Mediation Agreement stipulating the following: Defendants would pay \$20,000 to resolve all claims of individuals who resided at Tent City (as identified on Exhibit A to the Mediation Agreement) and who claimed loss or destruction of personal property arising from the closure of Tent City, including attorney's fees and costs. In addition, each identified claimant would recover a pro rata share of the global settlement offer, but not less than \$1,200 per person, in vouchers redeemable at certain businesses.

In addition, the City of Charleston agreed to work on a best-efforts basis with local homeless services providers to identify location(s) for an outdoor storage facility within six months of the date of the Mediation Agreement, and to facilitate completion of such a facility before July 1, 2018, with secure and individual storage spaces there to be available free of charge on a first-come basis to the unhoused residents of the City.

The parties agreed that they would work together, along with a homeless services provider, to identify businesses from which to obtain vouchers to use to facilitate the

settlement payments. The parties further agreed that if the Plaintiffs' attorneys and claimants wished to accept the settlement offer, the parties would work together in good faith to prepare a mutually agreeable settlement agreement and release and order of voluntary dismissal to dismiss all claims in the case with prejudice. The parties agreed to participate in status conferences and the parties acknowledged that the City had created a policy entitled "City of Charleston Homeless Encampment and Transient Outdoor Temporary Living Policy," and that the City had passed a resolution on December 19, 2016 authorizing \$75,000 in annual funding to a local homeless service provider to enable it to hire two new outreach workers to serve the unhoused population in the City.

It is not clear from the available documents on file whether the terms described in the Mediation Agreement were ultimately agreed upon and approved by the Court.

Occupy Columbia v. Haley, 738 F.3d 107 (4th Cir. 2013)

Occupy Columbia protesters brought a Section 1983 action against South Carolina government officials seeking a preliminary injunction to prevent officials from interfering with their 24-hour occupation of State House grounds. Plaintiffs alleged that a curfew requiring them to leave the public grounds between 6:00 p.m. and 6:00 a.m. each day violated their First Amendment rights of free speech, peaceable assembly, and petition. Defendants argued in response that camping and sleeping on the State House grounds was not protected expression under the First Amendment, and even if it was, the curfew constituted a permissible time, place, and manner restriction.

The District Court found that the Plaintiffs' conduct was protected expression under the First Amendment, that the curfew was not a reasonable time, place, and manner restriction, and granted a preliminary injunction. The Defendants immediately passed an emergency regulation prohibiting use of the State House grounds for camping, sleeping, or any living accommodation purpose. The Court found this regulation to be a valid time, place, and manner restriction, citing United States Supreme Court precedent in its decision.

Occupy Columbia subsequently filed an Amended Complaint in September 2012. The appellants moved to dismiss, arguing that the injunctive relief claims were moot, and that they were entitled to qualified immunity on the claims for damages. The District Court dismissed the injunctive relief claims, but found that the Defendants did not have qualified immunity. The Fourth Circuit affirmed, holding that Defendants were not entitled to qualified immunity, and that "in the absence of a valid time, place, and manner restriction, arresting members of Occupy Columbia for their presence and protest on State House grounds after 6:00 p.m. was a violation of their First Amendment rights." In February 2014, the parties' settled as to the fourth and fifth causes of action (damages under

§ 1983 and false imprisonment) and all other claims were subsequently dismissed.

Patton v. City of Baltimore, No. S-93-2389 (D. Md. Sept. 14, 1994)

Plaintiffs Tico Patton, Ricardo Maddox and Bernard Williams, three unhoused individuals, filed a class action suit in the U.S. District Court for the District of Maryland against Baltimore City, Downtown Management Authority of Baltimore City and The Downtown Partnership of Baltimore, Inc. seeking declaratory and injunctive relief. The Plaintiffs claimed that the policies, customs, and practices of the Defendants violated the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the U.S. Constitution and Articles 24 and 40 of the Maryland Declaration of Rights. The Plaintiffs also claimed that (i) Baltimore City Code Article 19, Section 249, the “Aggressive Panhandling Ordinance” and (ii) Baltimore City Code Article 19, Section 179-80, the “Storefront Ordinance,” violated the First and Fourteenth Amendments to the U.S. Constitution and Article 40 of the Maryland Declaration of Rights.

The Plaintiffs had filed a motion to permit intervention out of time to add additional Plaintiffs who were currently unhoused in the City of Baltimore because the named Plaintiffs were no longer experiencing homelessness. The Court denied Plaintiffs’ motion to permit intervention, but expressly stated that this was because the Court was convinced that the Plaintiffs had demonstrated their standing and permitting intervention would unnecessarily delay the proceedings. The Court also denied Plaintiffs’ motion to certify the case as a class action because the claims in the case were too complex to craft an ascertainable definition of the class and the requested relief would benefit the members of the proposed class even if the lawsuit was not maintained as a class action. Additionally, the Court denied the Plaintiffs’ motions for summary judgment on the grounds that Defendants’ policies (i) violated their right to freedom of association, (ii) constituted an unlawful search and seizure, and (iii) violated their right to due process.

The Court granted Defendants’ motion for summary judgment with respect to the Storefront Ordinance, finding that the Plaintiffs lacked standing because they could not demonstrate that they had an ability or desire to sell goods that was being interfered with by Defendants’ policies or that the statute was being enforced against them or other unhoused persons with respect to panhandling activities. The Court granted Defendants’ motion for summary judgment with respect to the claim that Defendants’ policies violated the Plaintiffs right to privacy, finding that the right to privacy and personal autonomy does not include or protect the right to eat, sleep or perform other essential activities in public. The Court also granted summary judgment to Defendants with

respect to the Plaintiffs’ claim that Defendants’ policies constituted cruel and unusual punishment. Citing *Powell v. Texas*, the Court stated that even if the Defendants did violate the Plaintiffs’ right to movement or travel, it was not based on their status as unhoused persons, and therefore was not cruel and unusual.

Both parties moved for summary judgment regarding the constitutionality of the City’s Aggressive Panhandling Ordinance. The Court found that panhandling was protected speech and that the Aggressive Panhandling Ordinance was a content-based restriction. As a content-based restriction, the Court analyzed whether the Aggressive Panhandling Ordinance was constitutional under both the First Amendment and the Fourteenth Amendment. The Court held that it was constitutional under the First Amendment because (i) the City had legitimate compelling state interests to protect citizens and visitors from threatening or intimidating behavior, to promote tourism and to preserve the quality of urban life, and (ii) that the City had narrowly tailored the speech restrictions in the Ordinance. The Court held that the Aggressive Panhandling Ordinance was an unconstitutional violation of the Equal Protection clause of the Fourteenth Amendment, however, because it discriminated against those soliciting money for a charitable purpose only and not for other purposes.

In September 1994, the parties reached a settlement agreement in which the City was to amend its panhandling Ordinance to reflect that panhandling is protected speech and that persons are allowed to remain in public places unless violating other laws. The City also agreed to repeal a park solicitation rule and adopt policies with respect to people experiencing homelessness and panhandlers.

FIFTH CIRCUIT

***Kohr v. City of Houston*, 2017 WL 6619336, at *1 (S.D. Tex. Dec. 28, 2017)**

Plaintiffs, on behalf of themselves and a class of unhoused persons similarly-situated, sued the City of Houston seeking, preliminary injunctive relief from various city Ordinances. Plaintiffs argued that the City’s enforcement of “no-camping” and/or “encampment” Ordinances violated their rights to be free from cruel and unusual punishment under the Eighth Amendment and essentially criminalized their “homeless” status. The encampment Ordinance at issue did not ban sleeping in public; rather, it prohibited the erection of tents or other temporary structures to facilitate encampment or the accumulation of large amounts of property in public spaces.

As a threshold matter, the Court found that Plaintiffs lacked standing to challenge the constitutionality of the encampment Ordinance on Eighth Amendment grounds in the absence of a citation or conviction for violating the

Ordinance. None of the named Plaintiffs had been cited, arrested, prosecuted, or convicted of a violation of any of the Ordinances for which they complained. Accordingly, the Court explained “[t]heir perceived threats of future criminal prosecution, without more, are an insufficient basis upon which to hold the encampment Ordinance violative of the Eighth Amendment.”

While Plaintiffs lacked standing to challenge the constitutionality of the encampment Ordinance on Eighth Amendment grounds, the Court also denied Plaintiffs’ motion for a preliminary injunction which sought to enjoin the City from enforcing the tent ban against unsheltered people. Applying the standard for a preliminary injunction, the Court found that Plaintiffs failed to establish the requisite elements.

With regard to whether Plaintiffs established a substantial likelihood of success on the merits, the Court rejected Plaintiffs’ argument that the Ordinance was “unconstitutional because it punishes involuntary conduct that necessarily arises from immutable status.” The Court explained, while the Ordinance did prohibit certain conduct, any person, regardless of whether he or she was unhoused, was subject to this Ordinance. Accordingly, “the Ordinance does not criminalize ‘homeless’ status but rather prohibited obstructions that hinder the City from preserving public property for its intended purpose.” The Court also found that the Ordinance facially appeared to be a valid exercise of the City’s discretionary police power.

Palmer v. Johnson, 193 F.3d 346 (5th Cir. 1999)

An inmate brought a 42 U.S.C. § 1983 action against prison officials for violation of his Eighth Amendment rights when he and forty-eight other inmates were ordered to sit in a field overnight. The inmates were confined to an area measuring approximately twenty feet by thirty feet, bounded by poles and a string of lights. The correctional officers overseeing the inmates were ordered to shoot anyone attempting the leave. The inmate claimed, *inter alia*, that he was not allowed to use a bathroom during the seventeen-hour outdoor confinement and was told that his only option was to urinate and defecate in the confined area that he shared with the other inmates. The inmate also claimed that he was forced to withstand strong winds and cold without the protection afforded by jackets or blankets. Prison officials argued that the conditions the inmate experienced did not rise to the level of a constitutional violation and the officials were entitled to qualified immunity. The prison officials moved for summary judgment on the basis of qualified immunity, which the District Court denied. The prison officials immediately appealed the District Court’s denial of qualified immunity to the Fifth Circuit.

On appeal, the Fifth Circuit explained that the Eighth Amendment’s prohibition against cruel and unusual punishment requires prison officials to provide humane

conditions of confinement, ensuring that inmates receive adequate food, clothing, shelter, and medical care. The Fifth Circuit further explained that the Eighth Amendment forbids prison officials from subjecting inmates to significantly cold temperatures or depriving them of the basic elements of hygiene. Based on these conditions, the Fifth Circuit held that, for purposes of the qualified immunity analysis, the inmate demonstrated a violation of his clearly established rights under the Eighth Amendment. Therefore, the District Court did not err by denying the prison officials’ motion for summary judgment on the basis of qualified immunity.

Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995)

A class of unhoused Plaintiffs challenged Dallas’ Ordinances prohibiting sleeping in public, solicitation by coercion, removal of waste from garbage receptacles, and providing for the closure of certain city property during specific hours. The Plaintiffs alleged that the City’s enforcement of these Ordinances violated their rights under the Fourth, Eighth, and Fourteenth Amendments. Plaintiffs also claimed the City’s conduct constituted wrongful (tortious) malicious abuse of process.

The U.S. District Court for the Northern District of Dallas granted Plaintiffs’ motion for a preliminary injunction in part, holding that the sleeping in public prohibition violated the Eighth Amendment because it imposed punishment on Plaintiffs for their status as unhoused people. Nevertheless, in its ruling on the motion for a preliminary injunction, the Court, in dicta, rejected Plaintiffs’ other claims, including the equal protection claims, finding that the challenged Ordinances did not impinge on Plaintiffs’ right to travel, unhoused people do not constitute a suspect or quasi-suspect class, and the laws were rationally related to a legitimate state interest. On appeal, the Fifth Circuit reversed the District Court’s order, vacated the preliminary injunction, and remanded the case with instructions to dismiss Plaintiffs’ Eighth Amendment claims for lack of standing.

The Court held that the Constitution’s prohibition on cruel and unusual punishment applied only after conviction for a criminal offense, and, on the record before it—compiled prior to the District Court’s certification of the action as a class action—there was no apparent evidence that Plaintiffs had actually been convicted of sleeping in public as opposed to merely being cited or fined. The District Court did not dismiss the case as ordered by the Fifth Circuit. The Defendants then filed a motion for summary judgment, which was denied. The Defendants next filed a petition for a Writ of Mandamus asking the Fifth Circuit to order the District Court to dismiss the Eighth Amendment claim. Without seeking a response from Plaintiffs, the Fifth Circuit issued the writ ordering the District Court to dismiss the entire case. The District Court dismissed the case as ordered. The Plaintiffs filed a motion for reconsideration with the Fifth Circuit.

As the thirty-day deadline for filing a notice of appeal for the dismissal approached, the Fifth Circuit still had not ruled on the motion for reconsideration. Therefore, Plaintiffs filed a notice of appeal of dismissal to the Fifth Circuit. The Fifth Circuit then entered a modified writ ordering the District Court to dismiss the Eighth Amendment claim only.

On April 24, 2001, the Trial Court granted Defendants' motion to dismiss the remaining claims, in addition to the Eighth Amendment claim. The Court ruled there could be no violation of the Fourth Amendment where Plaintiffs failed to establish they were ever actually arrested for sleeping in public. The Court did not address Plaintiffs' arguments attacking the vagueness of the Ordinances. Instead, the Court described the issue before it "a simple one" and ruled that because Plaintiffs failed to present any evidence of their arrest, probable cause is factually uncontested and the arrests presumptively constitutional. Therefore, the Court dismissed the case.

SIXTH CIRCUIT

Phillips v. City of Cincinnati, No. 1:18-CV-541, 2020 WL 4698800 (S.D. Ohio Aug. 13, 2020)

Plaintiffs had lived in various outdoor locations due to their lack of access to shelter but were forced to move or be arrested on multiple occasions. The Plaintiffs had their property destroyed by the city. The city provided notice on July 27, 2018 that an encampment on Third Street would be "closed for cleaning and maintenance" and that residents had to vacate and take any property, or it would be destroyed. The Plaintiffs filed suit in federal Court seeking a temporary restraining order to prevent the evacuation, which was denied, and the litigation that followed led to this action.

Plaintiffs brought this lawsuit against the mayor and city of Cincinnati seeking an injunction preventing the city from arresting unhoused residents, seizing and destroying unhoused residents' property, and enforcing both city policy regarding encampments and injunction banning homeless encampments. The Defendants filed a motion to dismiss, and the Court decided that seven of the Plaintiffs' eleven claims could proceed. The Court made the following holdings:

Jailing unhoused people for living in encampments when there is no available shelter could constitute cruel and unusual punishment in violation of the Eighth Amendment

The Cincinnati homeless encampments were an expression of free speech, calling attention to the housing crisis and the existing injunction making such encampments illegal violated the Plaintiffs' right to free speech;

Citing and arresting unhoused persons for sleeping in public spaces could violate the right to travel because it denies them the necessity of a safe place to sleep;

The City may be creating an unlawful state-created danger for the unhoused that violates the due process clause of the Fourteenth Amendment if it is requiring them to vacate well-lit and high-traffic public land, or go to jail, when housing is not available for some specific unhoused people, nor for all, and taking and destroying their tents, tarps, blankets, clothing, and other property;

There could be a procedural due process violation if the city is confiscating or destroying property without fair notice;

Ohio's criminal trespass statute may be unconstitutionally vague as applied to the Plaintiffs who seek shelter on public property by not providing adequate notice that they may be deprived of liberty or property interests for sheltering in a public space; and

The city could be liable if it has a policy or custom of evicting and arresting unhoused persons residing in encampments, that leads to or causes constitutional violations.

The Court explained that at this procedural stage, the Plaintiffs had not proven these claims but presented sufficient facts for them to proceed. The other claims were dismissed, and the mayor was dismissed as a Defendant.

Moe v. City of Akron, No. 5:14-cv-2197 (N.D. Ohio filed Oct. 3, 2014)

Six unhoused Plaintiffs filed a putative class action against the City of Akron and city officials alleging violations of Plaintiffs' federal and state constitutional rights protecting unlawful seizure, as well as due process violations arising out of homeless campsite cleanups.

Plaintiffs reached a settlement agreement whereby the individual Plaintiffs received a monetary settlement of an undisclosed amount. All unhoused individuals in Akron are intended beneficiaries of the agreement. Specifically, pursuant to the settlement, the city agreed to implement specific procedures relating to the disposal of any personal property located on public property, including that the city will not remove any personal items of unhoused individuals unless it provides written notice of no less than forty-eight hours. Moreover, any personal property that is removed by the city will be stored for no less than thirty days, and the city will develop procedures by which people may retrieve their items. However, the city is not responsible for providing notice of removal if it reasonably concludes that the property is abandoned or that exigent circumstances exist.

Cash v. Hamilton Department of Adult Probation, 2006 WL 314491 (S.D. Ohio Feb. 8, 2006), No. 1:01-CV-753 (not reported in F. Supp. 2d)

Unhoused individuals brought a § 1983 action against the City of Cincinnati and Hamilton County alleging that the city violated their Fifth and Fourteenth Amendment rights

when their personal property was taken and destroyed by a city clean-up crew instructed to clean out under bridges and viaducts where unhoused individuals resided.

The District Court for the Southern District of Ohio granted summary judgment for Defendant government officials. The Sixth Circuit reversed the District Court's summary judgment and remanded the case. The Sixth Circuit received two petitions for rehearing en banc, which it denied on the grounds that the issues raised in the petitions had been fully considered.

On remand, Plaintiffs moved for partial summary judgment, arguing that the evidence overwhelmingly showed that they lost their possessions pursuant to a policy or custom of the city, and that notice provided by the city was inadequate as a matter of law. Also on remand, the city moved to dismiss for lack of subject matter jurisdiction. The city relied on *Arnett v. Myers*, to support its argument that Plaintiffs' claims were not ripe because Plaintiffs had not exhausted state remedies to obtain just compensation for their loss.

The Court denied Plaintiffs' motion because questions of fact remained regarding whether Plaintiffs' property was indeed discarded pursuant to a policy or custom of the city, and Plaintiffs had not submitted any new evidence in support of their argument regarding the city's policy of discarding property of unhoused persons without notice and a hearing. The Court, however, denied the city's motion to dismiss because Plaintiffs abandoned their takings claim; their remaining procedural due process claim did not require Plaintiffs to exhaust any state remedies in order for their claim to be ripe. The case was settled on September 20, 2006. Under current procedures, personal property that is taken is retained and notice is given at the site regarding where such property may be retrieved.

Henry v. City of Cincinnati, No. C-1-03-509 (S.D. Ohio 2003)

Plaintiffs, four individuals participating in begging along with a non-profit homelessness institute leader, filed suit against the City of Cincinnati, arguing that the municipal Ordinance restricting vocal begging and requiring individuals to obtain a registration from the police department before begging violated their rights under the First, Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. The Ordinance regulated and restricted the time, place, and manner of "solicitation," and included an absolute ban in certain locations. "Solicitation" was defined as "mak[ing] any request in person . . . for an immediate grant of money, goods or any other form of gratuity from another person(s)." The law also barred soliciting in an "aggressive manner" or by knowingly using any misleading representations while soliciting.

The City filed a motion to dismiss the Plaintiffs' First Amendment claim, arguing both failure to state a claim upon which relief can be granted and lack of standing. The United States District Court for the Southern District of Ohio Western Division denied the motion to dismiss, holding Plaintiffs presented plausible claims stemming from the City's content-neutral restriction that may be overly broad, unduly restrictive, and an impermissible prior restraint.

The Court first addressed standing considerations presented in the City's motion, concluding Plaintiffs have standing to challenge the provisions of the Ordinance on First Amendment grounds due to the real and immediate threat of harm as well as possible restriction on speech.

Considering the motion to dismiss for failure to state a claim upon which relief can be granted, the City argued the Ordinance (i) regulates only panhandling, (ii) regulates only commercial speech, and (iii) is content-neutral. The Court held that the Ordinance does in fact regulate more than panhandling, as solicitation defined therein includes more speech than panhandling alone. It also concluded that charitable solicitation and panhandling involve more than mere commercial speech, and therefore the Ordinance at issue here is subject to a facial challenge on the grounds of overbreadth and prior restraint.

The Court did however conclude that the Ordinance is content-neutral because although it restricts the time, place and manner of the speech, the law is not "concerned with the message" and regulates the act of begging and its associated vocalization. Further addressing the specific issue of the registration requirement, the Court held the requirement is subject to a prior restraint challenge.

The District Court dismissed the motion, and Plaintiffs voluntarily dismissed the Fourth, Eighth, and Fourteenth Amended-based Complaints.

Ashcraft v. City of Covington, No. 02-124-JGW (E.D. Ky. Sept. 23, 2003)

On May 20, 2002, Plaintiffs James Paul Ashcroft, Delbert Thompson, and six others filed suit against the City of Covington, Kentucky and Mayor of Covington Irvin Callery, in both his individual and official capacities, in the Eastern District of Kentucky. Plaintiffs alleged violations of their Fourth, Fifth, and Fourteenth Amendment rights, based on the seizure and destruction of their personal property from an encampment along a river in Covington.

Plaintiffs alleged the Mayor Callery ordered a sweep of the riverbank on April 15, 2002, which resulted in the destruction of their property. Plaintiffs' allegations included a substantive due process violation based on the enforcement of an unwritten policy; a procedural due process violation based on the confiscation and

destruction of their property without notice and a hearing; and a violation of Fourth Amendment through unlawful search and seizure of their property without probable notice, cause, or a warrant. Defendants counterclaimed that Plaintiffs were trespassers for staying on the riverbank.

The facts were largely undisputed. Plaintiffs lived in camps along the river, a fact that at least some city employees were aware of for over ten years. In February, 2002, two residents of Covington emailed Mayor Callery, complaining that there were people living along the riverbank. The police went to the riverbank and told those living there to move. In March and April 2002, the police department received Complaints from local businesses that a group of people from the riverbank were using their public restrooms, panhandling, burning rubber, and in one instance, defecating in public. On April 15, 2002, city crews removed and discarded the makeshift shelters along the riverbank. The city later posted notifications regarding additional sweeps of the riverbank.

In order for Plaintiffs to prevail on their 42 U.S.C. § 1983 claims, Plaintiffs needed to show that the city employees acted pursuant to an official policy. Plaintiffs and Defendants cross-moved for summary judgment as to the existence of a policy regarding the removal and destruction of property from the riverbank. The Court ruled that a factual issue remained regarding whether Mayor Callery authorized, established, or approved a city policy, and thus denied both motions for summary judgment.

The Court granted Defendants' motion for summary judgment regarding Plaintiffs' substantive due process claims because Plaintiffs had a more specific Fourth Amendment claim and because Defendants' conduct did not shock the conscience. The Court also granted summary judgment on Plaintiffs' eviction claims, based on qualified immunity grounds because Plaintiffs did not have a clearly established right to homestead on the riverbank. The Court denied Defendants' motion based on qualified immunity as to the remaining claims.

The Court granted summary judgment in Plaintiffs' favor regarding Defendants' trespass counterclaims because the riverbank was open to the public without restriction. The Court denied Plaintiffs' summary judgment motion regarding procedural due process because they did not clearly establish a violation occurred pursuant to a municipal policy or custom.

Following the Court's order on the motions for summary judgment, the case settled in 2004; each of the five Plaintiffs received \$1,000 and their lawyers received attorney's fees.

Clark v. City of Cincinnati, No. 1-95-448 (S.D. Ohio Oct. 25, 1995)

Three unhoused people who subsist by begging or panhandling on a daily basis, a social activist who solicits for charitable contributions, another social activist who solicits contributions for Homeless Hotline of Greater Cincinnati, Inc. ("Homeless Hotline"), a non-profit homeless advocacy group, and Homeless Hotline itself filed a suit in the United States District Court for the Southern District of Ohio Western Division (the "Court") challenging the constitutionality of two misdemeanor Ordinances enacted by the City of Cincinnati (the "City"). The Court granted preliminary injunction in favor of Plaintiffs. The Court also granted the Plaintiffs' summary judgment motion and denied the City's cross summary judgment motion, holding that the two Ordinances in question are both unconstitutional under the first Amendment.

The sidewalk Ordinance made it a crime to sit or lie down on certain sidewalks from 7AM to 9:30PM, with limited exceptions. Cincinnati Municipal Code §723-76. The solicitation Ordinance made it a crime to beg or panhandle, whether by words or gestures, within 6 feet of the front of certain buildings, within 10 feet of ATMs, or within 20 feet of a crosswalk, and also prohibited all begging or panhandling every day after 8PM, regardless of distance from any buildings. Cincinnati Municipal Code §910-12.

Noting that sidewalks constitute a traditionally public forum, the Court applied the strict scrutiny standard in evaluating the constitutionality of the two Ordinances. The relevant First Amendment strict scrutiny test is as follows: "the government may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 177 (1983) (internal quotes deleted).

The Court noted that the City has a significant interest in protecting its residents from unsafe, disorderly, coercive behavior, and that interest was already addressed by existing criminal Ordinances addressing aggressive panhandling. However, as the sidewalk and solicitation Ordinances restrict innocent and/or passive conduct by beggars and panhandlers, the Court found that no significant government interest supports the additional restrictions established by the Ordinances. Moreover, the Court found that both Ordinances are overly broad – the solicitation Ordinance was broad enough to criminalize a business person asking another for money for a parking meter, and the sidewalk Ordinance would criminalize any tired person from resting momentarily on the sidewalk. In addition, the Court held that the solicitation Ordinance

is impermissibly content-based by restricting speech related to solicitation, not other topics, and by making an impermissible distinction between commercial signage (allowed under the Ordinance) and non-commercial speech (criminalized under the Ordinance).

The Court also held that the time, place and manner restrictions are arbitrary and do not have any explanations for the original or legal importance of the specific distance and time requirements. For example, if the City sought to address safety with the solicitation Ordinance, the 8PM time restriction is not related to the onset of darkness. Finally, the Court held that the Ordinances do not provide adequate alternative means by which the unhoused and poor Plaintiffs can legally communicate their requests for financial assistance or food.

Clements v. City of Cleveland, No. 94-CV-2074 (N.D. Ohio 1994)

In *Clements et al. v. City of Cleveland*, the Northeast Ohio Coalition for the Homeless and several unhoused residents brought suit against the City of Cleveland for declaratory relief, injunctive relief, and damages under the U.S. and Ohio Constitutions. The Complaint sought to halt the City of Cleveland from the unconstitutional policy, practice, and/or custom under which its police officers physically removed unhoused or destitute individuals from certain well-traveled sectors of the city, including Public Square and the Flats, to various distant locations against their will and abandoned them. Specifically, Plaintiffs alleged that the City of Cleveland violated Plaintiffs' right to be free from unreasonable seizures under the Fourth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 14 of the Ohio Constitution because the officers physically restrained Plaintiffs and employed a show of authority in forcing the Plaintiffs into police vans and squad cars in order to "sanitize" well-traveled sectors of the city.

In addition, Plaintiffs alleged that the City violated their right to move about freely without governmental interference under the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 1 of the Ohio Constitution by designating certain parts of the city as "off limits" to unhoused individuals and physically removing them from those locations. For substantially the same reasons, Plaintiffs also alleged that the City violated their right to associate under the First and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 3 of the Ohio Constitution and violated their right to be free from the unfettered discretion of law enforcement under the Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution and of Article 1, Section 16 of the Ohio Constitution. Therefore, Plaintiffs argued that the Court should grant its request for a preliminary and permanent injunction because the deprivation of constitutional freedoms unquestionably constitutes irreparable injury, the injunction would not

cause harm to others, and the injunction would serve the public interest.

In February 1997, the Plaintiffs and the City settled the lawsuit. Under the terms of the settlement, the City agreed to issue a directive to the police forbidding them from picking up and transporting people experiencing homelessness against their will; to issue a public statement that violating unhoused people's rights to move around the City is not and will not be the City's policy; to pay \$9,000 to the Plaintiffs to be used for housing, education, and job training for the unhoused Plaintiffs; and to pay \$7,000 to cover a portion of the Plaintiff's costs in bringing suit.

SEVENTH CIRCUIT

Young v. City of Indianapolis, No. 1:17-CV-02818-TWP-MJD (S.D. Ind. Feb. 16, 2018)

In August 2017, Plaintiff filed a putative class action against the Defendant, the City of Indianapolis, in response to an Ordinance passed by the Defendant which prohibited the general public from storing items or laying in the public right-of-way under certain bridge overpasses located throughout the city during an "emergency." As a result of enforcement of the Ordinance, unhoused populations, which would typically congregate under the underpasses for shelter, were being asked to disperse from under the overpasses and sometimes had their possessions (which were stored under the overpasses) confiscated. Plaintiff alleged that Defendant prevented unhoused persons from sleeping, sitting, standing or even stopping under the overpasses, while Defendant did not impose such restrictions on non-homeless persons. Plaintiff alleged that the Ordinance and its enforcement are unconstitutional because they violate Plaintiff's (i) due process rights for being void for vagueness (i.e., Defendant did not appropriately identify the "emergency" resulting in the Ordinance), and (ii) right to equal protection (i.e., the Ordinance was not uniformly enforced against non-homeless persons).

Defendant answered Plaintiff's Complaint alleging that the Ordinance was not void for vagueness because it clearly stated the prohibited behavior (i.e., storing items or laying in the public right-of-way) and identified a legitimate emergency (i.e., promoting public health and safety by keeping common thoroughfares easily passable should first responders need to respond to a public emergency). In addition, Defendant alleged that the Ordinance was applied neutrally to all individuals and that Plaintiff did not produce any evidence of disparate treatment on unhoused persons relative to others.

The Court denied Plaintiff's motion to certify a class on the grounds that a pro se litigant cannot serve as a class representative and granted Plaintiff's own motion to dismiss without prejudice.

Glover v. Executive Director of the Indiana War Memorials Commission, No. 1:07-cv- 1109 (S.D. Ind., filed Aug. 30, 2007)

Michael Glover and Calvin Cole filed suit against the Indiana War Memorials Commission arguing that its policy of removing unhoused people from the Commission's grounds who are accused of "loitering," and issuing "no trespass" orders to many such persons, violated the 14th Amendment. The Plaintiffs sued on behalf of themselves and a proposed class.

The Indiana War Memorials Commission is a state entity that controls a number of parks and other public places in Indianapolis, and has a small police force that patrols these properties. The Commission posted a list of rules at the entrance of these properties, which includes "no loitering"; the Complaint alleged that this is an undefined term, and members of the force have discretion to determine if someone is "loitering."

Mr. Glover was experiencing homelessness when he entered a Commission-controlled public area and sat on a ledge with his belongings which, he alleged, were not obstructive. An officer approached Mr. Glover and instructed him to leave, as he was loitering. Mr. Glover left, and returned three days later to the same public area.

The same officer approached Mr. Glover and allegedly claimed that the Commission's policy was to remove all unhoused people from Commission property. The officer requested Mr. Glover's identification, which he held for 5-7 minutes while issuing a "no trespass order". The order states if Mr. Glover returns to any Commission controlled public spaces, he would be subject to criminal trespass under a state criminal trespass law. The Complaint alleged that the issuing officer made no written record as to the basis of the order, and a record made by a different officer indicates that Mr. Glover was banned because he was sleeping on the property.

Mr. Cole was experiencing homelessness when he entered a Commission-controlled public area. Before Mr. Cole sat with his possessions, he was told by an officer that he could not remain in the area for more than 10 minutes. Mr. Cole left, and had not returned for fear of being issued a "no trespass" order.

The Plaintiffs sought class certification for "all persons who have been, will or may be informed by [the Commission] that they must leave the property controlled by [the Commission] despite that the fact that they were not, or will not be, engaged in any unlawful conduct." The motion included a request to certify a subclass of "all homeless persons, or persons perceived by [the Commission] as homeless" who are included in the larger class.

Plaintiffs argued that the Commission's practice of removing and banning persons from Commission property for perceived "loitering" and breaching "arbitrary and discretionary standards" violated the due process clause of the 14th Amendment, and that the practice of subjecting unhoused persons to different standards of permissible behavior on Commission property violated the equal protection clause of the 14th Amendment.

Mr. Glover also alleged that he was unlawfully detained while being issued the "no trespass" order in violation of the 4th Amendment. Plaintiffs sought declaratory relief, and injunctions enjoining the Commission from banning persons from Commission property (with a "no trespass" order or otherwise) pursuant to unwritten and discretionary rules, and from applying different standards of conduct to unhoused persons (or those perceived to be unhoused). Mr. Glover also sought to enjoin the Commission from enforcing the "no trespass" order against him, and for damages from the detaining officer.

The case was ultimately settled in 2009 before any substantive findings from the Court, including as to the class certification. Mr. Glover's damages claims were dismissed with prejudice, and the remaining claims dismissed without prejudice.

Love v. City of Chicago, No. 96-C-0396, 1998 U.S. Dist. LEXIS 1386 (N.D. Ill. Feb. 5, 1998)

Alleging violations of their Fourth, Fifth, and Fourteenth Amendment rights, a group of unhoused Plaintiffs challenged Chicago's policy and practice of seizing and destroying the personal property of unhoused people in the course of cleaning particular areas of the city. After the city made some of Plaintiffs' requested modifications to the challenged procedures, the U.S. District Court for the Northern District of Illinois denied Plaintiffs' motion for a preliminary injunction, finding that the city's practice was reasonable and did not violate Plaintiff's rights. On March 11, 1997, Plaintiffs sought to certify a class of unhoused persons whose possessions were destroyed due to the city's off-street cleaning program.

The Court held that Plaintiffs had satisfied all requirements for certification, and granted Plaintiffs' class certification motion. In December 1997, the city discarded the possessions of unhoused individuals despite the fact that the possessions had been stored in "safe areas" as allowed by the temporary procedures. This action prompted Plaintiffs to bring a renewed motion for a preliminary injunction claiming that the procedures violated Plaintiffs' Fourth, Fifth and Fourteenth Amendment rights. The number of possessions was greater than usual owing to Thanksgiving charity donations, and they were discarded along with others that had fallen off the safe areas and obstructed roadways.

While finding that the city violated its own procedures, the Court was unwilling to require sanitation workers to sort through possessions of unhoused people for reasons of sanitation and impracticability, stating that unhoused people have the burden of separating and moving those items they deem valuable. Specifically, the Court found that the program did not violate the Fourth Amendment, as it was reasonable, minimally intrusive and effective in preserving possessions of unhoused people. The Court stated that property normally taken by the city under the program is considered abandoned. The Court ruled, however, that losses of possessions that had been placed in safe areas and subsequently discarded must be compensated. But as Plaintiffs had not yet attempted to recover any compensation, any action was premature. Finally, the Court held that the city adequately provided notice to unhoused people through its practice of posting signs in the area, having city employees give oral notice a day before cleaning, and a second oral notification minutes before cleaning.

EIGHTH CIRCUIT

Berry v. Hennepin County, 2020 U.S. Dist. LEXIS 201810 (D. Minn. 2020)

In October of 2020, a group of individuals experiencing homelessness and ZACAH, a nonprofit organization that provides financial assistance to Minnesota residents on the verge of experiencing homelessness, filed suit seeking a temporary restraining order against various public entities and public officials in Hennepin County, Minnesota to prevent sweeps of encampments in public parks and related seizures of personal property throughout the Minneapolis area. Plaintiffs alleged that during these sweeps, police seized and destroyed their property in violation of the Fourth Amendment to the United States Constitution.

The organizational Plaintiff, ZACAH, argued in the Complaint that of the \$115,715 in donations it had received, it had to spend approximately \$113,000 on hotel rooms for displaced people, thereby preventing the organization from using the funds to advance its core mission to “support people in transitioning from a state of vulnerability, back toward a path of sustainability.” The Court found that there was not irreparable harm to justify injunctive relief because ZACAH would be able to recover its financial resources through money damages at the trial stage. The Court also found Plaintiffs’ claims of irreparable harm speculative because some of them did not live in encampments at the time the lawsuit was brought.

In September of 2021, after Hennepin County filed a motion to dismiss all claims, the District Court dismissed the claims for damages against the Sheriff based on qualified immunity, but denied the motion to dismiss as to the claims of unlawful seizure, procedural due process violations, and conversion. The Court also denied the

motion to dismiss the claims for punitive damages. This litigation is currently pending as to the claims that survived the city’s motion to dismiss.

Frank v. City of St. Louis, 458 F. Supp. 3d 1090 (E.D. Mo. 2020)

During the Covid-19 pandemic, unhoused individuals filed putative class action seeking a temporary restraining order (TRO) against the City to prevent the closure of tent encampments in public areas. Plaintiff argued that the Eighth Amendment would be violated if the City could close these tent encampments. The Court rejected Plaintiff’s argument and denied temporary injunctive relief.

In denying the TRO, the Court explained that a citywide ban on homelessness was not involved, rather the City would only be closing tent encampments located in a particular area. Other encampments throughout the city would remain open. As such, the City was not criminalizing the state of being homeless or its unavoidable consequences, like sleeping in public. At most, the City was criminalizing sleeping in a particular location. The Court further explained that during times of public health crises, local governments have broad latitude to institute protective measures so long as those measures have a real or substantial relation to the public health crisis.

Occupy Minneapolis v. County of Hennepin, 866 F.Supp.2d 1062 (D. Minn. 2011)

Occupy Minneapolis, a coalition that maintained a continuous “occupation” of two plazas next to a government center, brought suit against the County, the County Sheriff, and several County Commissioners, alleging that restrictions imposed on protesters in the plaza, including a prohibition against sleeping on the plazas, violated their rights to freedom of speech, assembly, and to petition the government for redress of grievances under the First Amendment.

The Court granted in part and denied in part the Plaintiff’s motion for a temporary restraining order. The motion was granted to the extent that it sought to enjoin the county from prohibiting signs and posters taped to Plaza property. The Court found, however, that while protesters’ activity of sleeping and erecting tents on the plazas was protected speech, the prohibition was a valid time, place, manner restriction on speech.

NINTH CIRCUIT

Santa Cruz Homeless Union v. Bernal, No. 20-CV-09425-SVK (N.D. Cal. 2021)

Santa Cruz Homeless Union, Santa Cruz Food Not Bombs, and a group of unhoused individuals brought suit against several Santa Cruz city officials and the city of Santa Cruz to challenge an executive order issued in December of 2020 that directed the closure of San Lorenzo Park,

an encampment site in Santa Cruz. Plaintiffs sought a preliminary injunction to enjoin Defendants from closing the park based on the irreparable harm that would befall unhoused encampment residents if they were forced to separate from vital services and survival items. Plaintiffs alleged violations of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 7 of the California Constitution.

Specifically, they argued that by closing the encampments, the city was placing unhoused individuals in known danger with deliberate indifference to their safety in violation of the state-created danger doctrine encompassed in the Fourteenth Amendment. As evidence, Plaintiffs cited Centers for Disease Control and Prevention (CDC) guidelines that urged states and localities to refrain from clearing encampments without provision of individual housing units during the pandemic. The District Court found that Plaintiffs did show a likelihood of success on the merits and also demonstrated requisite irreparable harm that would result absent a preliminary injunction. Accordingly, the preliminary injunction was granted in January of 2021.

In July 2021, the District Court dissolved the lawsuit after dismissal was jointly requested by both Plaintiffs and Defendants. The case was dismissed without prejudice.

Where Do We Go Berkeley v. CALTRANS, No. 21-CV-04435-EMC (N.D. Cal. 2021)

Where Do We Go Berkeley, a nonprofit organization founded by and comprised of people experiencing unsheltered homelessness, and eleven individual unhoused encampment residents in Berkeley filed suit against the California Department of Transportation (CALTRANS) to prevent CALTRANS from closing encampments located near the Berkeley-Emeryville border.

The Complaint alleged the CALTRANS was violating Plaintiffs' rights under the Americans with Disabilities Act (ADA) and their due process rights under the federal and state constitutions.

In August of 2021, the District Court issued a temporary restraining order enjoining Defendants from evicting the eleven individual Plaintiffs from the encampment. Finding that the Plaintiffs had provided sufficient evidence that due to their disabilities and circumstances, indoor congregate living would not be appropriate, the District Court also granted a preliminary injunction and enjoined the Defendants from proceeding with all but one of the planned encampment clearings. The Court found that moving encampment residents from only the Ashby/Shellmound encampment site would not create undue hardship on the Plaintiffs, and would allow the site to be leased for a construction project that would ultimately provide affordable housing.

The Court granted the preliminary injunction for a period of six months and is valid through March of 2022.

Cal. Homeless Union v. City of Sausalito, No. 21-CV-01143-EMC (N.D. Cal. 2021)

The Marin County Chapter of the California Homeless Union brought suit against the City of Sausalito on behalf of unhoused individuals living in an encampment in Dunphy Park. The lawsuit was brought in response to the city's plan to break up the encampment and move encampment residents elsewhere. Plaintiffs asserted substantive due process claims based on the U.S. and California constitutions, and sought to enjoin the City from clearing the Dunphy Park encampment during the COVID-19 pandemic. In the Complaint, Plaintiffs relied heavily on Centers of Disease Control and Prevention (CDC) guidelines urging states and localities to refrain from clearing encampments without first providing encampment residents individual housing units to best prevent the spread of COVID-19.

Finding that the city's planned encampment clearing and proposed ban on day camping in the park would endanger the Plaintiffs and others similarly situated, the District Court granted the motion for preliminary injunctive relief on March 1, 2021, and enjoined the city and named city officials from enforcing any camping prohibitions and from closing or clearing the Dunphy Park encampment.

Subsequently, Plaintiffs sought to have Defendants held in contempt for violating the preliminary injunction when fecal contamination was found at Dunphy Park. The District Court judge declined to find contempt, noting that there was no evidence that the city was aware of the contamination, and affirmed the city's plan to relocate encampment residents to nearby tennis Courts while it investigated the contamination. The preliminary injunction enjoining the city from enforcing any day camping bans or permanently clearing the Dunphy Park encampment remains in effect at the time of this writing. Litigation on the merits is ongoing.

Reed v. City of Emeryville, 2021 WL 1817103, at *1 (N.D. Cal. May 6, 2021).

Plaintiffs Jon Reed, Laura Berry, Frank Eugene Moore III, and Gabriel Smithson are unhoused individuals who currently reside at an encampment. Where Do We Go Berkeley (WDWG) is a 501(c)(3) organization made up of unhoused and housing insecure individuals and advocates that provides services for residents of Plaintiffs' encampment, who brought this lawsuit to enjoin Defendants, the City of Emeryville, Emeryville Mayor Dianne Martinez, and City Manager Christine Daniel, from closing the encampment.

On April 18, 2021, Plaintiffs sought and obtained a Temporary Restraining Order (TRO) that prohibited

the Defendants from proceeding with the removal of persons and personal belongings and structures from the encampment, closing the encampment, and/or otherwise removing unhoused persons from the encampment unless and until each person is actually provided with safe, indoor individual private housing, consistent with CDC guidelines.

The Court found that the Plaintiffs were not entitled to the preliminary injunction they sought because the City demonstrated the need to clear the encampment to protect public safety, both that of the encampment residents and people passing by the site. The Court emphasized that this is not a situation where the City is attempting to clear an encampment for purely aesthetic or sham-public health reasons. The Court agreed that the City had given reasonable notice of both its plan to clear the encampment and how it will collect, store, and make accessible any personal property left at the encampment. The City also offered and is mandated to provide for current encampment residents who want it, transportation to and provision of a guaranteed nighttime shelter bed at a shelter that is complying with reasonable COVID-19 protocols.

Absent statutory or constitutional authority requiring otherwise, the provision of a guaranteed shelter bed, transportation, and storage of personal property is all that can be mandated on this record.

The Court further recognized that the Center for Disease Controls' guidance at that time was that, in light of the risk of COVID-19, communities should consider allowing people who are living unsheltered or in encampments to remain where they are. However, the Court weighed that guidance and ultimately decided that because the City demonstrated a legitimate need to remove the four to five individuals living at the encampment and given the availability of the COVID-19 vaccine, the downward trend in Alameda County of COVID cases, and the efforts that St. Vincent de Paul's shelter was taking to mitigate, the CDC guidance did not require the injunction Plaintiffs seek.

Bilodeau v. Medford, No 1:2021-CV-00766 (D. Or. 2021)

A group of unhoused Medford residents brought suit on behalf of themselves and others similarly situated against the city of Medford, Oregon based on Medford's practice of "tak[ing] coordinated steps to drive unhoused people out of town" including the city's refusal to allow for warming stations in the winter and cooling stations in the summer, the city's placement of barriers to prevent people from resting under overpasses, and the city's reduction of available public bathrooms and park seating.

According to the Complaint, during the Alameda fire in the summer of 2020, an emergency shelter was opened

in the Presbyterian Church in downtown Medford, but it was not opened to unhoused people. Additionally, the Medford City Council routinely conducted sweeps and failed to create low-barrier emergency shelter. Medford residents found sleeping outside were often awakened by police, told to move along, ticketed, ordered to appear in Court, criminally fined and prosecuted for "illegal sleeping," "illegal camping," disorderly conduct, and criminal trespass, among other violations.

Plaintiffs specifically challenged Medford Municipal Code 5.256 "Civil Exclusion Zones" which were designated zones to "protect the public from those whose illegal conduct poses a threat to the public health, safety, and welfare" and allowed people to be excluded from certain areas of city property, and Medford Municipal Code 5.257 "Prohibited Camping, Lying, Sleeping" which prevented anyone from establishing campsites on public ways and sidewalks. Plaintiffs alleged Eighth Amendment violations, Equal Protection violations, Substantive Due Process violations, and Procedural Due Process/Notice violations. They sought declaratory judgment that Medford's "campaign to drive unhoused people out of the city [was] unconstitutional" and injunctive relief to stop such practices and policies.

Litigation in this case is ongoing as of the time of this writing.

Garcia v. City of Los Angeles, No. 20-55522 (9th Cir. 2021)

Plaintiffs sought a preliminary injunction against an Ordinance that allowed the City to discard bulky items of personal property stored in public areas when they were not designated as shelters (e.g., dog kennels, carts, plastic bins). Plaintiffs alleged the Ordinance violated the Fourth Amendment protection against unreasonable searches and seizures because the City was permitted to immediately destroy bulk items at encampments without providing notice to those whose property was being taken.

The federal District Court granted Plaintiffs' motion for preliminary injunction. On appeal, the Ninth Circuit affirmed the grant of the preliminary injunction, holding Plaintiffs were likely to succeed on merits of Fourth Amendment challenge to the Ordinance because the destruction of personal property constitutes an unreasonable seizure.

Warren v. City of Chico, No. 2:2021-CV-00640 (E.D. Cal. 2021)

In April 2021, a group of individuals experiencing homelessness brought suit against the City of Chico to challenge a "citywide web of local laws that imposed criminal penalties on people experiencing unsheltered homelessness when they sleep, sit, lie down, and rest in

public in violation of, among other things, the Fourth, Eighth, and Fourteenth Amendments of the United States Constitution and California civil rights laws.” Specifically, the Complaint alleged that Chico’s camping ban, closure of parks, prohibitions on storing personal property in public spaces, and restrictions on sitting or “obstruct[ing]” sidewalks were all violative of federal and state law. Plaintiffs argued that enforcement of these Ordinances ran afoul of the Eighth Amendment’s prohibition on cruel and unusual punishment, the Eighth Amendment’s prohibition on excessive fines, the Fourteenth Amendment’s prohibition on state-created danger and requirements of due process, and the Fourth Amendment’s prohibition on unlawful seizure of property. Further, Plaintiffs argued that the challenged laws violated California Civil Code Section 52.1.

Plaintiffs requested a temporary restraining order and well as injunctive relief enjoining the city from enforcing the challenged Ordinances. They also requested statutory damages and attorneys’ fees, and a declaration that the city was in violation of federal and state law. In January of 2022, Plaintiffs reached a settlement with the City, which required the city to construct a non-congregate housing site. The site will be required to have a minimum amount of bathing facilities, potable drinking water, laundry services, meals and kitchen areas, garbage disposal, pet areas, and personal property storage. The site must be low-barrier entry, must be open 24/7 for occupants to access, may not have any time restrictions for occupants, and may not require participation in any services or program as a condition of admission.

Additionally, the settlement provides that the City shall not require any unhoused people to relocate from public property, and may not enforce any of its anti-camping Ordinances until the housing site is open and available. Any requirement that an unhoused person relocate themselves or their personal property from a public space must be preceded by notice to counsel, contacts with outreach staff, and an individual assessment. Moreover, the settlement provides that the City may not seize any personal property believed to be abandoned on public property without first providing written notice 72 hours in advance of the seizure. Personal property seized by the City may not be destroyed without first being stored in a secure location for at least 90 days. The City also may not close or fence off any public restrooms located on public property, and must dismiss all charges against Plaintiffs related to their status as unhoused. The settlement also requires the City to pay damages and attorneys’ fees.

Usher v. City of Portland, No. 3:21-CV-00937 (D. Or. 2021)

In May of 2021, several unhoused individuals brought a lawsuit against Portland for using third party contractors to clear encampment sites and seize property. The litigation is ongoing as of the time of this writing.

LA Alliance for Human Rights v. Los Angeles, No. 21-55395 (9th Cir. 2021)

This action was initially brought by the LA Alliance for Human Rights – primarily made of downtown business interests - who sought to prove that LA County: (1) violated the California Welfare and Institutions Code by failing to provide medically necessary shelter to unhoused individuals, (2) facilitated public nuisance violations by failing to clear the encampments that proliferate the Skid Row area in LA, and (3) infringed upon Plaintiffs’ constitutional rights by providing disparate services to individuals living in the Skid Row area and enforcing policies that have resulted in danger to Skid Row-area residents and businesses. Directly-impacted unhoused persons in Skid Row’s interests were originally not represented, but the Los Angeles Community Action Network (LACAN) intervened with the legal support of the Legal Aid Foundation of Los Angeles and the Law Office of Carol Sobel.

The District Court initially granted a preliminary injunction to Plaintiffs against the City and County of LA, ordering LA to offer shelter all unhoused individuals in Skid Row within 180 days, but did not specify the quality or style of shelter required, and gave a green light to enforcement of anti-camping laws after any offer was made. The District Court framed its decision to grant the injunction primarily on its finding that the homelessness crisis in Skid Row and throughout LA is the consequence of structural racism enforced by the state through redlining, eminent domain, exclusionary zoning, and discriminatory lending, however did not recognize its decision would perpetuate discriminatory impacts. The city/county Defendants and the intervenors appealed to the Ninth Circuit to halt the injunction.

On appeal, the Ninth Circuit held that the District Court abused its discretion in granting the preliminary injunction because the District Court’s order relied largely on unpled claims and theories. In vacating the preliminary injunction, the Ninth Circuit panel stated that the Plaintiffs “did not bring most of the claims upon which relief was granted ...” and that the District Court “impermissibly resorted to independent research and extra-record evidence.” Agreeing that structural racism “has played a significant role in the current homelessness crisis in the Los Angeles area,” the Ninth Circuit panel ultimately concluded that it must vacate the preliminary injunction because the Plaintiffs never explicitly alleged racial discrimination, and never put forth particular evidence to support such allegations. In the absence of such allegations and evidence, the District Court lacked judicial authority to grant a preliminary injunction based on the reasoning that was given, according to the Ninth Circuit panel.

Although the preliminary injunction was vacated, attorneys who have been actively advocating on behalf of the unhoused intervenors have made clear that the original

injunction granted by the District Court was an insufficient remedy from the start. The injunction's shortcomings stem from the fact that it would have attempted to put in place stopgap quick fixes to LA's prevalent homelessness, rather than substantively addressing and dismantling the structural and systemic forces that operate in LA to maintain and criminalize poverty and homelessness.

Potter v. City of Lacey, 517 F. Supp. 3d 1152 (W.D. Wash. 2021)

Plaintiff Jack Potter lived in Lacey, Washington beginning in 1997 and in April of 2018, Plaintiff began living in a 23-foot unmotorized trailer attached to his truck. Plaintiff moved among different parking lots, but was unable to find a consistent place to park, so he parked in the parking lot of the Lacey City Hall, where other vehicle-sheltered individuals were parking. In September of 2019, Lacey passed an Ordinance which prohibited a recreational vehicle from being parked on the city streets or public parking lot for more than four hours, unless a special permit was obtained.

Following the passage of the Ordinance, Plaintiff and the other vehicle-sheltered individuals parking in the City Hall lot were notified of the Ordinance and that they would have to move by September 30, 2019, or tickets would be issued. Plaintiff alleged that a Lacey police officer returned on September 30, 2019 and issued him a citation for violation of the Ordinance and if he did not leave, his vehicle would be impounded. Plaintiff did not leave and on October 1, 2019, an officer returned and informed Plaintiff that if he did not leave, his vehicle would be impounded. Plaintiff left because he could not afford the fees to redeem his vehicle if it was impounded. Plaintiff did not apply for a special permit because he believed that due to outstanding warrants, his application would be denied.

Plaintiff then filed claims that the Ordinance at issue was unconstitutional because it violated his (1) federal and state constitutional right to freedom of travel, (2) federal and state constitutional right to be free from cruel punishment, and (3) Fourth Amendment and Wash. Const. art. I, § 7 rights as applied to the vehicle-sheltered unhoused. Plaintiff also asserted that the non-resident parking permit was unconstitutional because (1) it violated federal and state freedom of association by prohibiting permit holders from having visitors, and (2) unbridled discretion was granted to the Lacey Police Department to deny permit applications. Both Plaintiff and Defendant filed motions for summary judgment on each of Plaintiff's claims.

The Court examined each of the claims and held as follows:

Right to Travel – the right to travel does not include a right to live in a certain matter, and thus, is not applicable.

Violation of Eighth Amendment – neither the parking fine, nor the potential impoundment violate the Excessive Fines Clause. The Cruel and Unusual Punishments Clause applies almost exclusively to convicted prisoners, and in rare cases on what the government may criminalize, and since criminal punishment is not at issue, there is no violation.

Violation of Fourth Amendment – while the Court acknowledged that the seizure of a vehicle that is a person's only shelter is an extreme remedy, it determined that such seizure may be reasonable based on the totality of the circumstances, such that injunctive relief barring all seizures is not appropriate.

Non-Resident Parking Permit – Plaintiff lacked standing to challenge the parking permit because he did not apply for such permit and did not intend to apply, thus he cannot demonstrate injury-in-fact.

Though the Court required additional briefings on the Eighth Amendment claims, all of Plaintiff's claims were dismissed by the Court.

Langley v. San Luis Obispo, No. 2:21-CV-0749 (C.D. Cal. 2021)

Plaintiffs, a group of unhoused San Luis Obispo residents and Hope Village, a nonprofit dedicated to serving unhoused people, brought suit against San Luis Obispo based on the city's policy and practice of "citing, fining, and arresting – as well as threatening to cite, fine, and arrest – unsheltered persons to force them to 'move along' from public parks, creeks, sidewalks, open spaces, streets, and parking facilities" as well as its practice of seizing and destroying the personal possessions of unhoused individuals. Plaintiffs alleged violations of the Eighth Amendment of the U.S. Constitution as well as California's constitutional prohibition against cruel and unusual punishment. Additionally, they alleged violations of the Fourth Amendment and the California Constitution's prohibition against seizure and destruction of property, and Fourteenth Amendment violations of the Plaintiffs' substantive due process rights. Finally, the Plaintiffs alleged state-created danger claims in violation of federal and state law and violations of the Americans with Disabilities Act.

In making their Eighth Amendment claims, the Plaintiffs argued that because only a fraction of the affordable housing need was actually being met in San Luis Obispo, and because the entire county only had enough shelter beds to meet 20% of the unhoused population, many city residents had "no option but to live outdoors in cars, in tents, or sleeping rough." The Complaint argued that "the city's systematic enforcement of a constellation of local Ordinances effectively makes it a crime for unhoused individuals to exist in certain public areas and, thus, punishes them by virtue of their homelessness," citing

several San Luis Obispo Municipal Code Sections. The Complaint further alleged that the City regularly destroyed and disposed of personal property in encampment sites.

Plaintiffs sought injunctive relief enjoining the City from citing, arresting, fining, and prosecuting unsheltered individuals in public places for alleged violations of laws that punish people for camping, sleeping, staying, or traveling in those places. They also sought injunctive relief enjoining the City from seizing and disposing of unhoused individuals' personal property, enjoining the City from removing unhoused people from encampments, and enjoining the City to cease actions which discriminate against people with disabilities. Additionally, Plaintiffs sought declaratory judgment that the City's policies and practices were violative of the Eighth, Fourth, and Fourteenth Amendments, analogous provisions of the California Constitution, the Americans with Disabilities Act, the Rehabilitation Act, and the California Government Code.

The challenge survived the city's motion to dismiss, and the litigation is ongoing.

Yeager v. City of Seattle, 2020 WL 7398748, at *1 (W.D. Wash. Dec. 17, 2020).

Plaintiff was an unhoused individual who had been living in Cal Anderson Park since early June 2020. At Cal Anderson Park, she was part of a "protest encampment," a "staging ground for daily marches, political meetings, organizing, making art, growing food, and providing community-based solutions" to other unhoused persons' medical and mental health needs.

In the morning of December 14, 2020, several police officers entered Cal Anderson Park and notified Plaintiff that she must remove all her personal property from the park. On the morning of the intended sweep, Plaintiff filed this action and moved for a temporary restraining order ("TRO") and preliminary injunction enjoining the City from executing the sweep.

Plaintiff claimed that the intended sweep violated the First Amendment because "maintaining tents and temporary structures" in public fora, like parks, have expressive speech value. The Court held that Plaintiff's First Amendment violation argument fell short for several reasons, including, that Plaintiff's briefing did not challenge a statute, Ordinance, or any policy. The Court also held that the evidence Plaintiff offered to show that the City's intended evictions were content-based was slim.

The Court also found that there was insufficient evidence in the record to conclude that the City had, in fact, engaged in the type of on-the-spot destruction of property that the City of Los Angeles did. The Court further held that Plaintiff did not show that there was a "risk of an erroneous deprivation" through the procedures

set forth in the eviction notice, and had not identified any "substitute procedural safeguards.

Given the Court's analysis, the Court held that Plaintiff failed to show a likelihood of success on the merits, and thus denied her motion for a TRO and preliminary injunction.

Blake v. Grants Pass, No. 1:2018-CV-01823 (D. Or. 2020)

Plaintiffs Blake, Johnson, and Logan were all people experiencing homelessness in the City of Grants Pass who had been fined, ticketed, and had faced criminal prosecution for sleeping or "camping" outdoors in public spaces. They had to find shelter outside the city limits of Grants Pass in order to avoid fines that they could not pay. Plaintiffs challenged city Ordinances prohibiting any person from occupying a "campsite" on any "sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct," or any city park.

Plaintiffs sought to represent a class that consisted of all involuntarily unhoused people living in Grants Pass, Oregon. Plaintiffs also sought a declaration that the relevant laws and actions of the city of Grants Pass were an unconstitutional infringement on their Eighth and Fourteenth Amendment rights. Plaintiffs argued that the city was punishing the involuntary conduct of sleeping, seeking shelter, and being unhoused by refusing to provide any legal place to conduct such basic activities, and thus violated the Eighth Amendment. They further alleged that the city had taken coordinated steps to drive people experiencing homelessness out of town, including removing park benches, failing to create any low-barrier shelter options, and offering to pay one-way fare for unhoused people to leave the city.

Plaintiffs also argued that the city violated the right to equal protection and procedural due process of the Fourteenth Amendment by selectively applying the relevant Ordinances against unhoused people—an arbitrary classification—without providing sufficient notice to a reasonable homeless person that the conduct is prohibited. Plaintiffs asked the Court to issue an injunction prohibiting enforcement of the relevant Ordinances and criminal trespass laws against unhoused individuals in Grants Pass who are engaged in life-sustaining activities.

In July 2020, the U.S. District Court for the District of Oregon issued an opinion finding that Grants Pass' use of violations and fines to punish people sleeping outside was unconstitutional based on the Eighth Amendment's prohibition on cruel and unusual punishment.

**Winslow v. City of Oakland, No. 20-CV-01510-CRB
(N.D. Cal. 2020)**

Plaintiffs, a group of encampment residents, sued the city of Oakland after the city posted a notice to vacate the High Street encampment site where Plaintiffs resided. The notice stated that on the specified time and date, Public Works crews would close the encampment and remove all property left at the site. The Notice was issued pursuant to the Encampment Management Policy and the Standard Operating Procedure, which established steps the City would take to remove encampments on all city-owned property. The Complaint alleged that despite city policies against confiscating personal belongings of encampment residents and in favor of storing any items collected during encampment sweeps, city officials had a practice of destroying and discarding encampment residents' property during sweeps.

Plaintiffs sought a temporary restraining order enjoining their removal from the encampment site and the removal of their property and directing the city to follow its stated policies on removal of encampments and associated property. They alleged Eighth and Fourteenth Amendment violations in support of their claims. In analyzing the Eighth Amendment claims, the Court found that while *Martin v. Boise* limits localities' ability to arrest unhoused residents for the act of living in the streets when there is nowhere else for them to go, "it does not create a right for unhoused residents to occupy indefinitely any public space of their choosing" citing *Miralle v. City of Oakland*, 2018 WL 6199929, at 2 (N.D. Cal. Nov. 28, 2018); *Sullivan v. City of Berkeley*, 2017 WL 4922614, at 4 (N.D. Cal. Oct. 31, 2017). The Court therefore found that the Plaintiffs had not shown a likelihood of success on the merits with regards to their Eighth Amendment claim, and that a temporary restraining order on that basis was not warranted.

Turning to the Fourteenth Amendment claims, the Court acknowledged that a person living in an encampment does have a property right to their belongings based on *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012) and found that Plaintiffs had shown a likelihood of success on the merits on these grounds because the city had a practice of cleaning and clearing encampments without complying with its policies. Furthermore, the Court found that Plaintiffs would suffer irreparable harm if the city were to be allowed to continue to clear encampments without complying with its policies, and that the public interest weighed in favor of granting a temporary restraining order against the city. The Court ultimately held that the city may clean and clear encampments only if it abided by its policies not to confiscate or destroy the personal belongings of encampment residents.

Vannucci v. Sonoma, No. 18-cv-01955-VC (N.D. Cal., Dec. 4, 2020)

In March 2018, Nicholle Vannucci, Ellen Brown, Shannon Hall, individuals, and Homeless Action!, an unincorporated association (each a "Plaintiff" and collectively, the "Plaintiffs"), brought suit against the County of Sonoma, the Sonoma County Community Development Commission, and the City of Santa Rosa (collectively, the "Defendants") in the United States District Court for the Northern District of California. Plaintiffs alleged that Defendants violated Plaintiffs rights under the Americans with Disabilities Act and the Fourth Amendment, Eighth Amendment and Fourteenth Amendment to the Constitution of the United States. The parties stipulated to a preliminary injunction ("Preliminary Injunction") as the parties awaited U.S. Supreme Court Review of *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), for further clarification of the law governing police enforcement of local Ordinances against unhoused individuals.

In the Preliminary Injunction, the parties agreed, among other things, to define the scope of dwellings and enforcement actions, and offer procedures for enforcement actions by Defendants when encountering unhoused individuals. The procedures during enforcement actions include providing unhoused individuals with: (a) written notice of their rights; (b) an opportunity for assessment by trained homeless outreach staff; (c) potential placement in adequate shelter suitable to the disability-related needs of the individual; and (d) a reasonable opportunity to relocate if shelter is refused. The Preliminary Injunction also created a grievance process for unhoused individuals to contest the suitability of their placement.

The Preliminary Injunction also delved into procedures for the search and seizure of unattended personal property. Defendants agreed to collect, bag, tag, record, and store unattended items for up to 90 days. Defendants also agreed to evaluate the facts and circumstances in evaluating whether items were unattended or abandoned. Lastly, Defendants agreed to implement a training program for staff who interact with unhoused individuals, which consists of principles of trauma-informed care and information regarding reasonable accommodations.

The Supreme Court of the United States denied the writ of certiorari for *Martin v. City of Boise* in December of 2019. After the denial of writ of certiorari, Plaintiffs filed multiple motions to clarify and enforce the Preliminary Injunction.

Boyle v. Puyallup, No. 3:18-CV-95750 (W.D. Wash., Jan. 22, 2020)

Nancy Boyle and five other Plaintiffs filed suit in the United States District Court in the Western District of Washington at Tacoma against the City of Puyallup, alleging a violation of their rights under the Fourth and

Fourteenth Amendments of the United States Constitution and Article 1, Section 7 of the Washington State Constitution. Plaintiffs alleged that the city conducted sweeps of encampments, seizing and destroying their belongings, without adequate or effective notice, which they contended was unconstitutional seizure.

After leaving their camp temporarily to stay at a shelter due to cold weather temperatures, Nancy Boyle and Glenn Humphreys returned to find a three-day notice to vacate posted at their camp. The next day, a police officer told them they had 15 minutes to pack up what they could and leave. Plaintiffs further alleged that the officers began throwing things away while Boyle and Humphreys were still packing. Similar accounts were given by the other four Plaintiffs, Jerome Connolly and Christian Rainey, Nicki Wedgeworth and Terry Linblade.

While Defendants did not admit guilt, the City of Puyallup submitted Offers of Judgment to four of the six Plaintiffs in the amount of \$140,400. The Court ordered that judgment is entered in favor of the fourth Plaintiffs and the Plaintiffs accepted the offers. The Offers of Judgment were independent of and did not resolve the claim against Pierce County.

Pierce County argued that Plaintiffs claims did not constitute unconstitutional seizures. Four of the Plaintiffs dismissed their claims. Ultimately, the case was settled with remaining Plaintiffs, Nancy Boyle and Glen Humphrey pursuant to a Release, Hold Harmless and Settlement Agreement entered into by the parties, whereby Pierce County agreed to pay \$10,000 each to Boyle and Humphreys and \$80,000 in attorneys' fees to their counsel as well as enact a formal county policy, "the Pierce County Administrative Policy Regarding Unauthorized Encampments on County Properties."

O'Callaghan v. Portland, No. 3:12-CV-0201-YY, 2020 WL 265197 (D. Or. Jan. 17, 2020)

Plaintiff Michael O'Callaghan sought to have the city of Portland's camping prohibition declared unconstitutional. The anti-camping Ordinance provided: "that "[i]t is unlawful for any person to camp in or upon any public property or public right of way, unless otherwise specifically authorized by this Code or by declaration by the Mayor in emergency circumstances." P.C.C. 14A.50.020(B).

A violation of the Ordinance was punishable by a fine of not more than \$100 or by imprisonment for a period not to exceed 30 days or both. P.C.C. 14A.50.020(C). The Plaintiff alleged violations of the Fourth, Fifth, Eighth, and Fourteenth Amendments related to Plaintiff's multiple arrests and removal of his campsites. Prior procedural history resulted in dismissal of the Plaintiff's claims with prejudice.

Upon Plaintiff's filing of a Third Amended Complaint, a magistrate judge concluded that the claims under the Fourth, Fifth, and Fourteenth Amendments were the same as the ones that had already been dismissed, putting them beyond the scope of the Ninth Circuit's remand. Additionally, the magistrate judge found that the Plaintiff lacked standing for his Eighth Amendment claim against the anti-camping Ordinance despite the Plaintiff arguing that he "has endured 19 illegal campsite notices" and "the destruction of three of his homes."

The District Court for the District of Oregon accepted the magistrate judge's findings and recommendations and agreed that the Plaintiff lacked standing to raise an as-applied Eighth Amendment challenge because he was never prosecuted or fined for violating the Ordinance. The Court found persuasive Defendants' argument that "[p]laintiff cannot bring an as-applied challenge to an Ordinance that was never applied to him."

Gomes v. County of Kuai, No. 20-00189-WRP (D. Haw. 2020)

In September of 2020, a group of unhoused individuals brought suit against the County of Kuai, alleging that the County "criminalizes the unhoused sleeping on public property on the false premise that they had a choice in the matter" in violation of *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) and the Eighth Amendment to the U.S. Constitution. The County filed a motion to dismiss, arguing that the County was not in violation of *Martin* because unlike in Boise, Kuai was only criminalizing sleeping outside in particular public areas, and not in all public areas.

Finding that Plaintiffs failed to make any specific reference to County policies that violated the Eighth Amendment, the District Court granted the motion to dismiss. In its order, the Court noted that *Martin's* holding is narrow and that "an Ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible." Citing *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075, 1082 (W.D. Wash. 2019), the Court added that, "*Martin* does not limit the city's ability to evict unhoused individuals from particular public places."

Aitken v. City of Aberdeen, 393 F. Supp. 3d 1075 (W.D. Wash. 2019)

Unhoused individuals occupying undeveloped public land known as the "River Camp" sought a temporary restraining order (TRO) against the City of Aberdeen to enjoin a River Camp eviction and enforcement of the City's camping-related Ordinances. The unhoused individuals argued that the Ordinances were unconstitutional because they made homelessness illegal in Aberdeen and challenged the Ordinances as violating the Eighth Amendment, the right to travel, and freedom

of association. The District Court found that enjoining the eviction Ordinance was not warranted; however, temporarily enjoining enforcement of the City's other Ordinances was warranted.

Regarding the eviction Ordinance and the Eighth Amendment, the Court held that *Martin v. City of Boise*, a Ninth Circuit decision, did not limit the City's ability to evict unhoused individuals from particular public places. Regarding the other Ordinances and the Eighth Amendment, the Court found that the Plaintiffs raised enough questions to support a brief stay of enforcement to allow the Court to assess the city practices more thoroughly. The Court acknowledged that these other Ordinances, on their face, made camping either civilly or criminally sanctionable on all public property and are strictly enforced. The Court rejected Plaintiffs' freedom of association claim with respect to all Ordinances and rejected their right to travel claim to the extent it was based on the eviction Ordinance.

Le Van Hung v. Schaaf, No. 19-CV-01436-CRB (N.D. Cal. 2019)

Individuals residing at an encampment in Union Point Park in Oakland, California sought to enjoin the City from enacting their plan to "clean and clear" the park. Plaintiffs alleged the City provided inadequate notice to vacate the park and that the City had a practice of destroying property on the spot during encampment clean up.

The federal District Court held Plaintiffs did not make a proper showing of an Eighteenth Amendment violation because the clean and clear procedure did not involve arresting any individuals residing in the park. However, the Court held that Plaintiffs did show a likelihood of success on the merits of their Fourteenth Amendment due process claim because if the City did in fact clear parks by immediately destroying the property of those persons taking shelter, their conduct would constitute an unreasonable seizure. Therefore, the District Court granted Plaintiffs' motion for preliminary injunction, enjoining the City from clearing the park in a manner inconsistent with stated policies.

Rios v. Sacramento, No. 2:19-CV-00922-KJM-DB (E.D. Cal. 2019)

On May 22, 2019 Plaintiffs Rios, Mendez, Overstreet, and Sacramento Homeless Organizing Committee (SHOC) filed a Complaint against, among others, the County of Sacramento alleging violations of 42 U.S.C. § 1983 and the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution.

The action arose as a result of a raid and eviction of the Stockton Encampment where approximately 100 unhoused individuals were displaced, had their property destroyed, and in some cases, were given trespass citations.

As the Complaint alleged, Sacramento County holds around 3,000 unhoused individuals, but there are only 762 shelter beds to house those individuals. Furthermore, the Complaint alleged that the County is lacking in available low-income residential options. As a result of these circumstances, the County, on October 16, 2018, declared a shelter crisis in order to obtain funding to procure additional shelter beds. Each of the unhoused individual Plaintiffs resided at the Stockton Encampment for years prior to the raid. While they all faced different circumstances, they each resided at the encampment because there were no available shelter beds in the County, because they did not have the means to afford other housing, because they had exhausted public assistance, and because it was the only safe and private place they knew of. SHOC, the other Plaintiff is a nonprofit that advocates for the unhoused and low-income community. SHOC was present on the day of the raid to assist the unhoused individuals residing at the encampment.

As the Complaint alleged, the Stockton Encampment is a publicly owned lot that has been vacant for a decade. The site used to have a residential hotel and mobile home park, but those structures were demolished for redevelopment that has yet to take place. In the intervening decade, the lot came to house around 100 people and also had trash services and portable restrooms. Then, on April 28, 2019, Defendants served a notice on the individuals residing at the Stockton Encampment that they would have 72 hours to vacate the premises or face criminal prosecution. Three days later a fleet of Sheriff's Deputies arrived at the Stockton Encampment to remove any individuals remaining on the property.

As the Complaint alleged, in the process many of the individuals residing at the encampment were forced to frantically leave and many of their personal belongings were destroyed. No social workers were deployed to the encampment to assist in removing the individuals; it was only law enforcement.

The Complaint alleged that the notice to vacate: (1) did not give effective notice to the individuals residing at the encampment; (2) failed to provide information on how to retrieve property; (3) did not inform the individuals that their property would be destroyed; and (4) criminalized sleeping on public property contrary to federal rulings otherwise.

The Complaint listed as causes of action unreasonable search and seizure, denial of due process of law, cruel and unusual punishment, and excessive force. As for relief, the Complaint requested that Defendants be enjoined from: (1) seizing and destroying property of unhoused individuals without due process of law; (2) issuing criminal citations to unhoused individuals residing on public property who cannot obtain shelter beds; and (3)

enforcing any other policies that criminally punish those who must involuntarily reside on public property. The Complaint further requested, among other things, that Plaintiffs be free from seizure and destruction of property, be free from cruel and unusual punishment, have their property returned, and receive compensatory damages.

Cooley v. Los Angeles, No. 2:18-CV-09053-CAS-PLA (C.D. Cal. 2019)

Plaintiffs, a group of unhoused people living in the Venice neighborhood of Los Angeles, filed suit against the City of Los Angeles after the city performed an “area cleaning” on September 15, 2017. The Complaint alleged that during the “area cleaning,” the city threw away Plaintiff’s essential belongings in violation of the Plaintiffs’ federal and state constitutional right to be secure from unreasonable seizures, the takings clause of the federal and state constitutions, the due process protections under the federal and state constitutions, the Americans with Disabilities Act, the Unruh Civil Rights Act, the Bane Civil Rights Act, and California Civil Code Section 2080.

The Court found that the Plaintiffs had sufficiently alleged that the City had a longstanding practice of discarding the property of unhoused individuals without obtaining a warrant or providing due process in violation of the Fourth and Fourteenth Amendments, but dismissed the Plaintiffs’ takings clause claim because the Plaintiffs did not “adequately allege the grounds upon which the City seized their property” such that it was “unclear what state procedures, if any, [were] available to the Plaintiffs to seek compensation.” The Court also dismissed the ADA and Unruh claims, finding that Plaintiffs did not clearly allege how the destruction of their property constituted a violation of those laws.

Turning to the Bane Act claim, the Court considered Plaintiffs’ claims that the City intentionally interfered or attempted to interfere with their state or federal constitutional rights and did so by threats, intimidation or coercion, as is prohibited by the Bane Act. Finding that the Plaintiffs did not allege any coercion or intimidation, the Court found that they lacked standing to assert a Bane Act claim. However, the Court did not dismiss the California Civil Code Section 2080 claims, finding that the City did take charge of Plaintiffs’ property and destroyed it in violation of the California Civil Code Section 2080.

Accordingly, the Court dismissed the Takings Clause claims, the ADA claims, and the Unruh claims but allowed the Fourth Amendment, Fourteenth Amendment, and California Civil Code Section 2080 Code allegations to continue.

Arundel v. San Diego, No. 17-cv-1433-WVG (S.D. Cal. Nov. 8, 2019)

This class action related to a Complaint filed in the United States District Court in the Southern District of California against the City of San Diego by the unhoused people of San Diego, represented by Eric Arundel et al., alleging that the vagueness of Municipal Code §54.0110 had an adverse effect on them, making it impossible to comply.

The code made it unlawful for anyone to “erect, place, allow to remain, establish, plant any object on any public....property”. Plaintiff claimed the following with respect to the law: (1) violation of 42 USC §1983, Plaintiff’s constitutional rights, (2) violation of the Eighth Amendment by criminalizing the status of being unhoused, (3) violation of due process, (4) violation of equal protection, (5) violation of the right to travel, (6) unreasonable search and seizure, (7) violation of California Civil Code §52.1 “Bane Act”, (8) declaratory relief under CCP §1060, and (9) Injunctive Relief under §§526(a) and 527.

After a series of Court orders to schedule a settlement conference, the parties had a Mandatory Settlement Conference on June 24, 2019. There, the parties agreed to a Settlement Agreement and Stipulation to Continuing Jurisdiction which they filed on October 22, 2019, stipulating (1) that the City of San Diego would open a storage facility for unhoused people to store their personal belongings, (2) that the City of San Diego would adopt and implement new written rules for the “Unauthorized Encroachments Prohibited – SMDC 54.0110” San Diego Police Department Training Bulletin, (3) the distribution of attorneys’ fees, and (4) that the agreement would be subject to the continuing jurisdiction of Magistrate Judge William V. Gallo. The Settlement Agreement was approved on October 29, 2019 and the parties filed a joint motion to dismiss.

Quintero v. City of Santa Cruz, 2019 WL 1924990, at *1 (N.D. Cal. Apr. 30, 2019), appeal dismissed, 2019 WL 6318730 (9th Cir. Sept. 11, 2019).

Plaintiffs, in seeking a preliminary injunction, argued that the City’s closure of an Encampment is a violation of their Eighth Amendment right under the U.S. Constitution. Plaintiffs’ temporary restraining order application was initially granted on April 23, 2019, however, the Court later dissolved the temporary restraining order and denied the motion for a preliminary injunction.

The Court held that Plaintiffs failed to establish that they would suffer irreparable harm due to the closure of the Encampment. The Court acknowledged that the closure of the Encampment will undoubtedly cause the residents’ disruption and severe inconvenience as they will need to pack up their belongings and potentially end friendships they have developed throughout their time

at the Encampment, however, this harm does not rise to the level of irreparable harm that this element requires. Furthermore, the Court found that the City made efforts to determine the needs of the residents of the Encampment and has worked to find adequate housing for all the residents in this community to meet their needs.

The Court also found that the public interest factor weighed against granting a preliminary injunction. The Court recognizes the sensitivity and seriousness of this issue, however, ultimately took solace in the fact that the City had spoken with residents of the Encampment, identified primary concerns, and worked with community providers to create alternative shelter solutions for every resident in the Ross Encampment.

Shipp v. Schaaf, 379 F. Supp. 3d 1033 (N.D. Cal. 2019)

Two unhoused individuals living in an encampment in the City of Oakland sought a preliminary injunction against the City to prevent the removal of property within encampments. The City adopted standard operating procedures regarding the removal of encampments from public rights-of-way, parks, and City-owned property. Pursuant to its standing operating procedures, the City posted a notice saying that Plaintiffs' encampment would be temporarily closed to allow the City to clean the site thoroughly. In response, Plaintiffs immediately sued to enjoin the City from temporarily closing the encampment. Ultimately, the Court denied Plaintiff's request for preliminary injunction and found that the holding of *Martin v. City of Boise*, a Ninth Circuit decision, does not extend to this situation.

The Court explained that the City's decision to require Plaintiffs to temporarily vacate their encampment did not, by itself, implicate any criminal sanctions that would trigger Eighth Amendment protections. Nothing in the notice of temporary closure or elsewhere in the record suggested that the City intended to issue criminal sanction as part of the temporary closure operation. Additionally, even assuming this might occur, the Court stated that remaining at a particular encampment on public property is not conduct protected by *Martin*, especially when the closure is temporary in nature.

Housing is a Human Right v. San Clemente, No. 8:19-CV-00388-PA-JDE (9th Cir. 2019)

Three California housing groups and three unhoused individuals filed suit against Orange County, California and five cities—Irvine, Aliso Viejo, Dana Point, San Juan Capistrano, and San Clemente. The Plaintiffs claimed that the Defendants unfairly treated unhoused individuals in violation of multiple federal and state laws. Specifically, the Plaintiffs challenged "quality of life Ordinances," including anti-camping and anti-loitering Ordinances.

They claimed these Ordinances violated the Plaintiffs' rights under the First, Fourth, Fifth, Eighth, and

Fourteenth Amendments' substantive and procedural due process clauses, the Americans with Disabilities Act ("ADA"), and several provisions of California law, including the California State Constitution, California Civil Code § 11135, the California Housing Accountability Act, and the Taxpayers' Suit pursuant to the California Code of Civil Procedure § 526a. The Plaintiffs' claims were all dismissed, for varying reasons.

Four of the five city Defendants (Irvine, Aliso Viejo, Dana Point, and San Juan Capistrano) moved to dismiss the action for improper joinder, which the Court granted without prejudice. The Court held that the cities were improperly joined pursuant to Federal Rule of Civil Procedure 21 because, although those cities are all in the southern region of Orange County and presented similar issues for the Plaintiffs, they acted independently and each had their own Ordinances, with different populations of unhoused individuals, different programs for addressing homelessness, and other local circumstances. Adjudicating these issues therefore would require individual determination by the Court.

The Court also dismissed the housing group Plaintiffs' claims against Defendants Orange County and the city of San Clemente with leave to amend for failure to adequately allege standing. The Court held that the housing group Plaintiffs failed to adequately plead injury in fact and failed to adequately plead a causal connection between any alleged injury and the Defendants' complained of conduct.

The Court declined to exercise supplemental jurisdiction over the Plaintiffs' state law claims to the extent that they sought to enforce the California Housing Accountability Act, holding that the Act is a part of a detailed state regulatory scheme that is more properly adjudicated in state Court. The Court also declined to exercise supplemental jurisdiction over the claim under the Tax Payers' suit pursuant to the California Code of Civil Procedure § 526a for failure to meet Article III standing requirements.

The Court dismissed the constitutional claims against remaining city Defendant (San Clemente) and Orange County with leave to amend on justiciability grounds of ripeness^[1] in regard to the First, Fourth, and Eighth Amendment claims. The Court dismissed the Fourteenth Amendment substantive due process claims on the grounds that Plaintiffs failed to adequately allege in their Complaint that San Clemente's policies toward the unhoused met the deliberate indifference standard which would give rise to municipal liability. Finally, the Court dismissed Plaintiffs' claims under the ADA and California Civil Code § 11135 with leave to amend because the Plaintiffs did not identify in their Complaint any specific programs or services provided by San Clemente or that any such programs or services failed to provide reasonable accommodations to Plaintiffs.

Because the Court dismissed the claims against the other municipal Defendants, the remaining individual Plaintiffs needed to adequately allege that the City of San Clemente, Orange County, or their policies violated the First, Fourth, Fifth, Eighth, and Fourteenth Amendments. However, because San Clemente never actually cited either individual Plaintiff living in that municipality, the Court held that the Plaintiffs did not suffer violations of their Constitutional rights and failed to state a claim. In regard to the remaining Constitutional claims and the ADA and related claims, the Court held that the facts to which Plaintiffs cite involving the passage and enforcement of San Clemente's Urgency Ordinance had not yet arisen at the time of the filing of the first amended Complaint because the Ordinance had not yet passed.

Butcher v. City of Marysville, 398 F. Supp. 3d 715 (E.D. Cal. 2019)

Thirteen named Plaintiffs filed a putative class action against the City of Marysville, California and several public-entity and public-employee Defendants in the United States District Court for the Eastern District of California. The Plaintiffs previously lived in an encampment that once existed on the banks of the Yuba and Feather Rivers.

In March 2016, the City of Marysville and Yuba County developed a plan to expel the unhoused from encampments on City-owned property outside of the city limits. In October 2016, Yuba County officials used bulldozers to tear down the encampment, which allegedly caused the Plaintiffs to lose nearly all of their personal property. The Plaintiffs' initial Complaint included the following claims: conspiracy to interfere with civil rights under 42 U.S.C. § 1985(3), cruel and unusual punishment under the Eighth Amendment, unreasonable seizure under the Fourth Amendment, due process violations under the Fifth and Fourteenth Amendments, violation of the Equal Protection Clause, violation of free speech under the First Amendment, and multiple state tort law claims. The City filed a motion to dismiss most of the Plaintiffs' claims, which the District Court granted in part and denied in part.

First, the Court dismissed the § 1985(3) claims against the City, as pursuing a § 1985 claim requires the Plaintiffs to belong to a suspect class under the Ninth Circuit's precedents, and homelessness has not been designated as a suspect classification. Second, the Court dismissed the Eighth Amendment claims because the only two Plaintiffs with standing did not allege that the threat of arrest was pursuant to the City's enforcement of a criminal Ordinance, as opposed to a legitimate attempt to keep people out of a dangerous area. Third, the Court dismissed all the Fifth Amendment claims because the Plaintiffs were not bringing any claims against federal actors. Fourth, the Court dismissed the Plaintiffs'

retaliation claim under the First Amendment because they did not show that deterring political speech was a substantial or motivating factor in the City's conduct.

However, the Court found that the Plaintiffs had adequately pled a Fourth Amendment claim against the City for unreasonably seizing and destroying their personal property. In addition, the Court refused to dismiss the Equal Protection claim because discriminatory treatment of a non-suspect class must pass the rational basis review.

After the Plaintiffs amended their Complaint, the City filed another motion to dismiss, which the Court granted in part and denied in part. Specifically, to the extent the § 1983 claim was premised on the City's plan to expel unhoused people from encampments, the Court dismissed the Plaintiffs' Equal Protection claim; to the extent the § 1983 claim was premised on the City's custom of displacing unhoused people and destroying the property, the Court did not dismiss the Plaintiffs' Equal Protection claim. Further, the Court denied the City's motion to dismiss the Plaintiffs' state law claims because the Plaintiffs' allegations supported a plausible claim that the City had intentionally violated their rights under the Fourth Amendment and Equal Protection Clause, and the injunctive and declaratory relief sought by the Plaintiffs was available under the California Constitution. Finally, the Court denied the City's motion to dismiss the Plaintiffs' class allegations and requests for equitable relief as premature.

People's Homeless Task Force v. City of Anaheim, No. 8:18-CV-00642-DOC-DFM (C.D. Cal. 2018)

Plaintiffs, a group of unhoused individuals with mental and physical disabilities, brought suit against Anaheim for the city's practices of repeatedly seizing and destroying Plaintiffs' personal property without notice in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution. Plaintiffs argued that the city regularly took and destroyed Plaintiffs' property or, in some cases, stored property in locations and in manners that made the property inaccessible to Plaintiffs. In addition to the Fourth and Fourteenth Amendment claims, Plaintiffs alleged violations of the Americans with Disabilities Act based on Anaheim's custom of seizing and destroying essential items utilized by disabled unhoused individuals and the city's refusal to make reasonable modifications to protect the property of the Plaintiffs.

Plaintiffs also pleaded state-created danger in violation of the Fourteenth Amendment, as well as violations of Section 504 of the Rehabilitation Act based on Anaheim's misuse of federal funds to discriminate against people with disabilities by conducting property seizures in a manner that "disproportionately burdens people with disabilities." Plaintiffs additionally alleged Eighth Amendment violations based on Anaheim's policy of

"citing individuals who are unsheltered and sleep in public places, or who exhibit other necessary behaviors that are only conducted in public places because the individual is homeless." Under state law, Plaintiffs argued that the City had violated California Civil Code Section 52.1 by using arrests, threats, and intimidation to interfere with Plaintiffs' rights to maintain their personal possessions, conversion laws by possessing and destroying Plaintiffs' property, and California Civil Code Section 2080 by failing to protect and preserve Plaintiffs' personal property.

Plaintiffs sought injunctive relief to enjoin the City from seizing and destroying property, as well as declaratory relief affirming the unconstitutionality of Anaheim's policies and practices.

In January 2019, Plaintiffs reached a settlement with the city and the Court dismissed the proceedings.

Miralle v. Oakland, No. 18-cv-06823-HSG (N.D. Cal., Nov. 28, 2018)

On October 27, 2018, the Plaintiffs moved to a city owned parcel and created the Housing and Dignity Village ("HDV") for sober unhoused women and their families. On November 7, 2018, the city posted a sign notifying the individuals that the site would be cleared and closed on November 10, 2018. On November 9th, the individuals filed a motion for a temporary restraining order and preliminary injunction to enjoin the city from removing the property from the site. The Court granted a temporary restraining order pending a hearing.

Plaintiffs argued that the city's attempt to remove the encampment violated the Eighth Amendment under the holding of *Martin v. City of Boise* and that the notice to vacate violated their due process rights under the 14th Amendment.

On the first argument, the Court found that the holding in *Martin* is narrow and does not establish a constitutional right to occupy public property indefinitely. On the second argument, the Court found that while the individuals have a 14th Amendment right with respect to property confiscated by the city, the city has a standard operating guideline in place, which it says it will abide by in confiscating the individual's property. As such, the Court found that, on its face, the city's standard operating procedure provides adequate notice for opportunity for the Plaintiffs to be heard before their property is confiscated.

The Court also found that the balance of equities were not in the Plaintiff's favor, citing that HDV created a serious liability exposure for the city. The Court conceded that there is a homelessness crisis in Oakland but deferred to the city on how to address such crisis and concluded that the city had not overstepped any constitutional boundary in determining what was in the best interest of the city.

Sullivan v. City of Berkeley, 2018 WL 489011, at *1 (N.D. Cal. Jan. 19, 2018).

Plaintiffs were members of an "intentional community of unhoused Berkeley residents" that referred to themselves as "First They Came for the Homeless." Since forming in 2015, the group had been removed from several locations in Berkeley. These removals were carried out in the early morning by Berkeley police, who seized and threw away property that the group could not carry or otherwise left behind. Plaintiffs alleged that during these removals, the disabilities of the group's members were not evaluated or accommodated. They also generally alleged that members of the group "have been cited, arrested, or jailed for sleeping in public"

As of October 2017, the group had lived on land west of the BART tracks on the Berkeley/Oakland border for approximately ten months. On October 21, BART police served a trespass notice which stated that it would enforce an eviction in seventy-two hours. On October 25, BART police, with the assistance of Berkeley police, removed a different, nearby encampment whose members had no part in this suit. Afterward, BART and Berkeley workers removed all property remaining at that camp and discarded it into dumpsters. Plaintiffs filed a Complaint alleging violations of the Americans with Disabilities Act, as well as violations of the First, Fourth, Eighth, and Fourteenth Amendments. Berkeley filed a motion to dismiss.

Berkeley argued that Plaintiffs' claims under the Fourth and Fourteenth Amendments were foreclosed by allegations in the amended Complaint that Plaintiffs received notice prior to the City's removal of their encampments. To the contrary, although Plaintiffs alleged that the City provided notice in advance of some evictions, they also alleged that in other instances no notice was provided at all. The amended Complaint, however, only alleged that two Plaintiffs had been subjected to Berkeley's conduct. Defendant's Motion to Dismiss was granted only with respect to those Plaintiffs who did not allege in the Complaint that they were subjected to such conduct.

Plaintiffs' also challenged Berkeley's enforcement of California Penal Code Section 647(e) under the Eighth Amendment. Section 647(e) made it a misdemeanor to "lodge[] in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it." The Court held that at most, Plaintiffs alleged that other members of their group had been arrested for violations of Section 647(e), and that members of the group risked arrest due to the "vague language of the statute." The Court found that the amended Complaint failed to allege, that in removing Plaintiffs from previous encampments, Berkeley did so under threat of arrest or

citation under that statute. Thus, the Court also granted Berkley's Motion to Dismiss as to this Court.

However, the Court did find that the Plaintiffs' amended Complaint sufficiently alleged that there was a policy or practice of evicting unhoused residents in violation of Fourth, Fourteenth and First Amendments.

Drake v. County of Sonoma, 304 F.Supp.3d 856 (N.D. Cal. 2018)

Plaintiffs, five unhoused people and an advocacy group, sought a temporary restraining order (TRO) blocking the government from closing encampments. The Plaintiffs argued that enforcement of the city's anti-camping Ordinance and the California Penal code to remove the residents from the encampments violated the Eighth Amendment by punishing them for their unhoused status. The District Court found that a TRO was not warranted.

Applying the standard for a TRO, the Court found that Plaintiffs did not establish likelihood of success on the merits and irreparable harm because the government made adequate shelter options available to encampment residents. Even though the Court denied a TRO in this case, the Court acknowledged that "there is a strong argument that the Eighth Amendment (and perhaps also the Due Process Clause) precludes the government from enforcing an anti-camping Ordinance against unhoused people when it has no shelter available for them." The Court also explained "the common assumption that it's enough for the government simply to make temporary shelter beds available is likely wrong" because "the ability of the government to take enforcement action against people experiencing homelessness who are camping should depend on the adequacy of conditions in the shelters." The adequacy of the conditions, the Court explained, is a particular concern for people with disabilities, which includes many unhoused people.

Moreover, the Court found the balance of hardships and the public interest weighed against granting a TRO because "this is not a case where the community seeks to clear an encampment merely because it's a nuisance, without stepping up to provide adequate housing options for the people who would be displaced." Rather, the community was experiencing a housing crisis, which was worsened by fires, and the land where the encampments sat was designated for development of 175 apartment units, with 75 of them to be available at below market rate.

Jeremiah v. Sutter County, No. 2:18-CV-00522-TLN-KJN (E.D. Cal. 2018)

Plaintiffs Joyce Jeremiah, Betty Lane, Pauline Flack, Sarah Juarez, Beth Martin, Robert Mullen II, Ria Hagan, Andrew Blackburn, Michael Rose, and Barton Shafer, unhoused individuals living in Sutter County, CA, sought an Ex Parte motion for a temporary restraining order pursuant

to Federal Rule of Civil Procedure 65(b)(1)(A) against Defendant Sutter County, CA. Plaintiffs sought to enjoin the enforcement of Sutter County Ordinance 1640, the stated purpose of which was to regulate camping in the unincorporated areas of the County, provide temporary shelters, and promote the public health, safety, and general welfare. After the issuance of the second notice of enforcement of the Ordinance, Plaintiffs filed an action against Defendants Sutter County and the City of Yuba alleging that the County's Ordinance violated their rights under the Fourth, Eighth, and Fourteenth Amendments as well as their rights under California Gov. Code § 11135.

According to the Ordinance, camping in violation of the Ordinance was "by its very existence to be a public nuisance." The Ordinance made it unlawful to "Camp," "occupy Camp Facilities" (including "any form of cover or protection from the elements other than clothing"), "use Camping Paraphernalia" (including sleeping equipment), and to store property in any park or public place. Violating the Ordinance could result in the following penalties: (1) infraction punishable by a fine of up to \$50 for the first violation; (2) infraction punishable by a fine of up to \$75 for the second violation; and (3) infraction or misdemeanor punishable by a fine of up to \$100, imprisonment not to exceed six months, or both for any subsequent violations.

The Court granted Plaintiffs' motion for a temporary restraining order, finding that the Plaintiffs had demonstrated that irreparable harm would occur without relief, the possible harm to the County from granting relief was outweighed by the Plaintiffs' interest in their property and constitutional rights, and the public interest would be served by issuing the temporary restraining order.

Hooper v. Seattle, No. 2:17-CV-00077-RSM (W.D. Wa. 2017)

In 2017, a group of individuals experiencing homelessness, the Episcopal Diocese of Olympia, Trinity Parish of Seattle, and Real Change, a nonprofit organization, brought suit against the city of Seattle, the Washington State Department of Transportation (WSDOT), and the Secretary of Transportation for WSDOT to challenge the city's sweeps program. The program was conducted pursuant to official state policies and involved state officials clearing encampments and seizing property.

In the initial Complaint, Plaintiffs sought to have a class certified of all unhoused people living outside within the city of Seattle and who keep their belongings on public property. They also argued that the city's sweeps program violated due process requirements under the Fourteenth Amendment to the U.S. Constitution because of state officials' failure to provide adequate notice to unhoused individuals before seizing their property. The Complaint also alleged that the sweeps program failed to follow consistent internal procedure, and violated the Fourth Amendment to the U.S. Constitution.

The District Court denied the motion for class certification, finding that Plaintiffs failed to establish commonality because they did not offer significant proof of the existence of the practices alleged and failed to establish typicality because they did not adequately show that all members of the proposed class were actually living in danger that their property would be seized and destroyed. Further, the District Court found that Plaintiffs failed to establish adequacy of representation because the named class representatives did not all share the same interests.

The District Court also denied the motion for preliminary injunction, finding that Plaintiffs failed to demonstrate they were likely to succeed on the merits of their Fourth Amendment claims, given the Defendants' claims that they did indeed provide adequate notice and that any seizure of property of unhoused individuals was reasonable. The Court also found no likelihood of irreparable harm, and therefore declined to grant Plaintiffs' motion for preliminary injunction.

In 2019, the Ninth Circuit affirmed the denial of class certification on appeal. Seattle then filed a Motion for Conversion of a Preliminary Injunction Ruling into Final Judgment on the Merits, arguing that conversion was the functional equivalent of granting summary judgment, and such a decision was warranted based on the factual record available. On March 12, 2020, Plaintiffs moved for voluntary dismissal based on counsel's inability to contact their unhoused clients amidst the COVID-19 pandemic. The District Court denied the motion for Conversion of Preliminary Injunction into Final Judgment on the Merits, but granted Plaintiff's motion to dismiss all claims, and closed the case.

Cobine v. City of Eureka, 250 F. Supp. 3d 423, 435 (N.D. Cal. 2017)

For over ten years, the eleven unhoused Plaintiffs, and approximately 150 other unhoused individuals, continuously camped in the Palco Marsh area of Eureka, California, which historically served as a popular campsite for Eureka's unhoused population. In order to make room for a new waterfront trail, the City of Eureka sought to evict the unhoused individuals living in the area. Specifically, under the authority of an anti-camping Ordinance, the city began issuing notices of eviction and confiscating the personal property of the individuals living in the Palco Marsh.

The Plaintiffs filed a lawsuit and sought a temporary restraining order to prevent their eviction. The Plaintiffs argued that the number of unhoused individuals in the City of Eureka outnumbered beds available for the unhoused by a factor of almost three to one, and criminalizing public camping in a city without adequate shelter space to accommodate the city's unhoused population violated their Eighth Amendment rights. The Plaintiffs also argued that the city's seizure

of their property violated their Fourth and Fourteenth Amendment rights to be secure from government seizure without due process of the law.

At oral argument in the District Court, the City of Eureka represented that it would guarantee shelter for the Plaintiffs and would also institute procedures to address the process in which any seized property is stored and tagged. Based on this representation, the Court enjoined the City of Eureka from enforcing the anti-camping Ordinance unless and until the city: (1) provided the Plaintiffs with shelter, and (2) followed certain specific procedures regarding the storage of confiscated property (which included, without limitation, providing tote bags for storage, labeling all property and storing the confiscated property for at least ninety days before the city could dispose of it). The District Court found that if these conditions were met the Plaintiffs "would have the remedy they seek – adequate shelter and due process."

With respect to Plaintiffs' Fourth Amendment claims, the Court found that the Plaintiff's property was entitled to Fourth Amendment protection, but that the city provided sufficient due process by providing advance notice of the sweep, and 'adequate' post-seizure remedies (including the new storage processes). The Court held that in order to succeed on their Eighth Amendment challenge, Plaintiffs would have to show both that they had no choice but to sleep in public and that the enforcement of the anti-camping Ordinance criminalized the act of being unhoused itself. Based on the city's promise to provide the Plaintiffs (and the remaining unhoused population) in the Palco Marsh area with shelter, the Court found that the Ordinance did not effectively criminalize homelessness itself and thus declined to enjoin the city from engaging in any future sweeps based on an Eighth Amendment challenge.

After the Court denied in part and granted in part the motion for a TRO, the city moved to dismiss. However, the Plaintiffs filed a first amended Complaint, which resulted in the motion to dismiss being moot. The amended Complaint accounted for the fact that the residents of the Palco Marsh encampment had been evicted and presented a putative class action by and on behalf of the city's unhoused residents.

The Court opined that if a developed factual record indicated that the city has adequate homeless shelter space, then the camping Ordinance would not be found to criminalize involuntary conduct as a result of homelessness. Without enough evidence to determine this, the Court denied the motion to dismiss the Eighth Amendment claim. Plaintiffs next alleged that their substantive due process rights were violated by the city placing in a known danger with deliberate indifference to their personal, physical safety.

The Court articulated the stringent standard of "deliberate

indifference” that is required and found that the action regarding finding temporary shelter alternatives or moving a substantial portion of the population to a parking lot from public land did not rise to that level. Therefore, the Court granted the motion to dismiss as to the Fourteenth Amendment with leave to amend. Finally, the Plaintiffs assert they possess Fourth Amendment property rights even when their things are stored in public areas. The Court agreed that the unhoused Plaintiffs’ property was entitled to protection under the Fourth Amendment, but the procedural safeguards implemented by the city, such as providing 24-hour notice and storing the property for 90 days before discarding, were sufficient such that the Court granted the motion to dismiss as to this claim.

Orange County Catholic Worker v. Santa Ana, No. 2:17-CV-05667 (C.D. Cal., Aug. 2, 2017)

Plaintiff, Orange County Catholic Worker, brought suit against the City of Santa Ana, California (the “City”) for violation of rights under the Fourth and Fourteenth Amendments to the U.S. Constitution and under several California and federal laws regarding persons with disabilities, including Title II of Americans with Disabilities Act and under Section 504 of the Rehabilitation Act of 1973. The Complaint particularly challenged the inhumane conditions endured by unhoused individuals at the Santa Ana Civic Center (the “Civic Center”).

Given the rise of the unhoused population sheltered at the Civic Center, the city entered into a plan intended to protect the public and civic center employees from the unhoused individuals. As a result of the plan, the city increased police presence, surveilled the unhoused community round-the-clock with at least seven full time police officers and numerous security guards, seized and destroyed property without providing prior notice or sufficient information as to where and how seized property could be retrieved, failed to segregate seized property so that there would be a reasonable opportunity to reclaim it, and significantly increased code enforcement and criminal prosecution of hundreds of “quality-of-life” citations.

Storage of property laws were enacted prohibiting individuals from storing construction materials, tools, lumber, paint, tarps, bedding, luggage, pillows, sleeping bags, food, clothing, literature, papers and other similar property in the Civic Center. A person, however, was permitted to have food, clothing and blankets and a reasonable cover to protect such property, so long as it occupied no more than three cubic feet and is attended to all times while in the Civic Center with a person being within three feet of his or her property. Using this Ordinance, City officials seized without notice or destroyed personal property when the Plaintiffs left to go to the bathroom, medical appointments, social services, etc. Seized property was stored in storage facilities not easy for the unhoused population to access and no

information or notice about the storage facility was given to those whose property was seized.

Plaintiffs claim that both the City plan and the Ordinance were unconstitutional in that they violated the Fourth and Fourteenth Amendments to the U.S. Constitution. The Ordinance permitted the City, its employees and agents, to seize and summarily destroy the property of Plaintiffs and others without adequate pre- or post-deprivation notice, and without preserving the property for the rightful owner.

After an eighteen-month battle in the Courts, on July 23, 2019, a settlement agreement was entered into between the Plaintiffs and Defendant preventing most of the areas in Orange County, other than certain restricted zones like airports, flood control channels, fire-risky wilderness areas, inside public libraries, from enforcing anti-camping and loitering rules against unhoused people until alternate shelter beds are made available in the same county for the unhoused individuals.

Tammy Schuler et al. v. County of Orange, Case No. SA CV 17- 0259-DOC (KESx)(C.D. Ca. Mar. 6, 2017)

Unhoused individuals who resided in the Santa Ana riverbed area filed suit challenging Orange County’s practice of throwing out unhoused persons’ personal belongings, including essential items such as tents, blankets, and clothes. The Plaintiffs filed a Complaint alleging violations of the Fourth, Fifth, and Fourteenth Amendments, as well as other federal and California state law claims. The parties stipulated to a preliminary injunction providing expanded protection of unhoused persons’ property interests.

Mitchell v. City of Los Angeles, 6-01750-SJO (C.D. Cal. 2016)

Nine individuals experiencing homelessness who lived on “Skid Row” in the City of Los Angeles (the “City”) filed suit against the City, arguing that the City violated their rights under the Fourth and Fourteenth Amendments to the U.S. Constitution by seizing and immediately destroying their unabandoned personal possessions, which were temporarily left on public sidewalks in violation of Los Angeles Municipal Code § 56.11 (the “Ordinance”), a local Ordinance which provides that “no person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk.”

The District Court granted the Plaintiffs’ ex parte motion for a Temporary Restraining Order (“TRO”), the terms of which bar the City from (1) seizing property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband; and (2) absent an immediate threat to public health or safety,

destroying said seized property without maintaining it in a secure location for a period of less than 90 days. The District Court also ordered the City to show cause as to why it should not issue a preliminary and/or permanent injunction. The District Court, finding that Plaintiffs were likely to succeed on the merits, granted the preliminary injunction on the same terms as the TRO, which the City appealed to the Ninth Circuit.

On appeal, the Ninth Circuit affirmed the District Court's findings and concluded that, despite the City's arguments to the contrary, the Fourth and Fourteenth Amendments protect unhoused persons from government seizure and summary destruction of their unabandoned, but momentarily unattended, personal property. Considering the Fourth Amendment, the Ninth Circuit noted that the City's argument was based entirely on the false assumption that the Katz privacy analysis, which focuses on an individual's expectation of privacy, applies in every search or seizure case – a premise which was recently addressed and refuted by the Supreme Court in *United States v. Jones*, 565 U. S. ___, slip op. at 5 (2012).

With *Jones* as guidance, the Ninth Circuit clarified that the reasonableness of Plaintiffs' expectation of privacy here was irrelevant, as a reasonable expectation of privacy is not required to trigger Fourth Amendment protection against seizures, and the constitutional standard for searches under the Fourth Amendment is whether there was "some meaningful interference" with Plaintiffs' possessory interest in the property. The Ninth Circuit held that by seizing and destroying the Plaintiffs' unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with Plaintiffs' possessory interests in that property, and that no more is necessary to trigger the Fourth Amendment's reasonableness requirement. When balancing the invasion of Plaintiffs' possessory interests in their personal belongings against the City's reasons for taking the property and immediately destroying it, the City acted unreasonably and in violation of the Fourth Amendment.

As to the Fourteenth Amendment claims, the Ninth Circuit noted that it was undisputed that Plaintiffs owned their possessions and had not abandoned them and that, therefore, Plaintiffs maintained a protected interest in their personal property. Second, the Ninth Circuit held that due process requires law enforcement "to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return", and this requirement does not go away even if Plaintiffs had violated the Ordinance. The City admitted that it failed to provide any notice or opportunity to be heard before it seized and destroyed the Plaintiffs' property on the spot, which the Ninth Circuit stated presented an enormous risk of erroneous deprivation of the rights of those in a particularly vulnerable position.

In 2019, the City entered into a Settlement Agreement with Plaintiffs in another action who asserted identical claims to those raised in the foregoing case. The terms of the Settlement Agreement set forth procedures to be followed by the City when undertaking a cleanup of the Skid Row area (the "Covered Area"). The procedures included providing 24 hours advance notice of the cleanup, maintaining any property seized within the Covered Area (absent an immediate threat to public health or safety) for a period of no less than 90 days and providing a prominently posted notice in the location from which the property was taken advising individuals where seized property may be recovered and the hours of operation.

Martin v. Honolulu, No. CV-15-00363-HG-KSC (D. Hawai'i, Aug. 31, 2016)

The Plaintiffs were unhoused or formerly unhoused individuals who lived or have lived on public property owned by the City and County of Honolulu. Plaintiffs claimed that their personal property was seized by the Defendant in violation of Chapter 29, Article 16 of the Revised Ordinances of Honolulu (the "Sidewalk Nuisance Ordinance") and Chapter 29, Article 19 of the Revised Ordinances of Honolulu (the "Stored Property Ordinance") and, together with the Sidewalk Nuisance Ordinance, the "Ordinances"). Plaintiffs also challenged the constitutionality of the Ordinances.

The Sidewalk Nuisance Ordinance allowed the City and County to remove nuisances on public sidewalks; the City and County were required to provide written notice of the removal after the removal has taken place. Property owners were then able to reclaim their seized items within 30 days upon payment of \$200 or receipt of a fee-waiver.

The Stored Property Ordinance prohibited persons from storing personal property on City and County public property. The City and County were required to provide written notice twenty-four hours before removing the stored personal property. Property could be claimed by the owner within 30 days, and the owner was assessed moving, storage, and other related fees.

Plaintiffs argued that the Sidewalk Nuisance and Stored Property Ordinances, as-applied by the City and County of Honolulu, violated their Fourth and Fourteenth Amendment Rights. Plaintiffs sought a temporary restraining order (the "TRO") before upcoming sweeps by the City and County. In their TRO, the Plaintiffs also requested that the City train its employees in the impoundment of seized property, provide a legible list of stored items to all affected persons, store impounded property for at least ninety days, and provide translated forms and a simplified method for the waiver of the \$200 removal charge. Plaintiffs further requested that persons be able to recover their property outside of normal business hours.

Plaintiffs submitted a number of declarations in support of their request for TRO to show that the City and County removed property without notice and also submitted photographs they claimed showed Honolulu workers putting a tent into a garbage truck. The Defendants argued that they complied with all procedures set forth in the Ordinances and stated they do not immediately destroy seized personal property. The Court ultimately found that a TRO was not appropriate in this case, and denied the application without prejudice.

Ellis v. Clark County Department of Corrections, No. 15-5449-RJB (W.D. Wash. Sept. 16, 2016)

Plaintiff Terry Ellis and other unhoused persons filed suit against the Clark County Department of Corrections and individuals serving in the Department of Corrections in the U.S. District Court for the Western District of Washington at Tacoma under 42 U.S.C. § 1983 arguing that the County's correctional work crews' (convicted offenders sentenced to community service) practice of removing property of unhoused persons violated the Plaintiffs' Fifth Amendment and Fourteenth Amendment due process rights and their Fourth Amendment protections against unreasonable searches and seizures.

The Court held that the County's policy and practice of removing and destroying possessions and property of unhoused persons violated the Fourth and Fourteenth Amendments because unhoused persons were not provided notice of the removal of their property or any meaningful opportunity to retrieve property that was removed. Even when the County changed its official policy to provide notice to unhoused persons, the County failed to adequately train County employees or correctional work crews under the new policy and remained liable for the violations of the Plaintiffs' Fourth and Fourteenth Amendment rights by the employees and correctional work crews.

The Court denied Plaintiffs' and Defendants' summary judgment claims with respect to the claims against the individual employees of the County due to the existence of issues of material facts that should be resolved at trial.

Smith v. Corvallis, Civ. No. 6:14-cv-01382-MC (D. Ore. June 6, 2016)

Three unhoused individuals filed suit alleging that the City of Corvallis routinely confiscated and disposed of their property and the property of other unhoused individuals living in the City of Corvallis without adequate notice in violation of their Fourth, Fifth, Eighth, and Fourteenth Amendments. The city attempted to dismiss the unhoused Plaintiffs' claims by arguing that the Plaintiffs "abandoned" their property prior to its disposal by the city, and that the city "stored" the property in a publicly accessible dumpster, which made it available for pickup. The Court rejected these arguments. The city also sought

to dismiss the Plaintiffs' Fourth Amendment search and seizure claim, arguing that the confiscated property had been "voluntarily abandoned" at the time of confiscation.

Acosta v. City of Salinas, No. 15-cv-5415, 2016 WL 1446781 (N.D. Cal. Apr. 13, 2016)

Unhoused Plaintiffs moved for a temporary restraining order to enjoin the City of Salinas from enforcing a local Ordinance authorizing the city to conduct cleanup sweeps of a encampment in its Chinatown neighborhood. The Ordinance stated that "no person shall fail to remove personal property stored on City Property by the date of scheduled removal provided on the written notice posted in accordance with the Administrative Procedure."

The administrative procedure required outreach to affected individuals, referral of individuals to supportive services, advance notice of deadlines to remove personal property from public property, the city's storage of personal property that was removed by the established deadline, and an exception to permit temporary use of tents, sleeping bags, and the like overnight between 6:00 p.m. and 6:00 a.m. the next morning.

Pursuant to the Ordinance, the city conducted a cleanup sweep of the Chinatown neighborhood on the morning of March 29, 2016. Neither Plaintiffs nor the city stated that there were more cleanup sweeps planned for the area, but the terms of the Ordinance permitted the city to continue planning and executing sweeps.

The Court denied Plaintiffs' motion for a temporary restraining order on the grounds that Plaintiffs did not demonstrate that they were deprived of their personal property by the city without notice or procedure in violation of their due process rights. Notably, none of the Plaintiffs' submitted declarations stated that his or her own property had been seized or destroyed, or that the declarants witnessed harm to anyone who is a party to the case. Rather, Plaintiffs only made broad statements about harm to third parties. On these facts, the Court held that Plaintiffs had not demonstrated a likelihood of success on the merits of their claim that the Ordinance, as applied to them, violated the U.S. Constitution and failed to show a likelihood of irreparable harm in the absence of a temporary restraining order.

Mitchell v. City of Los Angeles, Case No.: 16-cv-01750 SJO (JPR) (C.D. Cal. April 2016)

A group of unhoused individuals, the Los Angeles Community Action Network, and the Los Angeles Catholic Worker filed suit to challenge the City of Los Angeles' practice of seizing and destroying unhoused persons' property during arrests and street cleanings. Each of the unhoused individuals live on the streets of Los Angeles' Skid Row area, and each had lost nearly all of their belongings at the hands of the Los Angeles

Police Department and the LA Sanitation crews. None of the Plaintiffs had been an opportunity to challenge the destruction of their property.

The federal District Court ordered the city to stop seizing and destroying unhoused persons' property, and to improve its property storage procedures. The city was also ordered to make critical belongings, like tents and medication, available within 24 hours after the seizure or immediately after a person is released from custody.

Following the District Court's order, Defendants sought clarification of two issues: (1) Whether the Court intended the city to leave non-essential property of unhoused arrestees on the street; and (2) Whether the order prohibited the city from removing sofas, appliances, sheds, and other bulky items from the city sidewalks, streets, and other public areas. The Court denied the motion for clarification. The denial was based on the conclusion that the first issue was essentially a dispute regarding the scope of the community caretaking function exception to the Fourth Amendment, which was not appropriate for resolution by the Court. The second issue was not appropriate for clarification because the order clearly permitted the confiscation of property that "presents an immediate threat to public safety."

Allen v. City of Pomona, No. 16-cv-1859 (C.D. Cal. filed Mar. 18, 2016)

In March 2016, fourteen unhoused Plaintiffs filed a putative class action suit against the City of Pomona arising out of the city's policy and practice of seizing and destroying unhoused persons' property, without notice and over the objections of the property owners. The Plaintiffs' Complaint detailed several instances where police officers had permanently deprived Plaintiffs of their most essential belongings, including food stamp cards, medication, tents, blankets, state-issued identification cards, birth certificates, and treasured family heirlooms with sentimental value.

In August 2016, the city and the Plaintiffs agreed to a sweeping settlement agreement that provides for six main forms of relief. First, it required the city to establish and fund a transitional storage center, which will consist of lockers that unhoused persons in Pomona can use to store their belongings. Second, it required the city to make a settlement payment to Plaintiffs in the amount of \$49,000 to be divided among and distributed to Plaintiffs in agreed-upon amounts. Third, it provided Plaintiffs with priority with regards to permanent housing resources developed by the city to the maximum extent allowed by law. Fourth, it established required procedures regarding the city's handling of unhoused persons' property. Fifth, it required the city to produce a semiannual report regarding the status of its unhoused population. Finally, it required the city to pay the Plaintiffs' attorneys' fees in the amount of \$160,000.

Glover v. City of Laguna Beach, No. 8:15-cv-01332 (C.D. Ca. filed Aug. 20, 2015)

In October 2008, the City of Laguna Beach enacted municipal Ordinances prohibiting camping and sleeping in public areas such as public parks, beaches or sidewalks. The Laguna Beach Police Department issued 160 misdemeanor citations in 2011 and 225 citations between January 2012 and June 2014 for violations of the anti-camping provisions. In November 2009, the city opened a permanent emergency shelter that could shelter forty-five people per night. The city gave priority to Laguna Beach locals who met certain residency criteria. If a person did not meet the residency criteria, they were required to enter a lottery to obtain a spot at the shelter for the night.

Five unhoused individuals filed suit against the city and sought to represent a putative class of unhoused, disabled persons living in Laguna Beach. The Plaintiffs sought a preliminary injunction against the city and police department enjoining enforcement of the municipal Ordinances against unhoused, disabled individuals in public outdoor places where their disability and homelessness was either known to Defendants or reasonably apparent to Defendants. Plaintiffs alleged that the Ordinances violated the Eighth Amendment of the U.S. Constitution by criminalizing "the status of being disabled and unhoused in Laguna Beach."

The Court disagreed with the Plaintiffs' arguments and concluded that Plaintiffs had not demonstrated that the Plaintiffs had no choice to sleep in public places because individuals purportedly could not access or tolerate the homeless shelter.

The Plaintiffs also alleged violations of the Americans with Disabilities Act ("ADA") on the grounds that the city had denied them a "benefit" in the form of "the provision of a safe, legal place to sleep." The Court rejected this theory and stated that the provision of a safe, legal place to sleep was not "focused enough" to amount to a "benefit" under the ADA.

Ultimately, because the Court found that Plaintiffs did not demonstrate a likelihood of success on the merits of their Eighth Amendment claims or ADA claims, the Court denied Plaintiffs' motion for a preliminary injunction. The Court acknowledged the plight of the unhoused, but expressed skepticism as to whether the judiciary could impose a legal obligation on the city to address problems affecting the unhoused.

In June 2017, the class was certified and the federal Court granted in part and denied in part the parties' motion for summary judgment. Plaintiffs' motion for summary judgment was successful for the ADA and Rehabilitation Act claims. The Court determined that there were genuine issues of material fact as to whether the Plaintiffs were excluded from, discriminated against, or denied

benefits from the Alternative Sleeping Location by reason of their disabilities. Additionally, the Plaintiffs presented a question of fact as to whether the remaining requested relief was necessary to avoid discrimination on the basis of disability.

In June 2018, the City of Laguna beach presented a settlement and agreed to provide improvements to its unhoused programs and facilities to ensure that people with disabilities would have access in accordance with the ADA and Rehabilitation Act. In November 2018, the U.S. District Court in Santa Ana granted final approval of the class action settlement.

Bell v. City of Boise, No. 09-cv-540, 2015 WL 5708586 (D. Idaho Sept. 28, 2015)

After a complex procedural history, the remaining two unhoused Plaintiffs in *Bell v. City of Boise*, 709 F.3d 890 (9th Cir. 2013) filed a motion for summary judgment against the City of Boise challenging municipal Ordinances that prohibited sleeping and camping at night in public places. The Plaintiffs sought relief in the form of: (1) a declaration under 28 U.S.C. § 2201 that the Ordinance violated the Eighth Amendment's prohibition against cruel and unusual punishment, and (2) a permanent injunction prohibiting the city from enforcing the Ordinances.

On August 6, 2015, The United States Department of Justice filed a statement of interest, arguing that making it a crime for people who are unhoused to sleep in public places, when there is insufficient shelter space in a city, unconstitutionally punishes them for being unhoused. As stated by the Justice Department in its filing, "[i]t should be uncontroversial that punishing conduct that is a universal and unavoidable consequence of being human violates the Eighth Amendment. . . . 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." The statement of interest advocated for the application of the analysis set forth in *Jones v. City of Los Angeles*, a Ninth Circuit decision that was subsequently vacated pursuant to a settlement. In *Jones*, the Court considered whether the city of Los Angeles provided sufficient shelter space to accommodate the unhoused population. The Court found that, on nights when individuals are unable to secure shelter space, enforcement of anti-camping Ordinances violated their constitutional rights.

The city filed a motion to dismiss the Plaintiffs' claims for lack of subject-matter jurisdiction, arguing that Plaintiffs did not have Article III standing to sue in federal Court. The city argued that the Ordinances at issue did not constitute cruel and unusual punishment because, by their terms, the Ordinances are not to be enforced when an unhoused individual "is on public property and there

is no available overnight shelter." In addition, neither Plaintiff demonstrated that he could not or would not stay in one or more of the available shelters (if there is space available), or that he has a disability that prevents him from accessing shelter space.

Based on these facts, the Court held that there was no actual or imminent threat that either Plaintiff would be cited for violating the anti-camping Ordinances. In the absence of such a threat, the Court concluded that the Plaintiffs could not allege a sufficient injury-in-fact to establish legal standing, and dismissed the case.

Los Angeles Catholic Worker v. Downtown Industrial BID, No. CV 14-7344 PSG, 2015 WL 13649801 (C.D. Cal. Jan. 15, 2015)

Plaintiffs were four unhoused individuals who live in Los Angeles's "Skid Row" area and two organizations (Los Angeles Catholic Worker ("LACW") and Los Angeles Community Action Network ("LA CAN") that provided food, shelter, and other services to unhoused individuals in the area. Plaintiffs filed suit against Los Angeles Downtown Industrial District Business Improvement District ("LADID"), Central City East Association, Inc. ("CCEA"), and the City of Los Angeles (the "City"). LADID is a municipal organization the purpose of promoting economic revitalization and physical maintenance of business districts. CCEA is a business corporation contracted by the City to manage the LADID.

Plaintiffs alleged that Defendants seized property from Plaintiffs and other unhoused individuals without prior notice despite being aware that unhoused individuals left their property unattended at times to tend to life's necessities.

Plaintiffs sought injunctive and declaratory relief based on several claims, including a Fourth Amendment claim based the right to be free from unreasonable seizures, and a Fourteenth Amendment claim based on the right to due process. Although the case ultimately settled, in denying Defendants' motion to dismiss the Court followed *Lavan v. City of Los Angeles*, 963 F.3d 1022 (9th Cir., 2012) in holding that the individual Plaintiffs had a property right in their belongings temporarily left on the street. In so doing, the Court distinguished property unattended versus that which was abandoned, the latter of which has no constitutional protections.

Although the Court noted that there is no inherent right to leave possession unattended on public sidewalks, "[u]nabandoned property of homeless persons is not beyond the reach of the protections enshrined in the Fourth and Fourteenth Amendments." Once the Court determined the existence of a protected property right, it conducted the balancing test required by the Fourth Amendment to determine the reasonableness of any seizure, concluding that Plaintiffs had sufficiently alleged an unreasonable

seizure given the types of property seized and the manner in which it was stored or labeled. The Court expressly rejected the argument that the property removal was reasonable as a matter of law because it was conducted pursuant to Los Angeles Municipal Code, instead concluding that such actions still must comply with constitutional protections.

For similar reasons, the Court held that Plaintiffs had sufficiently alleged a due process violation because the property was taken without notice and given the precarious living conditions of unhoused persons and the lack of extraordinary circumstance that might excuse pre-deprivation notice.

Cody v. Albany, Case No. 2:13-CV-05270 (N.D. Cal. 2014).

Plaintiffs were a group of unhoused individuals living in an area owned by the city of Albany, California (the "City") nicknamed "the Bulb." The residents of the Bulb built makeshift homes and structures which they used for shelter and storage. Many residents of the Bulb had physical or mental disabilities that prevented them from working or living in close quarters with others.

The Plaintiffs filed suit against the City, the Albany Police Department, and the Chief of Police to prevent the eviction by the City of around 60 unhoused individuals living on the Bulb. The grounds for eviction were based on the City's renewed enforcement of hours of operations limitations for the area, along with a long standing "anti-camping" Ordinance and provisions that prohibit "[c]onstruct[ing] or erect[ing] any building of any kind, whether permanent or temporary" or "[s]tor[ing] personal property."

The anti-camping Ordinance and prohibition on structures and storage of property apply to any open space in the City. These provisions had been in place for many years, but Plaintiffs aimed to show a pattern of non-enforcement, along with a history of approval by the City and the police of the unhoused population's presence on the Bulb.

Plaintiffs made several different arguments:

A provision in the City's code constituted cruel and unusual punishment under the Eighth Amendment because it prohibited involuntary and necessary acts such as sleeping and seeking shelter;

The City's transition plan involving temporary trailers with beds for a portion of the Bulb's population violated the Americans with Disabilities Act due to lack of accommodation for the individuals who had certain disabilities;

Eviction at the onset of the winter months with planned destruction of the residents' homes and personal possessions violated the residents' liberty interest

protected by the due process clause of the Fourteenth Amendment;

The City's plan to seize and destroy the residents' dwellings and possessions violated the residents' Fourth Amendment right to be secure from unreasonable seizures;

The City's plan to seize and destroy the residents' dwellings and possessions violated the residents' Fourteenth Amendment right to procedural due process due to lack of the opportunity for the residents to be heard;

The Ordinances to be enforced were unconstitutionally vague as evidenced by the City's selective enforcement;

The City's plan violated the residents' constitutional and state rights to privacy.

The Court never ruled on these arguments, as the claims were voluntarily dismissed with prejudice after the parties reached a settlement agreement.

Russell v. City & Cty. of Honolulu, 2014 WL 356627, at *1 (D. Haw. Jan. 30, 2014)

The Court, in its previous Order, found that Plaintiffs were likely to succeed on the merits of their as-applied due process challenge and their as-applied Fourth Amendment challenge to Chapter 29, Article 16 of the Revised Ordinances of Honolulu which addresses "Nuisances on Public Sidewalks." This Court found that a reasonable person reading the notices that Plaintiffs received upon the seizure of property pursuant to Article 16 would not be aware of the following critical aspects of the Article 16 process:

the ability to reclaim his necessities without paying the fee or going through the hearing process; and

the opportunity to seek a waiver of the fee for the remaining items from the hearings officer by demonstrating that the payment of the fee would be onerous for him.

Accordingly, the Court granted Plaintiffs' Motion for Preliminary Injunction, and enjoined the City from violating Plaintiffs' procedural due process and Fourth Amendment rights in its enforcement of Article 16. The City filed a Motion for Reconsideration.

The Court found that the City did not meet the standards required to obtain reconsideration – namely, the City did not sufficiently demonstrate reasons why the Court should reconsider its prior decision and did not set forth facts or law of a strongly convincing nature to induce the Court to reverse its prior decision. In 2019, the Ninth Circuit denied a petition for writ of certiorari.

Desertrain v. City of Los Angeles, 754 F.3d 1147 (9th Cir. 2014)

A group of unhoused Plaintiffs, each cited for violating the law, challenged the constitutionality of a Los Angeles Ordinance prohibiting the use of vehicles “as living quarters.” The Plaintiffs alleged that the police selectively enforced the law against unhoused people in violation of their equal protection rights. Additionally, the Plaintiffs argued that the law was unconstitutionally vague because it provided insufficient notice of the prohibited conduct and promoted arbitrary and discriminatory enforcement. The city successfully moved for summary judgment dismissing the claims at the District Court level. However, the Ninth Circuit reversed, holding that the Ordinance was unconstitutionally vague in violation of due process.

De-Occupy Honolulu v. City and Cty. Of Honolulu, 2013 WL 2284942

Plaintiffs, a group of individuals participating in the “Occupy” movement, had maintained a constant presence at Honolulu’s Thomas Square for over a year, where they had erected tents, signs, and other artwork. After their property was impounded several times, they brought suit against the City and County of Honolulu as well as several city and county officials in their personal and official capacities. Plaintiffs asserted violations of their First, Fourth, Fifth, and Fourteenth Amendment rights as well as other state law claims based on the Hawaii Constitution and provisions of state law.

Chapter 29, Articles 18 and 19 of the Revised Ordinances of Honolulu provide that the city may seize personal property left on public property after providing 24 hours notice. Pursuant to these codes, the City was permitted to impound personal property located on public property when the property interfered with the safe or orderly management of the premises or when it posed a threat to health, safety, or welfare. After multiple instances of impoundment without required notice, Plaintiffs challenged the constitutionality of the city’s practices.

The Court dismissed all claims against individuals because they were redundant of the claims brought against the city and county. Ultimately, five claims survived the Defendants’ motion to dismiss based on the Plaintiffs’ showings that Defendants seized, stored, and destroyed Plaintiffs’ property without following the city’s own notice requirements and based on the sufficiently pleaded allegations that Defendants had seized and destroyed signs protesting the city’s unhoused policies in violation of the Plaintiffs’ First Amendment rights. In addition to the First Amendment Complaint, the other surviving allegations were the Fourth Amendment claims, the Due Process claims, and the claims for conversion and replevin based on Defendants’ taking of Plaintiffs’ property.

Porto v. City of Laguna Beach, 2013 WL2251004 (C.D. Cal. 2013)

A Laguna Beach Ordinance prohibited camping in any public area and sleeping in any public park or bench at night or on any public street or building at any time. The Plaintiff Leonard Porto brought suit against the city, alleging that enforcement of the law violated his rights under the First, Fourth, Eighth, and Fourteenth Amendments.

The Magistrate found that Porto did not have standing to challenge the anti-sleeping Ordinance because he had never been issued a citation or arrested. Merely being threatened, awoken, and issued “Courtesy notices” was not sufficient. The Magistrate also dismissed Porto’s Fourth Amendment claim because no search or seizure was conducted, and held that he did not have a constitutionally protected liberty or property interest in access to the city’s designated Alternative Sleeping Location.

The Plaintiff filed an opposition to the Magistrate’s Report and Recommendation in California District Court. In September 2012, the Court issued an order accepting and adopting the Magistrate’s findings and recommendations, dismissing the case but granting Plaintiff leave to amend certain asserted claims. The Plaintiff filed an amended Complaint against Defendants shortly thereafter. In January 2013, the Magistrate once again dismissed Plaintiff’s Complaint, save for his claim against the City of Laguna Beach challenging the durational residency requirement for utilizing the Alternative Sleeping Location. The District Court subsequently accepted and adopted the Magistrate’s findings and recommendations.

The Defendants filed a Motion for Summary Judgment in January 2014 as to the remaining claim in the amended Complaint. The Magistrate found the Plaintiff failed to establish that he had sustained or was immediately in danger of sustaining some direct injury as the result of the challenged official conduct. In accordance with the Magistrate’s Report and Recommendation, the District Court granted Defendants’ Motion for Summary Judgment, dismissing the case.

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In later appellate briefings, the Court granted Defendants’ request for judicial notice of declarations made by Porto in an unrelated case, including one declaration that Porto was no longer unhoused. This left only his claim for damages. Porto was never arrested or charged any fines in connection with the Ordinance, so the Court determined that he lacked standing. In January 2019, the Supreme Court denied certiorari.

Sanchez v. City of Fresno, 914 F. Supp. 2d 1079 (E.D. Cal. 2012)

Luis Sanchez, an unhoused resident of the City of Fresno, brought claims under § 1983 and California law challenging the city’s formal policy of seizing and destroying unhoused persons’ property during “clean ups” of encampments. This case was one of more than thirty similar cases filed by unhoused individuals, all of which were consolidated for pretrial purposes, with the above-captioned matter serving as the lead case. The city moved to dismiss the case, which was granted in part and denied in part.

The Court found that Plaintiffs’ federal takings claim was not ripe and that the city had a rational basis for targeting the possessions of unhoused individuals for cleanup. The Court held, however, that the Plaintiffs stated valid

substantive and procedural due process claims and a claim for conversion. The Plaintiffs filed an Amended Complaint alleging, among other things, an illegal search and seizure, conversion, breach of contract, and denial of due process and equal protection under the U.S. and California Constitutions. The city again moved to dismiss the case.

The Court granted in part and denied in part Defendants’ motion to dismiss; refusing to dismiss Plaintiff’s §1983 claim, California Constitutional claims, the Bane Act claim, the intentional infliction of emotional distress claim, or portions of the conversion claim; but dismissing the breach of contract claim. Both parties moved for partial/summary judgment. In May 2014, the Court granted Defendants’ motion for summary judgment with regard to all claims except intentional infliction of emotional distress. The Court found that there was sufficient evidence of conduct that a reasonable juror could find to be outrageous. The Plaintiffs’ motion for summary judgment was denied in its entirety.

In October 2014, a number of Plaintiffs and Defendants reached an undisclosed settlement.

Watters v. Otter, 955 F.Supp.2d 1178 (D. Idaho 2013), 986 F.Supp.2d 1162 (D. Idaho 2013), and 26 F.Supp.3d 1014 (D. Idaho 2014)

Occupy Boise, protesters who had established a tent city on state capitol grounds, sought an injunction against enforcement of Idaho’s anti-camping law and a related law authorizing the State to remove and dispose of any unauthorized personal property on constitutional grounds. The state successfully moved for summary judgment as to the facial constitutional challenges. While the Court reaffirmed its original finding that Occupy Boise’s tent city and overnight camping constituted expressive conduct protected under the First Amendment, the Court found that the ban on “camping” or “sleeping” was a reasonable time, place, and manner restriction. It also found the ban on personal belongings related to camping was constitutionally proper.

The Court held, however, that Occupy Boise could maintain a 24-hour presence at the symbolic tent city provided that the protestors complied with all constitutional rules, including the prohibition against sleeping. When the State imposed administrative regulations governing use of the Capitol Mall exterior, Occupy Boise argued that those rules impermissibly restricted First Amendment activity, and sought partial summary judgment declaring the rules invalid and permanently enjoining their enforcement. The Court found that some of the challenged rules were reasonable time, place, and manner restrictions, and others were not.

In June, 2014, the Court granted Occupy’s motion for partial summary judgment declaring that (1) the State’s policy of enforcing Idaho Code §§ 67-1613 and 67-

1613A to remove Occupy's tents violated Occupy's First Amendment rights, and (2) in the future, the State must enforce the statutes consistently with the Court's interpretation of the statutes. The Court granted Plaintiff's motion for declaratory judgment, declaring that the Defendants' policy of enforcing the Ordinance violated the First Amendment; and that the Defendants and their officers, agents, employees, attorneys, and all persons who are in active concert or participation with them shall enforce the Ordinance consistently with the Court's decisions.

The Court also granted Defendants' motion to dismiss, holding that because the legislature struck down the rules the Court ruled as unconstitutional, Plaintiff's challenge to those rules was moot. On February 26, 2015, the Court granted a motion for \$179,803.50 in attorneys' fees to Occupy Boise.

Nishi v. Cty. of Marin, No. C11-0438 PJH, 2012 WL 566408 (N.D. Cal. Feb. 21, 2012)

Plaintiff alleged violations of his civil rights under 42 U.S.C. §§ 1982, 1983, and 1985 following multiple citations for illegally camping on public land, being "forced from his residence," and having property "illegally taken." He pursued a lawsuit against both state and county Defendants, but the state Defendants' motion to dismiss was granted. The claims against the county Defendants were dismissed but with leave to amend and allege sufficient facts.

County Defendants subsequently moved for summary judgment or summary adjudication by arguing that (1) the camping ban did not violate the Plaintiff's Fifth and Fourteenth Amendment rights, including the right to travel; (2) the camping ban did not conflict with Penal Code § 26; and (3) the camping ban was not unconstitutionally void for vagueness.

The Court explained that the right to travel does not include a right to live or stay where one will, and that nondiscriminatory Ordinances have, at best, an incidental impact on the right to travel. Therefore, the Court held that The County of Marin camping ban prohibited a person from camping on public property but did not violate the right to travel.

Next, the Court addressed Penal Code § 26 which exempted individuals who committed acts without consciousness from liability. The Court agreed with the Defendants' assertion that the Plaintiff was not unconscious when he deliberately engaged in illegal camping for which he was cited. His unconsciousness while sleeping was found to be a misplaced argument for exemption from liability.

Finally, the Court agreed with the Defendants' argument that the camping ban was not unconstitutionally vague

because it provided adequate notice that camping is prohibited and sufficient guidance to avoid arbitrary enforcement. The Ordinance clearly banned only overnight camping and possession of "camping gear," which was further defined. Noting the conclusions of the three arguments above, the Court granted the Defendants' motion to dismiss.

Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005 (C.D. Cal. 2011)

Nine unhoused individuals living in the "Skid Row" district of Los Angeles sought to enjoin the Los Angeles Police Department and Bureau of Street Services from confiscating and destroying personal possessions that are temporarily left unattended on sidewalks. The federal District Court held Plaintiffs demonstrated a strong likelihood of success on the merits of their Fourth Amendment claim, noting that by seizing and destroying unabandoned personal effects, the City acted unreasonably because their conduct meaningfully interfered with the Plaintiffs' possessory interests. Additionally, the Court held that unhoused persons' unabandoned possessions are property and thus, individuals must be given the reasonable opportunity to be heard when their possessions are to be seized and destroyed.

However, the City admitted their agents failed to provide any meaningful opportunity to be heard before or after seizing and destroying property belonging to the Skid Row's unhoused population. Therefore, the District Court found a likelihood of success on Plaintiffs' Fourteenth Amendment due process claims. The District Court granted Plaintiffs' motion for preliminary injunction and the Ninth Circuit affirmed.

Aschbaucher v. Arcata, No. CV 08-2840 MHP (NJV), 2010 WL 11211481 (N.D. Cal. Aug. 19, 2010)

Plaintiffs brought a § 1983 claim with four causes of action resulting from their treatment pursuant to municipal laws prohibiting actions such as camping on public grounds and sitting or lying on public sidewalks. Plaintiffs alleged four causes of action: (1) cruel and unusual punishment, (2) equal protection, (3) unconstitutional vagueness and overbreadth, and (4) unreasonable search and seizure. A Magistrate Judge for the Northern District of California recommended granting the Defendants' motion for an involuntary dismissal of two of the Plaintiffs for failure to prosecute due to their failure to participate, failure to oppose the Defendants' motion to dismiss them, and failure to explain their delay.

For the Plaintiffs' Eighth Amendment cruel and unusual punishment claim, the Court focused on the Plaintiffs' desire to change the laws prohibiting camping in public, as they have the greatest impact on unhoused individuals. In Arcata, there are more unhoused individuals than

shelter beds, and each of the Plaintiffs were arrested for what they contend is involuntary conduct, sleeping on public grounds. Based on concerns about the ramifications of providing constitutional protection to any condition over which a showing could be made that the Defendant had no control, the Court concluded that the Eighth Amendment does not extend protection to involuntary conduct, such as camping overnight on public grounds, attributable to the Plaintiffs' unhoused status. The Ordinances at issue proscribe conduct, not status, so the Court recommended that the Defendants' motion to dismiss be granted for failure to state a claim for cruel and unusual punishment.

Plaintiffs also alleged an equal protection claim based on their argument that the Ordinances were adopted and implemented with a discriminatory purpose. The Court recommended that the motion to dismiss this claim be denied to give the Plaintiffs a chance to show that the challenged classification could not reasonably be viewed to further the asserted purpose or to show that the Defendants' purported rational basis is pretext for an impermissible motive.

The Court found that the Plaintiffs sufficiently alleged a facial and as-applied challenge to the camping Ordinance for unconstitutional vagueness on the ground that it "encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." However, the Court dismissed with prejudice the overbreadth challenges because the Plaintiffs did not raise it in their second amended Complaint.

Finally, the Court recommended that the motion to dismiss the claim on unlawful seizure be denied because the Plaintiffs' allegations, taken as true for purposes of the motion, showed that their due process claims are not directed at random and unauthorized conduct.

Ryden v. City of Santa Barbara, Case No. 09-CV-1578 (C.D. Cal. March 6, 2009)

A class of unhoused Plaintiffs in Santa Barbara, California, with the assistance of the ACLU of Southern California, brought a lawsuit against the City of Santa Barbara and its police department challenging city Ordinances that prohibit sleeping in public places. The Plaintiffs' alleged that the City of Santa Barbara violated the Fourth, Fifth, Eighth, and Fourteenth Amendments and the Americans with Disabilities Act when it criminalized Plaintiffs for sleeping in public places when there was not shelter available. The Plaintiffs requested preliminary and permanent injunctions to prevent the Defendants from enforcing the city Ordinances and a declaration that the Defendants' actions violated the Plaintiffs' constitutional rights.

The Plaintiffs were chronically unhoused individuals who were displaced from a 200-bed winter emergency shelter in Santa Barbara when it was transformed into a 100-bed transitional housing facility. The Plaintiffs have mental and/or physical disabilities that prevented them from working or obtaining shelter for themselves. Two of the four named Plaintiffs were veterans and all four named Plaintiffs worked before becoming disabled. A conditional use permit required the transitional housing facility to exclude the Plaintiffs who were unable to work because the permit allowed the facility to house only episodically unhoused individuals who are able to work. None of the Plaintiffs were able to work.

The Plaintiffs alleged that when the shelter closed and they were displaced, they were forced to sleep in public places because Santa Barbara failed to provide available alternative shelter, despite having the authority and the resources to do so. The case settled in September 2009. In the settlement, Ryden agreed to dismiss the suit in exchange for the city's promise to (1) fund with substantial loans or grants the construction of 105 to 115 very-low-income house units, (2) facilitate outreach to chronically unhoused individuals and identify the 50 most chronically unhoused people in Santa Barbara for purposes of offering them right of first refusal to those housing units, and (3) create a program to avoid having chronically unhoused people subject to prosecution under the public sleeping criminal and municipal Ordinances. The implementation of these programs is still underway.

The Isaiah Project, Inc. v. City of San Diego, Case No. 09 CV 2699 (S.D. Cal.)

Unhoused individuals and the Isaiah Project, a homeless services organization, challenged the city's destruction of personal property after the Plaintiffs had temporarily left their belongings on the sidewalk while seeking services at a nearby day center or church. The Plaintiffs alleged that notice regarding seizure of property was inadequate, because, among other things, it predated Plaintiffs' temporary placement of their property and was not posted where the raids occurred. The Plaintiffs' lawsuit alleged due process and equal protection violations, along with infringement of their right to be free from unreasonable search and seizure under the Fourth Amendment.

In March 2011, the parties reached a settlement agreement. The agreement provided for \$160,000 to be paid to Plaintiffs. The city also agreed to lease to the Isaiah Project a large warehouse in downtown San Diego for at least one year, to provide 500 storage bins, and to comply with a new procedure for storage of unhoused persons' personal property. In November 2011, the Court approved the settlement class and judgment.

Lehr v. City of Sacramento, 624 F.Supp.2d 1218 (E.D. Cal. 2009)

A group of unhoused Plaintiffs and non-profit organizations brought a § 1983 action challenging a City of Sacramento anticamping Ordinance on Eighth Amendment grounds. The Plaintiffs also challenged the City's and County's practice of taking and destroying their personal property without providing adequate notice and the opportunity to reclaim their possessions on Fourth and Fourteenth Amendment grounds.

The Court held that enforcement of the Ordinance did not violate the Eighth Amendment, but that there was a genuine issue of material fact as to whether the seizure of property against the will of one Plaintiff, Connie Hopson, violated the Fourth Amendment. In March 2010, Sacramento County settled the case for damages and attorneys' fees.

The remaining parties continued to litigate the matter through a jury trial on the question of liability and on May 9, 2011, a jury found the City of Sacramento liable to the certified class of Plaintiffs for violation of their constitutional rights resulting in the seizure and loss of the Plaintiffs' property. Further, the jury found that police seized and destroyed personal property of unhoused people; that the police had a longstanding custom or practice of not giving adequate notice to unhoused individuals concerning how they could retrieve their property; and that the police failed to implement an appropriate policy concerning booking and handling the property.

The Court ordered the city to provide forty-eight hours' notice before sweeping any encampment and to store any confiscated personal property of unhoused persons to a storage location for a period not to exceed ninety days. The Plaintiffs were awarded attorney's fees and costs of \$783,079.58.

Anderson v. City of Portland, 2009 WL 2386056 (D. Or. 2009)

Plaintiffs, a group of unhoused individuals, filed suit challenging enforcement of a city Ordinance that makes it unlawful for any person to camp in public or to set up a temporary structure in certain public places without a permit. The Plaintiffs alleged that the city's enforcement of the anti-camping Ordinances violated their Eighth Amendment right to be free from cruel and unusual punishment. The Plaintiffs also alleged that they were denied equal protection in violation of the Fourteenth Amendment, and that enforcement of the Ordinance interfered with their fundamental right to travel and also infringed on their substantive liberty interests.

The city successfully moved to dismiss the Plaintiffs' right to travel and substantive due process claims because the

city's enforcement of the Ordinances did not prevent the Plaintiffs from traveling to or from the city, nor exclude them from certain areas of the city. The Court denied the motion to dismiss, however, with respect to the Plaintiff's Eighth Amendment and equal protection claims.

The Plaintiffs filed an amended Complaint in 2011, but voluntarily dismissed the lawsuit when the two sides reached a settlement. In the settlement, the city agreed to pay a total of \$3,200 in damages to the six Plaintiffs and three other individuals who brought claims. In lieu of paying attorney fees, the city made \$37,000 available for its rental assistance program, which helps people experiencing homelessness afford permanent housing. Furthermore, the police were required to change their policies to provide additional notice before issuing camping citations, to improve procedures related to the removal of unhoused persons' property, and to store items reasonably recognizable as belonging to a person.

Veterans for Peace Greater Seattle, Chapter 92 v. City of Seattle, Case No. C09-1032 RSM (filed July 21, 2009)

Plaintiffs were a group of about 70 unhoused people living in an encampment on property partially owned by the City of Seattle and partially owned by the Washington State Department of Transportation. The encampment was known as "Nickelsville" after the mayor of Seattle, Greg Nickels. The Plaintiffs filed suit in federal Court on July 21, 2009, along with a motion for a temporary restraining order and preliminary injunction, to prevent a noticed sweep of the encampment, which, they asserted, would result in loss of their home, community, and property.

The Court denied Plaintiffs' motion, finding that there was no showing of irreparable harm because the encampment had only been in existence a short time and the Plaintiffs had no legal right to live on the government property. The Court noted that social services had been offered to the residents of the encampment.

The Court also found that the Plaintiffs did not have a likelihood of success on the merits under their two constitutional causes of action, the fundamental right to travel and the Eighth Amendment right to be free from cruel and unusual punishment. The Court found that the right to remain at a certain place does not implicate the constitutional right to travel and, even if it did, the compelling government interests in protecting its public spaces and protecting itself against liability outweigh any such rights.

The Court also rejected the Plaintiffs' claim that the sweep would constitute cruel and unusual punishment, finding that the protection only applies to criminal Defendants. The parties stipulated to a dismissal of the suit on October 8, 2010.

Sipprelle v. City of Laguna Beach, No. 08-01447 (C.D. Cal., filed Dec. 23, 2008)

Unhoused individuals in Laguna Beach, California with the assistance of the ACLU of Southern California and local law firms filed a lawsuit against the City of Laguna Beach and its police department challenging both a city Ordinance that prohibited sleeping in public places and the selective targeting and harassment of unhoused individuals by the police. The Complaint highlighted a range of conduct by the local police department that prevented unhoused individuals from carrying out life-sustaining activities, including criminalization of sleeping in public places, selective enforcement of local Ordinances and laws, unwarranted stops and interrogations, and confiscation of property.

In their Complaint, the Plaintiffs contended that Laguna Beach had, prior to the filing of the Complaint, organized a “Homeless Task Force” comprised of local leaders and that the city council had fully adopted the findings of the task force. The task force found that the city’s unhoused population, most of whom suffer from mental and/or physical disabilities, did not receive necessary mental health or medical care, nor were there a sufficient number of shelter beds available. The Complaint alleged that in spite of the findings of the task force, the Defendants continued to harass and intimidate unhoused residents pursuant to the anti-sleeping Ordinance and other quality of life Ordinances, and that the city obstructed volunteers’ efforts to assist the unhoused community.

The Complaint specifically alleged violations of the Fourth, Eighth and Fourteenth Amendment, as well as violations of certain provisions of the Americans with Disabilities Act. On March 4, 2009, the Laguna Beach City Council repealed the city Ordinance challenged in the Complaint. The case was settled in June 2009. The city agreed to provide Plaintiffs’ counsel with advance notice of any meeting where action was proposed to revise provisions of the Laguna Beach Municipal Code pertaining to camping or sleeping for three years. The city also agreed to expunge Plaintiffs’ convictions under the camping and sleeping Ordinance and to provide advance notice of a resumption of enforcement of the state’s statute relating to lodging on public property for two years.

Lehr v. City of Sacramento, No. 2:07-cv-01565 (E.D. Cal Aug. 2, 2007)

A group of unhoused Plaintiffs challenged and sought to enjoin enforcement of a City of Sacramento Ordinance that prohibited unhoused persons from sleeping outside, alleging violations of their Fourth, Eighth, and Fourteenth Amendment rights. They also challenged the City’s and county’s practice of taking and destroying their personal property, without providing adequate notice and the

opportunity to retrieve or reclaim personal possessions before they are destroyed.

The Plaintiffs argued that because sleeping is necessary to maintain human life, enforcement of the Ordinance punished Plaintiffs based on their status as unhoused persons, and therefore violated the Eighth Amendment’s prohibition on cruel and unusual punishment. Plaintiffs noted in their Complaint that rental housing in Sacramento was beyond the means of unhoused people, and, with thousands of people in need of housing, the waiting time for persons on waiting lists for public housing or subsidized housing was more than two years. Further, shelters in Sacramento city and county could not accommodate all unhoused people in the area on any given night.

The Plaintiffs also argued that the property confiscation without notice was a violation of their Fourteenth Amendment rights to due process of law and to be free from unreasonable searches and seizures. Lastly, Plaintiffs argued that Defendants’ conduct reflected their “animus towards this disfavored group and lacks a rational relationship to any legitimate state interest,” in violation of the equal protection clause of the Fourteenth Amendment.

The Plaintiffs sought class certification, as well as a temporary restraining order and/or preliminary injunction and permanent injunction, declaratory judgment, return of Plaintiffs’ property, damages of at least \$4,000 per incident and attorneys’ fees and costs. The city argued in response that the Ordinances at issue are typically only enforced during the daylight hours and only in response to Complaints by private property owners. The city stated that it provides a form to any person whose personal property is taken by the city as part of any citation or arrest, indicating when and where such property can be claimed.

In March 2010, Sacramento County settled the case for \$488,000 in damages and a promise to give forty-eight hours’ notice before sweeping an encampment. Of the settlement money, (1) \$200,000 was allocated to pay verified claims with the residuum, if any, distributed to such non-profit corporation or corporations to provide for the needs of the unhoused; (2) each of the representative Plaintiffs received either \$2,000 or \$3,000, depending upon whether they lost property to the County during the class period, or not; (3) up to \$100,000 was allocated for claims administration, including providing notice of the settlement of this action and the claims procedure; and (4) \$150,000 went to attorney fees. The City of Sacramento continued to litigate the case. In May 2009, the city was successful on motion for summary judgment as to Plaintiff’s first cause of action, an Eighth Amendment claim alleging cruel and unusual punishment, as to all Plaintiffs.

The city was also successful in receiving summary judgment on the second cause of action, the Fourth and Fourteenth Amendment privacy claims based on unreasonable confiscation of property, as to all individual Plaintiffs aside from one Plaintiff, Connie Hopson, who was the only one to allege that her property had been taken against her will and thus the only one with standing. Accordingly, only one Plaintiff remained with a claim against the city.

In August, 2009, the class containing “[a]ll persons in the City of Sacramento...who were, or are, or will be unhoused at any time after August 2, 2005, and whose personal belongings have been taken and destroyed, or will be taken and destroyed, by one or more of the Defendants,” was certified with Hopson as representative Plaintiff.

Despite not settling, the city council held a special meeting in March 2009 in which it passed resolutions to improve and expand homeless services and to use \$1 million to implement the strategy. The strategy includes providing shelter beds, transitional housing, permanent supportive housing, permanent housing, storage for personal property, kennel services for pets, and other supportive services. The first statement in the background section of the resolution states, “housing is a basic human right.”

Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007)

The Plaintiffs, six unhoused individuals, filed a Complaint in the United States District Court for the Central District of California pursuant to 42 U.S.C. § 1983. Plaintiffs sought a permanent injunction against the City of Los Angeles and L.A.P.D. Chief William Bratton and Captain Charles Beck (in their official capacities), barring them from enforcing section L.A., Cal., Mun. Code § 41.18(d) in the area of Skid Row between the hours of 9:00 p.m. and 6:30 a.m. Plaintiffs alleged that by enforcing L.A., Cal., Mun. Code § 41.18(d) twenty-four hours a day against persons with nowhere else to sit, lie, or sleep, other than on public streets and sidewalks, the City is criminalizing the status of homelessness in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution, and Article I, sections 7 and 17 of the California Constitution.

The Ninth Circuit held that the City could not expressly criminalize the status of homelessness by making it a crime to be unhoused without violating the Eighth Amendment, nor can it criminalize acts that are an integral aspect of that status. Furthermore, Plaintiff’s illustrated, through undisputed evidence, that the number of unhoused persons in Los Angeles far exceeds the number of available shelter beds at all times. Thus, the Court held that the City encroached upon Plaintiffs’ Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily unhoused. The Court held in relevant

part, “[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human.”

The Court concluded that Plaintiffs were entitled at a minimum to a narrowly tailored injunction against the City’s enforcement of section 41.18(d) at certain times and/or places. Shortly after the Court reversed and remanded the matter back to the District Court for a determination of injunctive relief consistent with this opinion, the parties settled this action, and the Court withdrew and vacated its opinion from April 2006.

Spencer v. City of San Diego, No. 04 CV-2314 BEN (S.D. Cal. May 2, 2006)

A class of unhoused Plaintiffs brought a § 1983 action challenging the issuance of illegal lodging citations to unhoused individuals sleeping on the street. The Plaintiffs alleged that the citations violate their Eighth Amendment rights to be free from cruel and unusual punishment because there is no alternative sleeping area available. The city filed a motion to dismiss, claiming that none of the Plaintiffs were actually convicted under the illegal lodging law.

The Plaintiffs filed an amended Complaint alleging that seven of the ten Plaintiffs were convicted under the law. The city filed another motion to dismiss, stating that the Plaintiffs did not receive any punishment and thus could not raise their Eighth Amendment claims. 89 505 F.3d 1006 (9th Cir. 2007). In April 2006, the Court denied the city’s motion to dismiss, *citing Jones v. City of Los Angeles*. In November 2006, Plaintiffs filed a memorandum of points and authorities supporting their application for preliminary injunction. The Plaintiffs contended that they would succeed on the merits because the issuance of “sleeping tickets” to San Diego’s unhoused people impermissibly criminalizes involuntary acts “at all times and all places.”

The Plaintiffs cited *Jones v. City of Los Angeles*, which held that a city cannot “criminalize acts (such as sleeping) that are an integral aspect” of the status of being unhoused. The Plaintiffs also cited announcements by the Mayor and the Police Chief vowing to continue to issue “illegal lodging” tickets to unhoused people pursuant to the statute. In February 2007, the parties entered into a settlement agreement. Under the agreement, the parties agreed that the San Diego Police Department officers “will not ordinarily issue Penal Code section 647(j) citations between the hours of 2100 and 0530.” The settlement agreement was based on, and incorporated by reference, the S.D.P.D.’s training bulletin, dated November 17, 2006, regarding the illegal lodging statute.

The training bulletin emphasized that officers must remember that part of their role is to provide information to people about relevant social services and to assist

those who cannot assist themselves. It also provided guidelines that limited the enforcement of the illegal lodging statute (e.g., only in areas where the city has received Complaints and not ordinarily “between the hours of 2100 and 0530”). The bulletin also outlined various procedures that should be followed before issuing a citation (e.g., establishing that the person’s conduct constitutes “lodging” and then establish that the lodging is “without permission”), as well as additional investigative issues that should be considered.

Halfpap v. City of Las Vegas, No. 2:06-CV-01636-RCJ-RJJ (D. Nev. Dec. 20, 2006)

In November 2006, three men were arrested for violating a repealed provision of a Las Vegas city Ordinance, which prohibited, among other acts, sleeping within 500 feet of a deposit of feces or urine. The pertinent provisions of the law, which the city had passed a law in August 2006 prohibiting sleeping within 500 feet of a deposit of feces or urine, were repealed in September 2006. The three individuals filed a lawsuit against the city that included numerous causes of action including violation of their civil rights, negligence, false imprisonment and assault and battery. In March 2007, the three Plaintiffs entered into a settlement with the city under which the city paid each Plaintiff \$15,000 in damages.

Kincaid v. City of Fresno, 2006 WL 3542732 (E.D. Cal. Dec. 8, 2006)

The Plaintiffs brought suit against the City of Fresno and the California Department of Transportation (CALTRANS) for their alleged policy and practice of confiscating and destroying unhoused persons’ personal property, including essential personal possessions, without adequate notice and in a manner that prevents the retrieval of such personal property prior to destruction. The Plaintiffs argued that the sweeps of temporary shelters violated their federal and state constitutional rights to be free from unreasonable search and seizure, to due process of law and equal protection of the laws, as well as their other rights under California statutory and common law. The Plaintiffs moved for a temporary restraining order and preliminary injunction prohibiting Defendants’ conduct.

The Defendants contended that there were enough beds for unhoused people in the City of Fresno, so they did not need to be present on private or other property within the city; temporary shelters and congregations of unhoused persons were a risk to public health and safety and generated significant Complaints from residents, businesses and property owners; the city provided sufficient advance notice; and the city had no funds or resources to transport or store the property of unhoused persons until it could be reclaimed.

The Court found that Plaintiffs were likely to succeed on the merits of their unlawful seizure claim because the city’s “seizure of homeless people’s personal property without probable cause and the immediate and permanent destruction of such property without a method to reclaim or to assert the owner’s right, title, and interest to recover such personal property violated the Fourth Amendment.” The Court also found that, because the city was seizing “the very necessities of life: shelter, medicine, clothing, identification documents, and personal effects of unique and sentimental value,” the inconsistent and confusing notice of up to a few days was inadequate. There was no post-deprivation remedy or opportunity to reclaim the property because all property was destroyed upon seizure. In addition, the Court held that the balance of hardships weighed heavily in favor of Plaintiffs.

Accordingly, the Court granted Plaintiffs’ motion for preliminary injunction. In June 2008, the Court approved two separate preliminary settlement plans, one between the Plaintiffs and the city and the other between the Plaintiffs and CALTRANS. Under the settlement agreements, the city and CALTRANS agreed to contribute \$400,000 and \$85,000, respectively, to a Cash Fund to distribute cash and cash equivalent to verified members of the Plaintiff class. In addition, the city agreed to contribute \$1,000,000 to a Living Allowance Fund to distribute funds to third parties for the payment of various living expenses on behalf of verified members of the Plaintiff class. The city also agreed to pay Plaintiffs’ attorneys’ fees in the amount of \$750,000 and costs in the amount of \$100,000. Under the settlement agreement with the city, the city was also required to provide written notice to residents of the encampment of any need to vacate an encampment or remove personal property from an encampment.

Any personal property of value collected by the city must be stored for ninety days, during which time the property shall be available to be reclaimed. The city must also serve notice to organizations that assist residents of temporary shelters. Additionally, CALTRANS must follow the legal principles set forth in the preliminary injunction and certain procedures when property is found. In general, CALTRANS employees must inform the owner of the property within a reasonable time and return the property to the owner. When the owner is unknown, depending on the value of the property found, the property must be turned over to the city police or the sheriff’s department, or held for three months. For any property held by CALTRANS, a Lost and Found Report must be kept for twenty-four months. The notice to the Plaintiff class must include a statement encouraging unhoused people in Fresno not to set up camps or otherwise trespass or illegally encroach upon CALTRANS property. In July 2008, the Court approved final settlement of the case.

The Center v. Lingle, No. 04-537 KSC (D. Haw. 2004)

The Center (a nonprofit organization providing services for lesbian, gay, bisexual, transsexual, intersex, and questioning Hawaiians), Waianae Community Outreach (a non-profit organization providing services to the unhoused), and an individual Plaintiff sued the governor and Hawaii's Attorney General to seek an injunction barring the enforcement of a criminal trespass statute. The Plaintiffs alleged that an Amendment to the criminal trespass statute, Hawaii Statute § 708-815, violated the First and Fourteenth Amendments as well as the Hawaii Constitution. The Amendment, passed as Act 50, Session Laws 2004, amended § 708-814(1) to protect public property from trespassers by applying the offense of criminal trespass in the second degree, a petty misdemeanor, to persons who enter or remain unlawfully on any public property after a reasonable warning or request to leave has been given by the owner or lessee of the property.

The representative Plaintiff was allegedly banned from Hawaii public libraries for a year for looking at gay-themed web sites on library computers. The Plaintiffs also contended that the statute has been used to ban unhoused persons from public beaches and public parks and to threaten unhoused persons to leave certain public property immediately. The Plaintiffs alleged that this law lacks standards for determining what speech or conduct was prohibited and failed to provide any procedural safeguards. Therefore, Plaintiffs claimed that the statute violated the First and Fourteenth Amendments of the U.S. Constitution and a provision of the Hawaii Constitution.

The Plaintiffs also argued that the statute was unconstitutionally vague and failed to establish the required minimal guidelines to govern law enforcement. The Plaintiffs also challenged the statute for impermissibly making a distinction based on content, by favoring speech related to union activities. Finally, the Plaintiffs claimed the statute infringed on one's right to move freely. The Plaintiffs' Complaint sought declaratory and permanent injunctive relief, as well as a declaration that the statute was unconstitutional as applied. This lawsuit, combined with strong opposition from other homelessness service providers, sparked the legislature to consider a repeal of Act 50.

The legislature ultimately repealed part of Act 50 on July 8, 2005, including the Amendments made to the offense of criminal trespass in the second degree.

Chlubna v. City of Santa Monica, Case No. CV 09-5046 GW (C.D. Cal. 2009)

A prospective class of unhoused individuals sued the city of Santa Monica in federal Court for criminalization of homelessness in violation of their Eighth Amendment right to be free from cruel and unusual punishment, right to

equal protection, due process, Fourth Amendment right to be free from illegal search and seizure and freedom of movement and statutory protection against discrimination based on disability. The Complaint alleged that, despite lack of adequate space in shelters, Santa Monica in the previous year has undertaken a campaign to criminalize homelessness by selectively enforcing various city Ordinances, including those prohibiting camping in public places, prohibiting sitting or lying in building entrances during certain hours, and prohibiting smoking in public.

The selective enforcement of these Ordinances was seemingly undertaken with the intent to make Santa Monica's unhoused population move to other cities. On October 27, 2009, the Plaintiffs moved for certification of a class consisting of "All current and former disabled unhoused residents of Santa Monica who have been, are, or will be subject to harassment, citation or arrest by the Santa Monica Police Department for camping, sleeping, loitering, smoking in public, trespassing, or any other conduct related to the presence of the individual in a purportedly proscribed area ('presence offenses')." Before the class certification motion was decided, the parties reached a settlement agreement and the case was dismissed on May 24, 2010.

Amster v. City of Tempe, 248 F.3d 1198 (9th Cir. 2001)

The Ninth Circuit upheld a facial challenge against a City of Tempe Ordinance prohibiting individuals from sitting or lying down upon a public sidewalk, which provided: No person shall sit or lie down upon a public sidewalk or upon a blanket, chair, stool, or any other object not permanently affixed upon a public sidewalk or median in the downtown central commercial district during the hours between 7:00 a.m. and 10:00 p.m. on weekdays and between 7:00 a.m. and 1:00 a.m. on Fridays and Saturdays. The Ordinance provided limited exceptions for persons participating in or attending parades, festivals, performances, rallies, demonstrations, or meetings, but required a permitting process for such activities.

Plaintiff Randall Amster ("Amster") organized several demonstrations on the City of Tempe's sidewalks without first obtaining permits pursuant to the Ordinance. Although the city had never enforced the Ordinance during his demonstrations, neither Amster nor any other participant had been arrested or cited by the police. Nevertheless, Amster brought suit to enjoin the city from enforcing the Ordinance, claiming it was facially unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution.

The United States District Court for the District of Arizona enjoined the City of Tempe from enforcing the Ordinance, first finding Amster had standing to sue because of his potential prosecution, though he had not been arrested for violating the Ordinance. The District Court further held that the Ordinance conflicted with First Amendment

rights, finding that the Permitting Provision was not narrowly tailored to its stated goals of regulating sitting to allow free movement along sidewalks and into the commercial establishments in Tempe's downtown district. The District Court denied the City of Tempe's motion for reconsideration of its decision granting Amster's motion for a preliminary injunction.

On appeal, the Ninth Circuit reversed the District Court's decision, finding that the Ordinance regulated conduct (i.e., sitting or lying on a public sidewalk) that was not expressive by itself. The Circuit rejected the facial attack on the Ordinance, finding that the Permitting Provision provides a mechanism by which protestors can engage in conduct that is otherwise criminal. The Circuit stated that the Ordinance "regulates only sitting and lying in certain places at certain times; it does not regulate speech or patently expressive conduct."

Doucette v. City of Santa Monica, 955 F. Supp. 1192 (C.D. Cal. 1997)

In early 1995, a class of unhoused Plaintiffs filed a Complaint alleging that the City of Santa Monica's adoption and discriminatory enforcement of a series of Ordinances to criminalize homelessness violated Plaintiffs' rights under the First and Eighth Amendments. The Plaintiffs also alleged violations of the Fourth Amendment's prohibition on unreasonable searches and seizures and the Fifth Amendment's prohibition of takings without just compensation.

The U.S. District Court for the Central District of California denied Plaintiffs' motion for summary judgment on their claim that the anti-solicitation law violated the First Amendment, and granted Defendants' motion for summary judgment on that claim. The Court held that the city's Ordinance prohibiting "abusive solicitation" was a valid place and manner restriction, finding that it was content-neutral, narrowly tailored to meet a significant government interest, left open ample alternative channels of communication, and did not allow law enforcement officers excessive discretion in enforcement.

The Court concluded that some of the manner restrictions imposed by the Ordinance only affected conduct, not speech, and that the remaining provisions that did implicate the First Amendment were valid under the above three factor analysis. In February 1997, the Court granted summary judgment in favor of the Defendants regarding the two remaining Ordinances. The Court held that the Plaintiffs lacked standing to challenge one of the Ordinances because it was no longer being enforced.

Regarding the second Ordinance, which included solicitation restrictions, the Court indicated that: (1) there was no evidence that the Ordinance discriminated against speakers based on the content of their speech; (2) the Ordinance was narrowly tailored so as to achieve

the significant government interest of preventing "intimidating, threatening, or harassing" conduct; (3) sufficient "alternative channels" for communicating would still be available; and (4) the Ordinance did not place excessive discretion in the hands of law enforcement officials. Therefore, the Court granted summary judgment for the Defendants regarding the second Ordinance.

Joyce v. City and County of San Francisco, 87 F.3d 1320 (9th Cir. 1996)

In 1993, Plaintiffs filed suit against the City of San Francisco challenging the "Matrix" program, San Francisco's official policy of vigorously enforcing a set of Ordinances against unhoused people. The U.S. District Court for the Northern District of California denied Plaintiffs' motion for a preliminary injunction on the ground that the proposed injunction lacked specificity, would lead to enforcement problems, and that Plaintiffs were unlikely to succeed on the merits. The Court rejected Plaintiffs' claim that the Matrix program punished them for their status in violation of the Eighth Amendment, finding that homelessness is not a status, and that the Matrix program targeted particular behavior.

The Court also rejected Plaintiffs' claims alleging violations of their right to equal protection, due process, and their right to travel, as well as Plaintiffs' vagueness and overbreadth challenges. In 1995, the District Court granted Defendants' motion for summary judgment. On appeal, the U.S. Court of Appeals for the Ninth Circuit held, over Plaintiffs' objections, that the case was moot because, under its new mayoral administration, the city had eliminated the official Matrix policy, dismissed numerous citations and warrants issued to unhoused people under Matrix, and was unlikely to resume the program. The Law Center filed an amicus brief on behalf of Plaintiff's appellants.

Davidson v. City of Tucson, 924 F. Supp. 989 (D. Ariz. 1996)

A group of unhoused persons living in an encampment at the base of A-Mountain in Tucson, Arizona filed a class action suit in the U.S. District Court in the District of Arizona against the city of Tucson, arguing that the city's new resolution violated their rights under the Eighth Amendment and Fourteenth Amendment. The city of Tucson's new resolution provided that persons illegally camping on city property were to be informed of the resources available for finding employment and housing, and be given at least 72 hours' notice to vacate such city property before police take enforcement actions for violation of state trespass laws.

Plaintiffs moved for temporary restraining order, which was treated as motion for preliminary injunction. The District Court denied preliminary injunction, holding that the Plaintiffs could not prove that they were likely to prevail

on the merits of their claims. Specifically, the Court held that Plaintiffs' Eighth Amendment claim was not likely to succeed on the merits, as the Eighth Amendment protection against cruel and unusual punishment can only be invoked by persons convicted of crimes. As no named Plaintiff had been convicted of trespass for illegal camping on city property, Plaintiffs lacked standing to raise this argument.

The Court also found that Plaintiffs' equal protection argument that Defendants discriminated against the unhoused class by selectively enforcing criminal trespass laws was not likely to succeed on its merits because no Court had ever held the unhoused to be a suspect class. The Court held that, under the rational basis standard, the City's concerns about crime, sanitation, aesthetics and safety would justify Defendants' actions. The Court also rejected Plaintiffs' argument that Defendants violated Plaintiffs' fundamental right to travel, as Defendants' actions did not impede interstate travel and because Plaintiffs were not seeking to travel anywhere.

Stone v. Agnos, 960 F.2d 893 (9th Cir. 1992)

An unhoused man arrested for lodging in public alleged that his arrest violated his First Amendment rights and the destruction of his property following his arrest violated his Fourteenth Amendment right to due process. The Court held that because sleeping is not protected under the First Amendment, there was no violation. The Court also rejected the Plaintiff's due process claim on the ground that he did not show that the police had acted unreasonably.

Lee v. California Department of Transportation, 1992 U.S. Dist. LEXIS 21916, No. 3:92- CV-03131-SBA (N.D. Cal. Oct. 26, 1992)

A group of unhoused individuals, who were arrested for illegally lodging on state property, brought a class action against the California Department of Transportation (CALTRANS) and local and state police departments, alleging that their essential personal belongings were intentionally confiscated and destroyed without even rudimentary process or compensation. The Plaintiffs' §1983 claims alleged denial of due process and equal protection. In addition, Plaintiffs alleged that Defendants violated state laws relating to handling of lost property and establishment of tort liability.

The California State Police and its Chief moved to dismiss Plaintiffs' Complaint, and thereafter reached a settlement with Plaintiffs. The State Police agreed not to destroy certain items of personal property of unhoused persons, including eyeglasses, books and blankets, without providing a reasonable opportunity to recover the property. The City of Oakland Defendants reached a similar settlement with Plaintiffs. CALTRANS and its director also moved to dismiss the case. CALTRANS

argued that the Ninth Circuit's ruling in *Stone v. Agnos* required dismissal of Plaintiffs' §1983 claim because *Stone* held that the disposal of property in connection with arrests for illegal lodging does not violate due process.

The Plaintiffs argued in response that *Stone* applies only to negligent confiscation of property, not the intentional destruction that was at issue in this case. The Court granted in part and denied in part Defendants' motion to dismiss. Because §1983 only applies to "persons," the Court dismissed the §1983 claims against CALTRANS. As for the director of CALTRANS, the Court rejected Defendants' argument based on *Stone*, because the motion in *Stone* was for summary judgment, where Plaintiffs had to put forward evidence that the destruction of property was deliberate. In the present motion to dismiss, however, the Court must accept Plaintiffs' allegations (that the destruction of property was planned and deliberate) as true. Therefore, the Court denied Defendants' motion to dismiss the §1983 claims against the director of CALTRANS.

In May 1993, CALTRANS, its director, and Plaintiffs reached a settlement. Under the agreement, CALTRANS must conspicuously post, in Spanish and in English, the location where property is found on a state right of way for forty-eight hours before the property (except immediate hazards) is removed. The posting must include the date and approximate time of the expected removal of the property; an advisement that property is subject to confiscation, and possible disposal, if not removed; a brief explanation of how to reclaim confiscated property; and the Department of Transportation public information telephone number. CALTRANS must retain items confiscated for twenty days, but its employees "will not be required to sift through piles of garbage to find items of value" or "spend inordinate time or resources collecting or storing property." Possessions will be released to persons who can identify them. Lastly, CALTRANS will not interfere with any law enforcement agencies' handling of arrestees' personal property in connection with arrests of unhoused persons on state rights of ways.

TENTH CIRCUIT

Denver Homeless Out Loud v. Denver, Colorado, 514 F. Supp. 3d 1278 (D. Colo. Jan. 25, 2021)

Plaintiffs, non-profit organization and several people experiencing homelessness, filed a putative class action against the City and County of Denver and several other Defendants including government officials and law enforcement officers alleging that during the Covid-19 pandemic Defendants swept numerous encampments around Denver with either no or insufficient notice, and seized or disposed of unhoused individuals' property without due process. Plaintiffs sought a preliminary injunction and asserted numerous claims including *Monell* liability under 42 U.S.C. § 1983, Fourteenth Amendment

(substantive and procedural due process), and Fourth Amendment.

Regarding Plaintiffs' Fourteenth Amendment procedural due process claim, the Court found that Plaintiffs established substantial likelihood of success on the merits. The Court explained Plaintiffs only received notice of the sweeps on the morning they occurred which carries a significant risk that unhoused individuals have been and will be erroneously deprived of property. While Denver has a significant interest in maintaining the public health and safety, this interest does not justify providing written notice no earlier than the morning of the sweeps. By providing notice of the sweeps the morning they occurred, Plaintiffs effectively received no advanced notice of the sweeps.

The Court also found that Plaintiffs established a substantial likelihood of success on the merits of their *Monell* claim against Denver. The Court explained that Denver had a municipal custom, policy or practice of imposing area restrictions on encampments with effectively no advance written notice which violated Plaintiffs' fourteenth Amendment procedural due process rights.

Regarding Plaintiffs' Fourth Amendment claim, however, the Court found that Plaintiffs did not establish a substantial likelihood of success on the merits. The Court acknowledged that Denver has a legitimate interest in removing property that contributes to unsafe and hazardous conditions. Similarly, the Court found that Plaintiffs did not establish a substantial likelihood of success on the merits of their Fourteenth Amendment substantive due process claim. Plaintiffs relied on the danger creation doctrine to argue that displacement from encampments increases their risk of exposure to Covid-19.

Applying the remaining elements of the preliminary injunction test, balance of the harms and public interest, the Court held that a preliminary injunction requiring seven days' notice before an encampment sweep was warranted to protect Plaintiffs procedural due process rights. The injunction provided for an exception to this seven days' notice requirement when the government can adequately articulate why protection of the public health and safety requires advance notice of a shorter duration.

Lyll v. City of Denver, No. 16-CV-2155-WJM-CBS (D. Colo. 2019)

Unhoused individuals brought suit against the City and sought to enjoin the City from conducting "mass sweeps" of encampments. Plaintiffs alleged that during these "mass sweeps," the City (1) failed to provide notice that an area would be subjected to a sweep, (2) had a practice of only allowing affected individuals to take those possession that they could carry, and (3) failed to discriminate between valuable personal items that should

be preserved, and trash or hazardous materials that should be discarded. The federal District Court denied cross-motions for summary judgment because there was a genuine issue of material fact as to whether the City of Denver had policy, custom, or practice of carrying out the alleged mass sweeps in the manner so described.

City and Cty. of Denver v. Holm, No. 17-CV-31066 (D. Colo. 2017)

On October 14, 2016, a Denver police officer issued Defendant Mr. Holm a ticket for smoking marijuana in the park. He subsequently issued Mr. Holm a "suspension notice" he believed was authorized by Parks Directive 2016-1, which provides officers authority to banish anyone from public parks whom they suspect engaged in illegal activity. After being in the park again after the suspension order, Mr. Holm was issued a Trespass charge.

On behalf of Mr. Holm, the ACLU of Colorado filed a motion to dismiss all charges against Mr. Holm based on the argument that the officer did not have the legal authority to issue the suspension notice and subsequent trespass charge. In the motion to dismiss, the ACLU argued that Parks Directive 2016-1 violated Procedural Due Process as well as Mr. Holm's fundamental rights to use streets and facilities guaranteed by the Colorado Constitution (Article II, Section 3) as well as by the substantive due process clause of the Fourteenth Amendment to the U.S. Constitution. In addition to the Motion to Dismiss, the ACLU of Colorado also sent a letter to the City Attorney and to the Executive Director of Denver Parks and Recreation urging them to suspend enforcement of Directive 2016-1 and revoke all suspension notices in effect based on the directive's unconstitutionality.

The Denver County Court judge granted Defendant's motion to dismiss, finding that the risk of erroneous deprivation of one's right to utilize public property was too high to justify enforcement of the Directive such that its enforcement violated due process. On appeal, the District Court affirmed the order granting Mr. Holm's motion to dismiss, finding that the Directive failed to provide sufficient process and any related criminal charges could therefore not be sustained.

ELEVENTH CIRCUIT

McArdle v. City of Ocala, 418 F. Supp. 3d 1004, 1005 (M.D. Fla. 2019)

A group of three unhoused Plaintiffs, each arrested for violating the law, challenged the constitutionality of a City of Ocala "open lodging" Ordinance, which prohibited sleeping anywhere in the City where there are other indicia of lodging. The Plaintiffs alleged that the law effectively leaves unhoused people with no place to sleep since the law applies to both public and private property

even when shelters are closed or at capacity. Because sleep is necessary for survival, Plaintiffs alleged that they have no opportunity to comply with the Ordinance.

The City's motion to dismiss the case was denied because the Court distinguished *Joel v. City of Orlando*, which is an Eleventh Circuit case with a similar Ordinance. The Court in *Joel* highlighted the fact that the Ordinance at issue did not apply unless the homeless residents had alternative places to sleep. Therefore, the Court found that the Complaint sufficiently plead that the lodging Ordinance was vague and violative of the substantive due process and equal protection clauses of the Constitution.

In a later ruling, 519 F. Supp. 3d 1045 (M.D. Fla. Feb. 8, 2021) the Court ruled that the Ordinance violated the Eighth Amendment and Fourteenth Amendment procedural due process and granted summary judgment to the Plaintiffs on those counts. The Court also found there existing genuine issues of material facts as to the equal protection, substantive due process, and state constitutional claims. The Court ruled, however, that the Ordinance was not void for vagueness.

Stone v. Ft. Lauderdale, No. 0:17-CV-61211 (S.D. Fla., June 19, 2017)

Sixteen individual Plaintiffs filed a Complaint in the United States District Court in the Southern District of Florida against the City of Fort Lauderdale ("City") for declaratory and injunctive relief and for damages.

Plaintiffs, who resided in the encampment adjacent to Stranahan Park in the City, alleged that the City intentionally and indiscriminately raided the encampment and unlawfully seized and destroyed their property. They alleged that the City conducted the raid without notice and in a manner that prevented Plaintiffs from retrieving their personal property to avoid its destruction. According to the Complaint, the City arbitrarily decided to allow only individuals present at the time of the raid to save and store personal possessions they were able to retrieve within a few minutes. For those who were not present at the time of the raid or who arrived while the raid was in progress, the City provided no means for Plaintiffs to claim or retrieve their personal possessions but instead the City immediately and summarily destroyed Plaintiffs' property.

Plaintiffs alleged that the City's intentional taking and destruction of their personal property violated their (x) constitutional right to be free from unreasonable seizure under the Fourth Amendment, and (y) due process rights under the Fourteenth Amendment.

To support their constitutional claims, Plaintiffs argued that the policy that the City followed in closing the encampment was a "departure from its usual procedures" that are codified into City Code Section 16-83, "Outdoor storage of public property." Under the Code, the City

was required to post written notice in the area to be cleaned at least thirty-six (36) hours in advance of the cleaning. The Complaint alleged that the City failed to provide such advance notice.

Although the Code provided an exception to the advance notice requirement if "an officer determines personal property stored on public property is a threat to the health, safety or welfare of the public," the Complaint claimed that even if there was a threat to health, safety or welfare, the City "had ample time to provide notice and to safeguard personal property of unhoused individuals living at the encampment." The Complaint also argued that the Code required the City to properly store the property, which the City failed to do. According to the Complaint, the City's actions were taken "under color of law" as they were authorized by the City manager who acted under the consent of the City's Mayor.

The Complaint also provided specific factual details about the individual Plaintiffs and their experience during the City's raid and seizure. The case was ultimately dismissed pursuant to a settlement agreement.

Cross v. Sarasota, No. 15-CV-02364-EAK-JSS (M.D. Fla., June 21, 2016)

A group of unhoused men challenged two Sarasota County Ordinances banning sleeping outdoors and panhandling in certain public locations. The Plaintiffs' Complaint contended that the lodging Ordinance constituted cruel and unusual punishment and was interpreted overly broadly. Sarasota only had one shelter, a Salvation Army shelter which charged a fee and was often overcrowded.

Plaintiffs alleged that the shelter was not adequate for Sarasota's large unhoused population. Additionally, the Plaintiffs challenged Sarasota's panhandling statute, which restricted panhandling in public spaces, as an unconstitutional restriction on free speech. The Complaint argued that the Ordinance restricted a category of speech based on geographical location but did not restrict other types of speech in the same geographical location. Plaintiffs also asserted that the panhandling Ordinance was content-based because it drew distinctions based on the message of a particular speaker.

Plaintiffs requested injunctive relief against the enforcement of the Ordinances.

Following the lawsuit, Sarasota amended its panhandling Ordinance and the lawsuit was later settled.

Gotshall v. Titusville, No. 6:13-CV-00369 (M.D. Fla., Mar. 4, 2013)

Plaintiffs, a group of unhoused individuals, filed a Complaint alleging that the City of Titusville, Florida had a policy of unlawfully destroying their personal

property without warning in violation of Plaintiffs' Fourth Amendment constitutional rights to be free from unreasonable seizure and to due process of law under the Fourteenth Amendment of the U.S. Constitution.

In 2011, the City of Titusville enacted a plan to dismantle and remove every encampment in the city. A month later, when Mr. Gotshall and several other Plaintiffs were away from their campsites, the city police removed the camps and destroyed all personal belongings, including such items as family heirlooms, World War II flags, and birth certificates. The Plaintiffs were camped on properties owned by private individuals, with permission, and were not notified of the raid. No attempt was made by the city to protect their personal property and no procedures were implemented for the Plaintiffs to claim their property once seized. Instead, as the Complaint alleged, the city irrevocably seized the Plaintiffs' property by destroying it.

Plaintiffs alleged that they had clearly established possessory interest in their personal property, and that their interest was reasonable and legitimate. Plaintiffs claimed that they had a right to be free from unreasonable seizures under the Fourth Amendment. By seizing and completely destroying Plaintiffs' property, the city meaningfully interfered with Plaintiffs' possessory interests and seized Plaintiffs' property in violation of the Fourth Amendment, and destroyed such property without constitutionally adequate due process required by the Fourteenth Amendment.

The City of Titusville filed a motion to dismiss the Complaint. Upon receiving no response from Plaintiff to the motion to dismiss in a timely manner, the Court dismissed the case.

Catron v. City of St. Petersburg, 658 F.3d 1260 (11th Cir. 2011)

Plaintiffs filed a Complaint against the City of St. Petersburg under § 1983 alleging violations of the First, Fourth, Eighth, and Fourteenth Amendments of the U.S. Constitution and Article I, Section IX of the Florida Constitution, based on the city's "anti-homeless policies." The policies included the enforcement of Ordinances that ban trespassing in public spaces, storing belongings on public property, sleeping in or on a right-of-way, and public urination/defecation.

The Plaintiffs also alleged that the city had a policy of stopping unhoused people and asking for identification, searching their possessions, and directing them to vacate public areas. The Plaintiffs sought injunctive and declaratory relief. The Defendants filed a motion to dismiss, which was granted.

The Plaintiffs appealed to the Eleventh Circuit. The Court vacated and remanded, finding that Plaintiffs had stated a procedural due process claim under the U.S. Constitution and a right to travel claim under the Florida Constitution

because the as presently written and allegedly enforced the Ordinance lacked constitutionally adequate procedural protections. However, facing a hostile judge in the District Court, Plaintiffs voluntarily dismissed their case. The Law Center served as co-counsel on this case, along with Southern Legal Counsel and Florida Institutional Legal Services.

Acevedo v. City of Jacksonville Beach, No. 3:03-CV-507-J-21HTS (M.D. Fla. 2003)

Roberto Acevedo, an unhoused man in the City of Jacksonville Beach, Florida (the "City"), Richard Fargo and Larnette Jones, both individuals living in homes in the City, and Emergency Services Homeless Coalition of Jacksonville, Inc., a non-profit corporation formed to assess the needs and advocate on behalf of unhoused persons in the City (collectively, "Plaintiff"), filed a Complaint in United States District Court, Middle District of Florida, Jacksonville District, seeking declaratory and injunctive relief, damages, attorney's fees and costs against the City ("Defendant") to prevent the deprivation of Plaintiff's rights, privileges and immunities secured by the First, Fourth and Fourteenth Amendments to the United States Constitution.

The City enacted an Ordinance which prohibited sleeping, lodging or camping on certain public places and made it unlawful to camp, occupy camp facilities or use camp paraphernalia in any public park or street, any public sidewalk, any public parking lot or public area, and any public beach in the City. Defendants customarily arrested unhoused people in accordance with this Ordinance and destroyed or seized their personal property, and Plaintiffs alleged that they had either been directly impacted or expected to be directly impacted by the enforcement of the Ordinance.

The parties voluntarily dismissed the case because the Plaintiffs were not able to continue with the suit. Plaintiff's counsel reported that they have not heard of police harassment since the suit was filed and were continuing to monitor the situation.

Joel v. City of Orlando, 232 F.3d 1353 (11th Cir. 2000), cert. denied, 149 L.Ed.2d 480 (2001)

James Joel, an unhoused person, filed suit against the City of Orlando, arguing that the city Ordinance prohibiting "camping" on public property violated his rights under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. City of Orlando police officers arrested Joel for violating Section 43.52 of the city's code for "camping" on public property. "Camping" under the code was defined to include "sleeping out-of- doors."

The District Court granted summary judgment in favor of the city, and Joel appealed to the Circuit Court. The Circuit Court affirmed the District Court's decision,

holding that Joel had failed to prove that the Ordinance was enacted for the purpose of discriminating against unhoused people. Considering the equal protection claim, the Court held that unhoused persons are not a suspect class and that sleeping outdoors is not a fundamental right. Therefore, the Court used the rational basis test and held that the city was pursuing a legitimate governmental purpose by promoting aesthetics, sanitation, public health, and safety. Further, it rejected Joel's argument that even if the city met the rational basis test standard, the code nonetheless violated equal protection because it was enacted to "encourage discriminatory, oppressive and arbitrary enforcement" against unhoused people. The Court found no such purpose behind the code.

Richardson v. City of Atlanta, No. 97-CV-2468 (N.D. Ga. Aug. 28, 1997)

Nine unhoused citizens of the City of Atlanta and two members of Food Not Bombs (an organization that feeds unhoused citizens) (collectively, the "Plaintiffs") filed a class action for declaratory and injunctive relief and damages against the City of Atlanta, Georgia in United States District Court for the Northern District of Georgia challenging the constitutionality of an "Urban Camping" Atlanta City Code which made it illegal "to sleep, to lie down, to reside or to store personal property in any park owned by the City of Atlanta" and which made persons criminals if they "use any public place, including city parks and sidewalks, for living accommodations purposes or camping...". The city Ordinance had been in effect more than six months with over 200 arrests and anyone found guilty of a crime under it could be imprisoned up to six months.

Plaintiffs alleged that the "Urban Camping" Ordinance was punishment of Plaintiffs' status as unhoused persons and, as such, was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. In addition, Plaintiffs alleged that the police specifically targeted unhoused people (and did not and would not arrest housed people) when enforcing the Ordinance in further violation of the Fourteenth Amendment to the U.S. Constitution. Further, Plaintiffs also contended that the police were violating the rights of unhoused people by either leaving or disposing of their belongings after they had been arrested.

The lawsuit eventually settled and Plaintiffs received damages. As part of the settlement, the City of Atlanta revised the Ordinance to significantly limit the scope and police officers in Atlanta must also now designate on arrest records the housing status of all detainees, in order to effectively track patterns of discriminatory arrests on unhoused people.

Pottinger v. City of Miami, 76 F.3d 1154 (11th Cir. 1996)

A class of unhoused Plaintiffs challenged Miami's policy of arresting unhoused people for conduct such as sleeping, eating, and congregating in public, and of confiscating and destroying unhoused people's belongings. At trial, the U.S. District Court for the Southern District of Florida found that some 6000 people in Miami were unhoused, that there were fewer than 700 shelter spaces, and that Plaintiffs were unhoused involuntarily.

The Court found that the criminalization of essential acts performed in public when there was no alternative violated the Plaintiffs' rights to travel and due process under the Fourteenth Amendment, and right to be free from cruel and unusual punishment under the Eighth Amendment. In addition, the Court found that the city's actions violated Plaintiffs' rights under the Fourth Amendment. The Court ordered the city to establish "safe zones" where unhoused people could pursue harmless daily activities without fear of arrest.

On appeal, the Eleventh Circuit remanded the case to the District Court for the limited purpose of clarifying the injunction and considering whether it should be modified, since the "safe zones" were not operating as the District Court envisioned. On remand, the District Court modified its injunction, enjoining the city from arresting unhoused persons until the city established two safe zones. In February 1996, the Eleventh Circuit referred the case for mediation.

The parties negotiated a settlement during the Court-ordered mediation process. The city agreed to implement various forms of training for its law enforcement officers for the purpose of sensitizing them to the unique struggle and circumstances of unhoused persons and to ensure that their legal rights shall be fully respected. Additionally, the city instituted a law enforcement protocol to help protect the rights of unhoused people who have encounters with police officers. The city also agreed to set up a compensation fund of \$600,000 to compensate aggrieved members of the community. The Law Center filed an amicus brief on behalf of Plaintiffs appellees.

D'Aguanno v. Gallagher, 50 F.3d 877 (11th Cir. 1995)

Four unhoused individuals ("Plaintiffs") sued the county sheriff and deputy sheriffs ("Defendants") for alleged violations of the United States Constitution and the Florida Constitution. For the alleged violations of the United States Constitution, the unhoused individuals invoked 42 U.S.C. § 1983 and sued the county sheriff and deputy sheriffs in their individual capacities.

The unhoused individuals lived in shelters they built in a "homeless campsite," which was located on undeveloped, private property in Orange County, Florida. The owner

of the property did not know these unhoused individuals were living on the property and never gave permission or consent for any person to live on or use the property. Ultimately, the deputy sheriffs entered the campsite and removed the shelters and personal property of the unhoused individuals. The unhoused individuals then filed suit seeking declaratory relief, injunctive relief, monetary damages, attorney's fees, and litigation costs on the basis that Defendants did not have legal authority to force them to leave. The Defendants' argued that their act of removing the shelters and personal belongings from the property was taken based on their belief that Plaintiffs were trespassing on private property.

In relevant part, the District Court granted Defendants' motion for summary judgment concluding that Defendants were entitled to qualified immunity on Plaintiffs' claims for violations of Plaintiffs' rights to peaceable assembly, freedom of association, due process of law, and to be free from unreasonable searches and seizures under both the federal and state constitutions.

On appeal, the Eleventh Circuit affirmed in part and vacated in part. The Court explained: (1) qualified immunity is a defense only to federal claims, not state law claims; and (2) qualified immunity is a defense only to claims for monetary relief, not claims for injunctive or declaratory relief. Accordingly, qualified immunity only applies to federal claims for monetary relief. To the extent the District Court's decision was contrary to these principles, the decision was vacated and remanded. The Court then examined whether the District Court properly concluded that Defendants were entitled to qualified immunity on the federal claims for monetary damages.

Plaintiffs' claims for monetary damages were based on: (1) First Amendment right to peaceable assembly and freedom of association; (2) Fourth Amendment right to privacy and the right to be secure from unreasonable searches and seizures; and (3) Fifth Amendment right to due process. To overcome Defendants' qualified immunity defense, the Court explained, Plaintiffs must establish that Defendants' conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known.

Applying this standard, the Court affirmed the District Court and held that Defendants were entitled to qualified immunity because Plaintiffs failed to show Defendants violated a clearly established federal law of which a reasonable officer would have known. In reaching this conclusion, the Court explained that Plaintiffs cited no authority recognizing: (1) people have a right to pursue such ends on the property of another without the owner's permission; (2) a person's right to privacy when he lives or stores his belongings on private property *without* the landowner's permission; or (3) that unhoused persons retain a property interest in the shelters they erect or

whether unhoused persons retain a property interest in shelters erected and property stored, without permission, on private property. Rather, Plaintiffs merely cited precedent which established *general* constitutional rights, which the Court explained is insufficient to overcome a qualified immunity defense.

The Court also held that for qualified immunity purposes, the term "damages" includes costs, expenses of litigation, and attorneys' fees claimed by a Plaintiff against a Defendant in the Defendant's personal or individual capacity. As such, the award of costs and fees, even in actions for injunctive and declaratory relief, are barred when the Defendant's conduct meets the objective good faith standard encompassed by the qualified immunity doctrine.

Church v. City of Huntsville, 30 F.3d 1332 (11th Cir. 1994)

Joe Church, Gregory Jacobs, Michael Dooly and Frank Chisom filed a class action suit against the City of Huntsville on behalf of over 800 unhoused citizens. The City of Huntsville supervised the removal of unhoused individuals from their living quarters below the state highway bridges. The removal caused an influx of unhoused citizens to inadequate shelters. The situation was exacerbated by zoning and building code Ordinances that shut down private shelters in Huntsville. Additionally, unhoused individuals were harassed and occasionally taken beyond city limits and abandoned by police, as well as ordered out of the city by government employees.

Plaintiffs alleged that the city had deprived them of various constitutional rights as part of a concerted effort to remove them from Huntsville. Specifically, Plaintiffs argued that the city's actions violated their Fourth Amendment, Eighth Amendment, and Fourteenth Amendment Equal Protection rights

The U.S. District Court for the Northern District of Alabama found that while Huntsville was under no constitutional duty to address homelessness, the city is under a constitutional duty to refrain from discriminating against unhoused people solely because of their status. The Court ordered that Huntsville and its employees be preliminarily enjoined from 1) implementing a policy of removing class members from the city, 2) harassing class members solely because of their unhoused status, and 3) using the zoning or building code Ordinances to shut down private shelters. Defendants appealed.

On appeal, the Eleventh Circuit held that the Plaintiffs lacked standing to seek to enjoin Huntsville's use of its building code and zoning Ordinances to close shelters, because they failed to show that any Plaintiff faced a real danger of losing their current shelter due to the enforcement of building code or zoning Ordinances. The Court further held while the Plaintiffs had standing

regarding the rest of the Complaint, they ultimately failed to show a substantial likelihood that a formal policy or custom resulted in the loss of their constitutional rights. The preliminary injunction was vacated, and the case was remanded to the District Court.

Following the decision, the Defendants moved for summary judgment. The District Court held that the burden of proof required by the Eleventh Circuit was insurmountable, as the Plaintiffs needed to prove the existence of an Ordinance requiring their expulsion from Huntsville. The Court found that even if the Plaintiffs could prove that they were removed pursuant to a policy, such an action was not indicative of a policy intended to violate the rights of unhoused citizens. Judgment was granted for the City of Huntsville.

DISTRICT OF COLUMBIA CIRCUIT

Proctor v. D.C., 531 F. Supp. 3d 49 (D.D.C. 2021)

Plaintiffs are current and former unhoused individuals who brought action under § 1983 against District of Columbia, alleging that District's protocol for clearing encampments violated Fourth and Fifth Amendments. The parties cross-moved for summary judgment. The Court, held, that given the record created by the Plaintiffs, the Plaintiffs could not show any injury from the fear from the District's clearing policy. Plaintiffs argued that the risk of their feared injury is higher because they "cannot always be present at the time of a scheduled clearing because they might need to step away from their tents to obtain food, seek medical attention, [or] use or access other services," however, the Court did not find the loss of property imminent.

The Court also held that although all three Plaintiffs experienced multiple District clearings, only one Plaintiff claims to have lost wanted property on one occasion. But the undisputed record shows that the District complied with the Fourth Amendment for that clearing because it stored her belongings. The evidence also shows that this Plaintiff had actual notice of the clearing before it took place, which the Court held satisfied the Fifth Amendment.

The Court further held that none of the Plaintiffs had standing to seek declaratory and injunctive relief against the District's current clearing practices.

The Court recognized that Plaintiffs had an interest in protecting their unabandoned property at these encampments, but ultimately held that the District had an equally salient interest in ensuring the health, safety, and well-being of all City residents, including the unhoused.

The Court found that the undisputed record showed that the only Plaintiff to have lost her wanted, unattended property during a clearing did not suffer a constitutional violation, but even if she had, the Court emphasized that the evidence did not support a custom, policy, or practice

to impose liability on the District for that violation. The Court thus held that the District was entitled to summary judgment on Plaintiffs' constitutional challenges to its clearing practices.

STATE COURT CASES

Alaska

Engle v. Municipality of Anchorage, Case No. 3AN-10-7047CI (Alaska Super. Ct. filed Apr. 28, 2010)

A class of unhoused people sued the City of Anchorage in state Court alleging that an Ordinance governing the abatement of encampments violated procedural due process and equal protection rights, and constituted an unreasonable search and seizure. The Ordinance permitted city officials to clean up or "abate" illegal encampments after providing residents of the camps with twelve hours notice. After notice was provided, individuals remaining in the camps at the time of the planned abatement were given 20 minutes to gather their belongings and leave the encampment; any remaining property was considered abandoned.

The judge ruled that the Ordinance violated procedural due process because it did not require the city to retain possessions found at the campsite for 10 days for campers to recover. The judge held that any items worth more than \$50 must be held for at least ten days to provide sufficient due process. Accordingly, the Court granted summary judgment for the Plaintiffs.

California

Sanchez v. CALTRANS, No. RG16842117 (Alameda Cty. Sup. Ct., filed Dec. 13, 2016)

On December 13, 2016, Plaintiffs filed a class action lawsuit on behalf of unhoused Californians seeking a permanent injunction against the California Department of Transportation ("CALTRANS"), CALTRANS Director Malcolm Dougherty, and Does 1-50 (together, the "Defendants") to stop the illegal practices of taking and destroying unhoused individuals' property in violation of the United States and California State Constitutions, and California statutory and common law. The named Plaintiffs included: (i) Kimberlee Sanchez, James Leone, Scott Russell, Christopher Craner, and Patricia Moore, on behalf of themselves and all others similarly situated (the "Displaced Plaintiffs"), (ii) Homeless Action Center ("HAC"), (iii) Western Regional Advocacy Project ("WRAP") and (iv) Susan Halpern and Natalie Leimkuhler, as California tax payers (the "CA Taxpayers", and collectively with the Displaced Plaintiffs, HAC and WRAP, the "Plaintiffs").

Between December 2014 and October 2019, the Defendants allegedly engaged in regular "sweeps" of areas where unhoused individuals lived to intentionally

and indiscriminately take and destroy these individuals' property, including clothing, medication, cooking utensils, tents and family heirlooms. The Plaintiffs alleged that CALTRANS routinely failed to give proper notice before raiding encampments—refusing the Displaced Plaintiffs an opportunity to move their belongings before destroying them in garbage compactors—and provided no means to reclaim or recover such possessions, even if they had noticeable value.

Notably, CALTRANS had been sued at least two additional times for committing the same types of violations, and in both cases, CALTRANS agreed to stop seizing and destroying unhoused individuals' personal property for a specific period of years and paid money into a settlement fund for such individuals. After those settlements expired, however, the unlawful sweeps returned. As a result, the displaced Plaintiffs sought a statewide permanent injunction to restrain the Defendants from continuing or repeating such practices.

Particularly, Plaintiffs alleged that the taking and destruction of property violated unhoused individuals' state and federal constitutional rights to be free from unreasonable seizures and/or deprivation of property without due process of law. Additional causes of action include, but are not limited to, violations of rights under the California Civil Code for loss and return of property and interference by threat, intimidation or coercion as well as other statutory and common-law rules for conversion, trespass to chattels and negligent infliction of emotion distress. Plaintiffs further claimed that the taking and destruction violated the Defendants' own internal policies against illegal encampment removals, which required "notice to vacate" signs at least seventy-two (72) hours prior to any clean up and dictate that prior to a sweep, all individuals must be allowed to remove their possessions.

Along with the Displaced Plaintiffs, the CA Taxpayers brought suit as citizens and taxpayers of Alameda County and the State of California to prevent further illegal and unconstitutional expenditure of state funds, seeking to permanently enjoin the CALTRANS activities throughout California and a declaration from CALTRANS that the activities violate the law. Similarly, HAC and WRAP, both of which are non-profit organizations that work on behalf of people experiencing homelessness in California, requested injunctive and declaratory relief to protect the rights of the unhoused.

In addition to any injunctive and declaratory relief, Plaintiffs sought the return of any taken property, damages in the amount according to proof, but in no event less than \$4,000 per incident experienced by a class member, and punitive and exemplary damages. Plaintiffs demanded a jury trial.

In 2019, Plaintiffs secured a settlement, which included a \$1.3 million fund to compensate people whose property

had been unlawfully seized, a \$700,000 grant to a local nonprofit agency to fund a position to assist unhoused persons, reforms to CALTRANS' sweeps policies, and attorneys' fees. The settlement was approved by the Alameda County Superior Court in July 2020.

Allen v. City of Sacramento, 183 Cal.Rptr.3d 654, 234 Cal.App.4th 41 (2015)

This case arose after a private property owner allowed twenty unhoused individuals and two people providing services to the unhoused to camp on a vacated lot that he owned in an industrial area of the City of Sacramento. City police informed the unhoused individuals that camping in the lot violated a city Ordinance prohibiting extended camping on public or private property without a city permit. When the individuals continued to camp on the lot, the police cited them on two separate occasions and eventually removed their camping supplies. When the individuals continued to bring in other camping supplies and camp in the lot, they were arrested for refusing to comply with the no-camping Ordinance.

The unhoused individuals sued the city, claiming that the camping Ordinance was unconstitutional on its face and as applied to the unhoused. Specifically, the Plaintiffs argued that the Ordinance illegally discriminated against the unhoused, criminalized the status of homelessness, was selectively enforced by police against the unhoused, interfered with the freedom to travel, deprived the unhoused of due process, contained terms that were constitutionally vague, and deprived unhoused individuals of equal protection.

The Court of Appeals in the Third District of California affirmed the Trial Court's decision to dismiss all causes of action except for the equal protection argument. Specifically, the Court rejected Plaintiffs' arguments that the Ordinance was unconstitutionally vague as the Ordinance clearly applied to the Plaintiffs' conduct. Further, the Court found that the Ordinance did not punish the state of being homelessness but rather the act of camping and therefore did not violate the Eighth Amendment's prohibition against cruel and unusual punishment, because "Sacramento's Ordinance punishes the acts of camping, occupying camp facilities, and using camp paraphernalia, not homelessness."

Finally, the Court found that the Ordinance did not violate the right to travel, because it only indirectly affected the Plaintiffs' right to travel, which was not constitutionally impermissible under the circumstances. However, the Court held that Plaintiff's allegations were sufficient to state a cause of action for declaratory relief for a violation of the equal protection standards of the Fourteenth Amendment. Reading the allegation that the city selectively enforced the camping Ordinance against the unhoused as true on demurrer, the Court held that such allegations sufficiently state a cause of action. The

appeals Court did not determine whether Plaintiffs could ultimately prevail on their equal protection cause of action.

Cervantes v. International Services, Inc., Case No. BC220226 (Cal. Super. Ct. 2002)

Armando Cervantes filed suit against the Central City East Association, Downtown Industrial District, Toytown Business Improvement District, International Services, Inc., and other unknown entities (collectively, the “Defendants”) in the Superior Court of the State of California. Cervantes filed a putative class action suit alleging that International Services, Inc. – the private security force retained by the Central City East Association, Downtown Industrial District, and Toytown Business Improvement District, to patrol certain sections of downtown Los Angeles – unlawfully interfered with Mr. Cervantes and the other Plaintiffs’ (collectively, the “Plaintiffs”) statutory, constitutional, and common law rights.

Specifically, Plaintiffs alleged that the Defendants, through a pattern of harassment, intimidation, property confiscation, and property destruction, committed assault, battery, false imprisonment, and conversion, and violated their rights under California Civil Code §§ 43 and 52.1 and the California Constitution Article I, § 1.

In February 2002, Defendants Totally Security, Inc. and the Historic Core Business Improvement District (“Settling Defendants”) entered into a settlement agreement with Plaintiffs (collectively, the “Settling Parties”), in which the Settling Defendants agreed to modify the behavior of certain employees (“Safety Officers”), conduct certain employee trainings, meet regularly with community stakeholders, and maintain a system for investigating Complaints regarding the Safety Officers.

Specifically, the Settling Defendants agreed to prohibitions on instructing individuals – unhoused or otherwise – to “move along,” searches of individuals – except when incident to a lawful citizen’s arrest, the taking of identification photographs or mug shots on public property, and – except as required in connection with a traffic accident – requiring individuals to provide identification or advising individuals that they will be arrested or reported to law enforcement if they fail to identify themselves. The Settling Defendants also agreed to provide training to all current employees and any new employees within seven business days of their assignment to work within the Historic Core Business Improvement District and maintain a system for recording and promptly investigating improper conduct by the Safety Officers.

The Settling Parties also agreed to provide training sessions designed to inform participant-employees of the special circumstances of the unhoused population within the Historic Core Business Improvement District and

to meet with and discuss issues relating to interactions between the unhoused community, residents, and property owners.

Three individual Plaintiffs received \$600 in vouchers for food, clothing, and/or hotel accommodations and Plaintiffs’ counsel received \$20,000 in attorney’s fees under the terms of the settlement agreement.

Tobe v. City of Santa Ana, 892 P.2d 1145 (Cal. 1995)

Unhoused persons in Santa Ana, California filed suit in state Court against the City of Santa Ana facially challenging the constitutionality of a city Ordinance prohibiting (1) the use of “camp paraphernalia”— including cots, sleeping bags, or non-designated cooking facilities; (2) pitching, occupying, or using “camp facilities” including tents, huts, or temporary shelters; (3) storing personal property on any public land within the city; or (4) living temporarily in a “camp facility” or outdoors in public within Santa Ana.

The lower Court upheld the Ordinances, with the exception of the provision prohibiting living temporarily in a camp facility or outdoors. On appeal, the Court of Appeals held that the anti- camping Ordinance violated Appellants’ right to travel, which “includes the ‘right to live or stay where one will,’” and, by punishing them for their status as unhoused people, violated their right to be free from cruel and unusual punishment.

The Court also held that the Ordinance was unconstitutionally vague and overbroad. In 1995, the California Supreme Court reversed the judgment of the Court of Appeals. The Court held that the challenged Ordinance, which may have an incidental impact on travel, did not violate the right to travel as it had a purpose other than the restriction of travel and did not discriminate among classes of persons by penalizing the exercise of the right to travel for some. In addition, the Court found that the Ordinance penalized particular conduct as opposed to status and thus did not violate Plaintiffs’ rights under the Eighth Amendment, and was not unconstitutionally vague or overbroad. However, the Court noted that the result might be different in an as-applied, as opposed to a facial, challenge.

The Law Center filed an amicus brief in support of Plaintiffs-appellees, as did the U.S. Department of Justice.

Colorado

Burton v. City & Cty. of Denver, No. 20SC821, 2021 WL 1951174 (Colo. May 10, 2021)

Jerry Burton was an unhoused man charged with violating Denver’s anti-camping Ordinance. The Ordinance generally prohibited camping on private or public property without consent. Camping was defined by the Ordinance as residing or dwelling temporarily in a place,

with shelter. To reside and dwell included eating, sleeping, or storing personal possessions. Defendant sought dismissal of the charges, arguing that the Ordinance violated the Fourteenth Amendment Equal Protection clause, the Fourteenth Amendment Due Process clause, and the Eighth Amendment prohibition of cruel and unusual punishment. Defendant brought other challenges, but the Court did not substantively discuss them.

First, Defendant argued that the Ordinance violated the Fourteenth Amendment Equal Protection clause due to the city's selective enforcement, resulting in subjugation and removal of unhoused individuals from Denver. The Court held that the city lacked the animus necessary to violate the Equal Protection clause because the city did not base its enforcement decisions on any unjustifiable standard and that it was not motivated by a discriminatory purpose.

Next, Defendant argued that the Ordinance violated the Fourteenth Amendment Due Process clause, and its related guaranteed rights. The Court held that the Ordinance did not violate the right to travel because the city did not have a policy of arresting unhoused people for engaging in basic activities, the city implemented programs to end homelessness, and there was no Supreme Court precedent for the right to intrastate travel. The Court further held that the Ordinance did not violate the right to bodily integrity because Defendant was not arrested and was allowed to load his possessions into a truck. Finally, the Court held the Ordinance did not violate the right to privacy because the unhoused lack a legal right to occupy the public or private property they camp on.

However, the Court did hold that the Ordinance facially violated the Eighth Amendment and its prohibition of cruel and unusual punishment. The Court reasoned that the government cannot criminalize the unhoused for sleeping outdoors if they have no other choice, and that if no shelter is available, then the individual does not have a choice. The Court observed that though the city's shelters were not full, there would nevertheless not be enough shelter beds if every unhoused individual attempted to use the available shelters; that it is hard for certain unhoused individuals to obtain shelter (for example, individuals with serious mental illness or individuals with pets); and that shelters will turn away individuals who arrive after curfew unless accompanied by a police officer.

In September 2020, a District Court judge overturned the Denver County Judge's ruling, reasoning that the Ordinance did not criminalize status, and only criminalized an activity, thus meaning it could not violate the Eighth Amendment's prohibition on cruel and unusual punishment.

Connecticut

State of Connecticut v. Mooney, 218 Conn. 85, 588 A.2d 145 (Conn. 1991)

Defendant David Mooney, an unhoused man, was convicted by the Superior Court in the Judicial District of New Haven (the "Superior Court"), of the crimes of felony murder, in violation of Conn. Gen. Stat. § 53a-54c, and robbery in the first degree, in violation of Conn. Gen. Stat. § 53a-134(a).

At the time, Defendant was unhoused and living under a bridge abutment. Defendant filed an appeal with the Supreme Court of Connecticut (the "Court"), asserting that the Superior Court improperly: (1) denied his motion to suppress certain evidence gathered as a result of a search and seizure of certain personal property located under the bridge abutment where he had been living; (2) denied his motion to dismiss for lack of a speedy trial; (3) admitted into evidence certain testimony about a larceny he allegedly committed subsequent to the murder and robbery; and (4) denied him access to the mental health records of a state's witness.

The Court reversed the judgment of conviction and remanded the case back to the Superior Court for a new trial, agreeing with Defendant's first argument. The State had argued that the Defendant had no reasonable expectation of privacy in the area in question because "(1) it was in effect an open field; (2) the [D]efendant was not legitimately residing there, but was an interloper on public land; and (3) it was an area accessible to the public at large, and thus was by its nature 'incapable of sheltering a reasonable expectation of privacy.'" Although the Court agreed with the State's argument that Defendant did not have a reasonable expectation of privacy in the area in question, they nonetheless concluded that Defendant had a reasonable expectation of privacy in his *belongings* in that area.

The Court held that the "contents of the duffel bag and cardboard box should have been suppressed because the [D]efendant had a reasonable expectation of privacy in the closed containers found in the secluded area that the police knew Defendant regarded as his home and Defendant did not abandon his expectation of privacy as his absence was due to his arrest." The Court recognized that there was a dearth of cases with the highly unique factual circumstances as this case, and instead relied upon a fact specific inquiry in order to come to its holding.

In considering whether there was an expectation of privacy in a particular place that society is prepared to recognize as reasonable, the Court asked whether the place is one "in which society is prepared, because of its code of values and its notions of custom and civility, to give deference to a manifested expectation of privacy." *United States v. Taborda*, 635F.2d 131, 138 (2d

Cir. 1980). Applying this principle to the facts of the case, the Court held that there was a reasonable expectation in the contents of Defendant's duffel bag and cardboard box as they were left in an area that the police knew was Defendant's "house" and he did not abandon those items as he was under arrest and in police custody at the time of the search.

Florida

City of Sarasota v. Nipper, No. 2005 MO 4369 NC (Fla. Cir. Ct. 2005)

Unhoused individuals were charged with violation of Section 34- 41 of the Sarasota City Code, which prohibited lodging outdoors in a wide variety of situations. They defended the charges on the ground that Section 34-41 was unconstitutional as applied because it offends substantive due process by penalizing otherwise innocent conduct and did not establish sufficient guidelines for enforcement. In June 2005, the Sarasota County Court found that Section 34-41 was unconstitutional as written, because the Ordinance punished innocent conduct and because it left too much discretion in the hands of the individual law enforcement officer.

City of Sarasota v. Tillman, No. 2003 CA 15645 NC (Fla. Cir. Ct. 2004)

Five unhoused individuals were charged with violating Section 34- 40 of the Sarasota City Code, which was an anti-sleeping Ordinance that prohibited camping on public or private property between sunset and sunrise. The public defender who represented the Defendants challenged the constitutionality of the anti-camping Ordinance in the context of the criminal case, arguing that the Ordinance violated substantive due process and was void for vagueness and overbroad because it penalized innocent conduct.

The lowest level county Trial Court upheld the constitutionality of the city Ordinance, finding it was constitutional because it served a valid public purpose, it was not vague in that a person of ordinary intelligence was on notice of the prohibited conduct, and there were sufficient guidelines to prevent selective enforcement of the Ordinance. The unhoused Defendants appealed.

The Circuit Court for the Twelfth Judicial Circuit for the State of Florida reviewed the case in its appellate capacity and found the Ordinance unconstitutional on the grounds that the Ordinance was void for vagueness and violated substantive due process by effectively making criminal the non-criminal act of sleeping. The city then petitioned the Second District Court of Appeal for certiorari review and the Court denied the petition. Instead of asking for rehearing, the city enacted a criminal lodging Ordinance. However, the lodging Ordinance was subsequently struck down in *City of Sarasota v. Nipper*.

State v. Folks, No. 96-19569 MM (Fla. Cir. Ct. Nov. 21, 1996)

Defendant Warren H. Folks, an unhoused man, was arrested for violating a Jacksonville (Florida) Municipal Ordinance (the "Ordinance") that prohibited sleeping, lodging, or laying in the downtown area of Jacksonville or on another's grounds. Defendant subsequently moved to declare the Ordinance unconstitutional and to dismiss the charge against him, arguing the Ordinance violated his rights under the First, Fifth, Eighth and Fourteenth Amendments of the United States Constitution as well as under the Constitution of the State of Florida.

Chiefly, Defendant argued the Ordinance was unconstitutional on the grounds of (i) Due Process, (ii) Vagueness, (iii) Police Powers, (iv) Cruel or Unusual Punishment and (v) Overbreadth. The County Court in the Fourth Judicial Circuit for Duval County Florida granted the motion and dismissed the charge, holding the Ordinance violated Defendant's aforementioned rights under both the United States and Florida Constitutions.

The Court first addressed Defendant's argument that the Ordinance was unconstitutionally vague in violation of his right to due process. In agreeing with Defendant's argument, the Court pointed to the lack of specificity in the term "lodge," which was left undefined in the law. The Court further pointed to the absence of a timeframe constituting a violation, supporting its holding that the Ordinance was void for vagueness. The Court went on to assert that it was unclear from the Ordinance what conduct must actually be done prior to arrest.

The Court also found merit in Defendant's claim that the Ordinance is unconstitutional as an arbitrary and unreasonable exercise of the police powers. While not elaborating further, the Court found that the Ordinance served as a "catchall" law designed to prohibit the undesirable conduct of public sleeping and did not relate to public safety, therefore suggesting that the enforcement of the Ordinance constituted an excessive use of police powers.

Considering the Eighth Amendment claim, the Court concluded that, because the punishment mandated by the Ordinance was disproportionate to the otherwise "innocent conduct" of sleeping or lodging in a public place, the Ordinance constituted cruel and unusual punishment.

Finally, the Court held the Ordinance violated Defendant's First Amendment rights to associate, assemble, or travel by being overbroad. The Court stated that the Ordinance was overbroad because it attempted to criminalize conduct that includes the non-criminal act of sleeping in a public place, and may have a chilling effect on First Amendment freedoms to associate, assemble, or speak.

This case was the result of the September 1972 arrest of Earl Penley for sleeping on a bench in a St. Petersburg city bus stop, in violation of St. Petersburg City Ordinance 22.57. The Ordinance held that “[n]o person shall sleep upon or in any street, park, wharf or other public place.” Upholding the lower Court’s finding, the second circuit of the Florida appellate Court held that the statute was unconstitutional, as it “draws no distinction between conduct that is calculated to harm and that which is essentially innocent,” is “void due to its vagueness in that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,” and “may result in arbitrary and erratic arrest and convictions.”

The State of Florida filed an appeal from a judgment of the Circuit Court, Pinellas County suppressing evidence from an arrest on the ground that any enforcement of a city Ordinance would have been arbitrary and capricious. On September 6, 1972 a St. Petersburg police officer arrested the appellee, Earl L. Penley, for violation of St. Petersburg City Ordinance 23.57 which prohibited sleeping in a public place: “No person shall sleep upon or in any street, park, wharf or other public place. (Code 1955, ch. 25 §47).” Following the arrest, the officer found a small caliber pistol in Penley’s possession.

On October 6, 1972, the State of Florida filed an information charging the appellee with carrying a concealed firearm in violation of Section 7900.01(2) of the Florida statutes, F.S.A. On October 9, 1972, the appellee filed a motion to suppress all evidence seized as a result of an unlawful arrest, search and seizure. On October 17, 1972, the Trial Court granted appellee’s motion to suppress on grounds that any enforcement under the Ordinance would have to be arbitrary and capricious.

The District Court of Appeal of Florida reviewed the State of Florida’s appeal and affirmed the Trial Court’s decision that the St. Petersburg City Ordinance was unconstitutional and therefore the evidence was seized as a result of an unlawful arrest, search and seizure. The District Court of Appeal found the Ordinance unconstitutional in that provided “no distinction between conduct that is calculated to harm and that which is essentially innocent” and “... fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute...” The Court further held that the challenged Ordinance, as it was written, could lead to arbitrary arrests and convictions.

Maryland

Archer v. Town of Elkton, Case No. 1:2007-CV-01991 (Md. Dist. Ct. July 27, 2007)

Eight unhoused individuals sued the town of Elkton, Maryland challenging the August 23, 2006 seizure and destruction of their personal property that they had stored on public property, and the constitutionality of a city Ordinance enacted on June 6, 2007 prohibiting loitering in public places. On August 23, 2006 the town of Elkton, its police department and its Department of Public Works conducted a raid on an encampment in a wooded area on public property behind a shopping center. During the raid, the Plaintiffs were allegedly threatened with arrest and a \$2,000 fine if they attempted to retrieve their belongings from the site. Following the incident, personal property owned by the Plaintiffs was removed and destroyed.

As a result of these events, the Plaintiffs sought actual and consequential damages based on a claim that the town’s actions violated the Plaintiffs’ right to (1) be free from unreasonable search and seizure (under the Fourth Amendment), (2) due process (under the Fourteenth Amendment), and (3) equal protection under the Fourteenth Amendment, as the town’s actions singled out unhoused persons with the goal of driving them from the town. Further, the Plaintiffs argued that the seizure and destruction of property violated state constitution and statutory provisions and also constitutes common law conversion, among other claims. Following the 2006 seizure of Plaintiffs’ property, the town of Elkton passed an Ordinance prohibiting loitering in public places. Specifically, the Ordinance defined loitering as “loiter[ing], remain[ing] or wander[ing] about in a public place for the purpose of begging.”

In addition to challenging the 2006 seizure of their property, the Plaintiffs challenged the validity and enforcement of this Ordinance. They argued in their Complaint that the Ordinance violated the First Amendment by prohibiting seeking charitable contributions in public places – an activity that has been held to be protected speech under the First Amendment. Further, among other constitutional arguments, the Plaintiffs contended that the Ordinance, by not defining key terms therein, was void for vagueness. As part of their Complaint, the Plaintiffs sought to enjoin enforcement of the loitering Ordinance, in order to prohibit the town from charging, arresting or threatening to arrest anyone under the Ordinance. Although the injunction was denied by the Circuit Court, the Plaintiffs succeeded in obtaining an injunction from the Maryland Court of Special Appeals, pending appeal of the Circuit Court decision.

In September 2007, the Elkton Town Commission voted unanimously to rescind the loitering Ordinance. In December 2008, the city settled the lawsuit with respect to the property destruction. The city agreed to provide

each Plaintiff with \$7,500 in compensation for the property destruction.

Massachusetts

Geddes v. City of Boston, Civil Action No. SJ-2021-0408 (Mass. Sup. Ct. 2021)

Three individuals experiencing homelessness, on behalf of themselves and a class of similarly situated individuals, brought this action against the city of Boston, the Boston Police Department, the Boston Public Health Commission, the Mayor of Boston, and other city officials to challenge the city's practices of sweeping the encampment area of Massachusetts Avenue and Melnea Cass Boulevard ("Mass & Cass"). Plaintiffs alleged that the sweeps violated the Eighth Amendment of the United States Constitution as well as Article 26 of the Declaration of Rights under the state constitution. They also alleged violations of disability rights under federal (the Americans with Disability Act) and state (Article 114 of the Amendments to the Massachusetts Constitution) law, unlawful seizure and destruction of personal belongings, and deprivation of property without due process of law in violation of Fifth and Fourteenth Amendments to the U.S. Constitution and the due process clause of the state constitution. Plaintiffs sought Declaratory and Injunctive Relief to end encampment clearings at Mass & Cass and implement individualized assessment of alternative housing options for unhoused people in the affected area.

The case was filed after the Acting Mayor of Boston issued an "Executive Order Establishing a Coordinated Response to Public Health and Encampments in the City of Boston" in October of 2021, which dictated that tents and temporary shelters would no longer be allowed on public ways in the city of Boston. In enforcing the Order, the city and its agents dispersed people living at encampments under threat of arrest and destroyed their personal property.

After a hearing on November 9, 2021, the Justice ordered the case to be transferred to Superior Court for further proceedings and denied Plaintiffs' request for a temporary restraining order against the city. At the November 17 hearing, the City represented to the Court that unhoused people in Boston were free to erect tents anywhere in the City unless and until they received 48 hours notice that they must leave that particular location and the 48 hours had since passed. At the time of this writing, ACLU of Massachusetts and co-counsel WilmerHale were actively monitoring whether this representation was being honored by city officials.

New Jersey

Lakewood v. Brigham [Citation not available]

The Township of Lakewood ("Lakewood") initiated an ejectment action to have unhoused persons living in a "tent city" in the woods removed from this public land owned by Lakewood (the "Property"), on the grounds that they are trespassing on the Property. The unhoused individuals then filed an answer, counterclaim, and third-party Complaint against Ocean County (where Lakewood is located), the Ocean County Board of Chosen Freeholders, and the Ocean County Board of Social Services (collectively, with Lakewood, the "Government Parties"), alleging, on behalf of a proposed class of all unhoused individuals in Ocean County, that they had the right to live on the Property because the Government Parties violated New Jersey law by failing to provide them with adequate emergency shelter or permanent housing, as required under Article I, Sections 1 and 2 of the New Jersey Constitution.

Specifically, the unhoused individuals contended that the Constitution's recognition of various "natural and inalienable rights," including "enjoying and defending life" and "obtaining safety," coupled with the requirement that the Government maintain "protection" and "security" of the people, required the Government Parties to provide shelter for people experiencing homelessness. The unhoused individuals further contended that this was against various longstanding New Jersey statutes, referred to as "Poor Laws." See N.J.S.A. 44:1-1 through 44:1-160.

Lakewood filed a motion for partial summary judgment asking the Court to issue an order declaring that the unhoused individuals had no right to remain on the Property (the "Motion"), but claimed it was not seeking the immediate ejectment of the unhoused individuals from the Property at that time and was only seeking an "orderly vacation." The unhoused individuals opposed the Motion on the following grounds: (1) it was premature given that no discovery had occurred yet, (2) Lakewood should be estopped from ejecting the unhoused individuals because it knew they were living on the Property for over ten years and condoned it, (3) the unhoused individuals' need to survive is superior to Lakewood's interest in reclaiming the land, (4) Lakewood has unclean hands by failing to abide by specific duties owed to the unhoused individuals to assure them shelter, and (5) the New Jersey Constitution guarantees unhoused people the right to fend for their own lives and safety on public land until safe and adequate shelter is made available to them.

Ultimately, Lakewood and the unhoused individuals reached a settlement, memorialized through a consent order, whereby Lakewood agreed to allow the "tent city" residents to stay on the Property until it provided safe and adequate indoor housing for each resident for at least one year. In accordance with the consent order, every resident

of the “tent city” who cooperated with the process received permanent housing, subsidized by Lakewood for a year, and the camp was closed. The claims by the unhoused individuals against the other Government Parties remained pending post-settlement, but it is unclear how or if they were resolved.

New York

Miller-Jacobson v. City of Rochester, 941 N.Y.S.2d 475 (2012)

Members of Occupy Rochester brought an action against the city, seeking a preliminary injunction to prevent the city from removing the group’s encampment from a park or requiring it to cease use of the park after hours. The Plaintiffs asserted that Rochester City Code § 79–2(C) was unconstitutional because it was an unlawful prior restraint on expressive activity in a public forum, that it contained no standards to limit or guide the Commissioner, and that it provided no opportunity for judicial review of an adverse decision. The Plaintiffs further asserted that it was overbroad both on its face and as applied and was under-inclusive.

The Court held that the Plaintiffs failed to prove a likelihood of success on the merits, and accordingly denied the motion for preliminary injunction. The Court further held that the City had a contractual right to deny camping, and that the challenged Ordinance was constitutional.

Oregon

State v. Barrett, 302 Or. App. 23, 25, 460 P.3d 93, 94, review denied, 366 Or. 731, 468 P.3d 471 (Or. App. Ct. 2020)

Defendant, a member of the unhoused community residing in downtown Portland, appealed her convictions of unlawful camping on public property and a variety of other charges. She argued, *inter alia*, that the camping law violated her constitutional right to travel. The Court of Appeals of Oregon, en banc, affirmed her convictions and held that the camping law, which addressed all persons alike, does not violate the right to travel of those who are unsheltered.

The Defendant also argued that the camping law violated the Eighth Amendment as applied to her because camping on public property was an involuntary act that was an unavoidable consequence of her status of being unhoused. The Court, however, did not decide whether the camping law violated the Eighth Amendment as applied to her because there was not enough evidence in the record.

Miller v. Portland [Settlement Reached in 2016 Before Case Was Officially Filed in the Oregon Circuit Court]

On July 16, 2016, Charles Hales, the Mayor of the City of Portland, Oregon, announced that individuals living along the Springwater Corridor, within the city limits, would need to vacate the area by August 1, 2016. Prior to that point, the police had tolerated people sleeping and camping along the Springwater Corridor. In response to this, the Oregon Law Center prepared a motion for preliminary injunction, with supporting documents, to seek temporary relief from the implementation of this order on behalf of eleven disabled individuals, as well as all others that were similarly situated. The motion sought to delay the imposition of the no-camping rule for disabled individuals until October 1, 2016, to afford those individuals time to be relocated without loss of their personal property.

The motion alleged that the City of Portland was discriminating against the proposed Plaintiffs on the basis of their disabilities, in violation of the Americans with Disabilities Act (“ADA”), the Rehabilitation Act, and analogous state law. The analysis under the ADA and the Rehabilitation Act is essentially the same, although the Rehabilitation Act also requires that the discriminatory program receives federal assistance. The motion for preliminary injunction alleged that the proposed Plaintiffs had disabilities that impaired their major life activities. Plaintiffs signed declarations stating their disabilities, which included a wide range of physical and mental impairments such as seizure disorders, degenerative bone and joint disease, PTSD, and other impairments.

The motion contended that the City of Portland must afford disabled residents the same ability to comply with the order as those individuals without disabilities. Plaintiffs alleged that the City of Portland had an affirmative duty to make reasonable accommodations (in this case, allowing individuals who are disabled additional time to vacate the Springwater Corridor), which the City of Portland had not done.

Separately, the motion also alleged that the City of Portland was discriminating against the proposed Plaintiffs on the basis of their disabilities in violation of the Fair Housing Act (“FHA”). The proposed Plaintiffs alleged that they suffered from a recognized handicap, the City of Portland knew or should have known, that accommodations were necessary to afford them an equal opportunity to use and enjoy their dwellings, and that the City of Portland refused to make those accommodations. The motion included an analysis of why the proposed Plaintiffs’ encampment along the Springwater Corridor should be considered a “dwelling” under the FHA caselaw.

The motion argued that the August 1 sweep would constitute cruel and unusual punishment, in violation of

the Eighth Amendment, by precluding camping even though there was inadequate shelter space in Portland. Additionally, the motion argued that the City would depriving the proposed Plaintiffs of their procedural due process rights regarding the deprivation of their personal property that would be confiscated during the proposed sweeps. Finally, the motion including a substantive due process claim similar to the procedural due process claim.

Prior to filing the suit, the Oregon Law Center provided the motion to the City of Portland.

The parties then entered into a Memorandum of Understanding, whereby the proposed Plaintiffs agreed to not file suit and the City agreed to postpone the sweeps until September 1, 2016, and to provide posted notice in advance of any sweep and to store any confiscated property for a minimum of 30 days.

Oregon v. Kurylowicz, No. 03-07-50223 (Or. Cir. Ct. 2004)

In *Kurylowicz*, an Oregon Circuit Court (Trial Court) invalidated Portland City Code Section 14A.050.030, which provided, in relevant part:

Unless specifically authorized by Ordinance, it is unlawful for any person to obstruct any street or sidewalk, or any part thereof, or to place or cause to be placed, or permit to remain thereon, anything that obstructs or interferes with the normal flow of pedestrian or vehicular traffic, or that is in violation of parking lane, zone or meter regulations for motor vehicles. Such an obstruction hereby is declared to be a public nuisance.

The provisions of this Section do not apply to merchandise in course of receipt or delivery, unless that merchandise is permitted to remain upon a street or sidewalk for longer than 2 hours.

The Court understood Section 14A.050.030 to essentially “prohibit[] a person from doing two things: (1) blocking any part of a sidewalk or street; or (2) placing, asking someone else to place, or permitting an object to be placed and remain on the sidewalk in a way that makes it difficult for others to walk around it.”

Three unhoused persons were charged with violating the Ordinance. The Defendants filed a demurrer to the charges, making a number of arguments. The Court found that the Defendants’ claim that the Ordinance was vague and overbroad was case-dispositive, invalidated the Ordinance on that basis, and did not reach the Defendants’ other arguments on preemption, equal protection, and disproportionate punishment.

In its analysis, the Court noted that it is bound to examine the validity of an Oregon state law “under the Oregon Constitution before the Court undertakes an analysis of the law under the U.S. Constitution.” However, the Court

also found that the substantive overbreadth analysis was the same under the Oregon constitution and the federal constitution. The Court proceeded to conduct seemingly separate analyses of the law under the Oregon and federal constitutions, even though the Court seemed to find that the Oregon Constitution alone (particularly the Oregon Constitution’s guarantee of the right to peaceably assemble and protections against vagueness) sufficed to invalidate the statute.

The Court ultimately reasoned that the Ordinance was unconstitutionally vague and overbroad for a number of reasons:

The Ordinance, like the laws in *State v. Ausmus*, 336 Or. 493 (2004), and *City of Eugene v. Lee*, 177 Or. App. 492, 493 (2001) (as-applied challenge), unconstitutionally infringed upon the right to peaceably assemble and could not be “saved by judicial interpretation”;

The Ordinance was unconstitutionally vague because there is no definite meaning to phrases such as “the normal flow of . . . traffic,” and the Ordinance left such phrases to ad hoc interpretations by police; and

The Ordinance constituted a criminal law without a *mens rea* element.

For these reasons, the Court found that the Section 14A.050.030 was facially unconstitutional and sustained the Defendants’ demurrer and dismissed the charges against them.

Voeller v. The City of The Dalles, No. CC02155 (Or. Cir. Ct. 2003)

In August 2002, Plaintiff Curt Voeller filed a Complaint for Declaratory Judgment, Injunctive, and Supplemental Relief against The City of The Dalles in Wasco County, Oregon, arguing that The Dalles’ Ordinance No. 90-1112 was invalid as applied because of its conflict with Oregon state laws OS 203.077 and 203.079. At the time the suit was filed, Voeller had no fixed address and was unhoused.

Ordinance 90-1112 made it unlawful for a person to establish a campsite for the purpose of maintaining a temporary place to live in public locations because such campsites created “unsafe and unsanitary living conditions which posed a threat to the peace, health and safety” of those camping and other citizens. A campsite was 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, or any vehicle or part thereof.” The Ordinance also fixed a penalty of a fine of not more than \$100 or 30 days imprisonment or both.

Voeller was cited twice for violating the Ordinance after he was found camping on undeveloped property in The

Dalles, once in July 2000 and once in August 2000. His first violation resulted in the imposition of a fine of \$147 (notably and inexplicably above the maximum set by the Ordinance). His second fine was fixed at \$85. Voeller paid \$20 towards the first fine and in December 2000, received an envelope from the City Clerk with his citation record noting that if he did not “send in payment by December 11th,” the Clerk would issue a warrant. He then paid an additional \$50.

OS 203.077 required that all municipalities and counties “(1) develop a policy that recognizes the social nature of the problem of homeless individuals camping on public property” and “(2) Implement the policy as developed, [sic] to ensure the most humane treatment for removal of homeless individuals from camping sites on public property.”

OS 203.079 further required that the particulars of the policy developed in 203.077 included:

24-hour written notice in English and Spanish to those unhoused individuals camping at a particular site of their forthcoming removal;

Notice to local agencies delivering social services that such removal was imminent and the potential deployment of outreach workers to assist the unhoused;

Law enforcement storage of personal property for at least 30 days so long as the property was not unsafe or illegal; and

Permitting the suspension of these requirements if certain exceptional emergencies so required. The Dalles Ordinance reflected none of these requirements.

In November 2002, a municipal judge in the Municipal Court of the City of The Dalles set aside and expunged Voeller’s convictions. Later that month, the City Council of the City of The Dalles repealed Ordinance 90-1112, acknowledging that it did not comply with the state law requirements for developing appropriate policies regarding camping of unhoused individuals in the state.

State v. Wicks, Nos. 2711742 & 2711743, (Or. Cir. Ct. Multnomah County 2000)

Police officers arrested the Wicks, an unhoused father and his son, for violating Portland City Code, Title 14, 14.08.250, which prohibited “camping” in any place where the public has access or under any bridge or viaduct. The Wicks claimed the Ordinance violated their right to be free of cruel and unusual punishment, the right to equal protection under the Fourteenth Amendment, and their right to travel. The Court agreed and found the Ordinance as applied to unhoused people violated Article I § 16 of the Oregon Constitution and the Eighth Amendment to the U.S. Constitution. The Court reasoned that one must not confuse “status” with an immutable

characteristic such as age or gender as the State of Oregon did in its arguments.

The Court held that, although certain decisions a unhoused person makes may be voluntary, these decisions do not strip away the status of being homeless. Citing the Supreme Court’s decision in *Robinson v. California*, 370 U.S. 660 (1962), holding that drug addiction is a status, the Court held that homelessness is also a status. Furthermore, the Court determined it impossible to separate the status of homelessness and the necessary acts that go along with that status, such as sleeping and eating in public when those are “the only locations available to them.” Because the Ordinance punished necessary behavior due to a person’s status, the Court reasoned it was cruel and unusual.

Moreover, the Court found the Ordinance in violation of both equal protection and the right to travel on the basis that the Ordinance denied unhoused people the fundamental right to travel. The Court rejected the state’s argument that it had a legitimate state interest in protecting the health and safety of its citizens, noting that there were less restrictive means available to address these interests, such as providing sufficient housing for unhoused people and adequate services. According to a newspaper report, the state attorney general’s office has dismissed its appeal, citing its inability to appeal from an order of acquittal.

Washington

City of Everett v. Bluhm, Case Nos. 7000, 7005, 7006, 1112997 (Everett Muni. Ct., Jan. 5, 2016)

Four unhoused people were charged with violating the City of Everett’s camping ban. In their defense of the charges, the Defendants argued that application to the unhoused population of the Ordinance, which prohibited camping in “any park, on any street, or in any publicly owned parking lot or publicly owned area” violated their constitutional rights to travel and to be free from cruel and unusual punishment. The Court agreed, noting that the city lacked alternative locations where unhoused people in the city could engage in life-sustaining activity.

City of North Bend v. Bradshaw, Case No. YI 32426A (North Bend Muni. Ct., Jan. 13, 2015)

Mr. Bradshaw was charged with camping in violation of the City of North Bend Municipal Code 9.60.030, which defined camping to include merely sleeping on any public property. He moved to dismiss the charge, and also asked the Court to declare the camping ban unconstitutional. The Court dismissed the charge and also held that the Ordinance was unconstitutional because it violated the fundamental right to travel and the Eighth Amendment prohibition on cruel and unusual punishment.

II. CHALLENGES TO RESTRICTIONS ON LIVING IN VEHICLES

Federal Court Cases

SEVENTH CIRCUIT

Towers v. Chicago, 979 F. Supp. 708 (N.D. Ill. 1997)

Sandra Towers filed suit against the city of Chicago, seeking a common law writ of certiorari to contest the final order of the city's administrative hearing and alleging violations of Section 42 U.S.C. 1983. She further amended her Complaint to add two additional Plaintiffs. Relying on Chicago Municipal Code §7-24-225, officers of the city of Chicago seized and impounded Ms. Towers' car for containing a controlled substance. An acquaintance of Ms. Towers was operating the car and Ms. Towers was not in the car at the time.

The District Court granted the city's motion to dismiss finding that (i) the city Ordinances allowing seizures of vehicles adequately protected procedural due process rights, (ii) the \$500 fine was not subject to criminal due process protections for substantive due process purposes, (iii) the \$500 fine was not excessive under the Eighth Amendment, (iv) seizure of the car was not unreasonable under the Fourth Amendment, and (v) Ms. Towers and the other Plaintiffs failed to satisfy the numerosity requirement of the class action rule and were not entitled to a preliminary injunction.

In reaching its decision regarding the denial of Ms. Towers' writ of certiorari review, the Court held that the city provided Ms. Towers with the requisite procedural and substantive due process protections under the U.S. Constitution.

Regarding Ms. Towers' claims that the city violated 42 U.S.C. 1983, the Court reviewed Ms. Towers' claims under the Matthews Test and determined that the city did not deny Ms. Towers' due process rights because (i) the city's method of notifying car owners of the seizure is reasonably calculated, (ii) the risk of wrongful deprivation due to procedural faults is minimal and (iii) Ms. Towers offered no substitute procedures to the city's current Ordinances.

The Court also rejected Ms. Towers' argument that the \$500 fine imposed was criminal in nature. The Court determined that the car was borrowed with Ms. Towers' consent and it was merely the purpose for which it was used that did not have her consent. Further, the Court determined that the city Ordinances were also civil in nature.

Additionally, the Court rejected Ms. Towers' claims that because she was merely an innocent owner of the car and did not authorize the use of the car for illegal purposes,

the \$500 fine imposed was unconstitutionally excessive under the Eighth Amendment. The Court stated that the fine was not a criminal penalty but rather a civil in rem forfeiture and did not require a finding of scienter. The Court found that Ms. Towers consented to the use of her car by the third-party who had the contraband in the car.

The Court rejected Ms. Towers' claims that the impoundment of her car was an unreasonable seizure under the Fourth Amendment. The Court noted that other Courts have reached the conclusion that any seizure by the government would be reasonable and followed the same interpretation here, stating that it would be a high hurdle for a person to challenge the reasonableness of the seizure.

Finally, the Court determined that this action did not meet the numerosity requirement in order to certify the class because Ms. Towers was relying only upon a conclusory allegation that a joinder would be impossible. Further, Ms. Towers and the other Plaintiffs were not entitled to injunctive relief because there is no threat of future injury as there is no evidence that the city would seize her car again in the future.

NINTH CIRCUIT

CELERINA NAVARRO, & others, Plaintiffs, v. THE CITY OF MOUNTAIN VIEW, Defendant. Additional Party Names: Alma Aldaco, Armando Covarrubias, Evelyn Estrada, Gabriel Rangel Jaime, Janet Stevens, No. 21-CV-05381-NC, 2021 WL 5205598 (N.D. Cal. Nov. 9, 2021)

Plaintiffs brought a suit against the City of Mountainview for violations of due process, the right to travel, and the right to privacy and disability discrimination, excessive fines, and unlawful seizures in relation to two parking Ordinances that ban parking of oversized vehicles (OSVs) on most of the public streets. Plaintiffs are a group of six low-income residents of Mountainview who claim that they were priced out of their homes and as a result, were forced to either live in an OSV or leave the city.

The two Ordinances at issue (1) prohibit parking on streets less than or equal to forty feet in width, and (2) prohibit parking an OSV on streets in Mountainview with a Class II Bikeway. 89% of the City's streets were affected by the Ordinances. Many of the remaining 11% of streets were unavailable because they do not allow parking at all, no parking from 2 a.m. to 6 a.m., or are otherwise unavailable. As a result, the Ordinances effectively ban OSV parking city-wide.

The City filed a motion to dismiss Plaintiffs' claims and Plaintiffs filed a motion for preliminary injunction to enjoin

the City from enforcing the OSV parking Ordinances. With respect to the City's motion to dismiss, the Court examined each of Plaintiffs' claims and held that Plaintiffs alleged facts sufficient to state claims for all but the Invasion of Privacy, Right to Travel, and ADA claims, which the Court dismissed with leave to amend.

As to Plaintiffs' motion for injunctive relief, the Court found that Plaintiffs did not show a likelihood of irreparable harm or that the balance of equities was in Plaintiffs' favor and denied the motion for preliminary injunction.

Potter v. City of Lacey, 517 F. Supp. 3d 1152 (W.D. Wash. 2021)

Plaintiff Jack Potter lived in Lacey, Washington beginning in 1997 and in April of 2018, Plaintiff began living in a 23-foot unmotorized trailer attached to his truck. Plaintiff moved among different parking lots, but was unable to find a consistent place to park, so he parked in the parking lot of the Lacey City Hall, where other vehicle-sheltered individuals were parking.

In September of 2019, Lacey passed an Ordinance which prohibited a recreational vehicle from being parked on the city streets or public parking lot for more than four hours, unless a special permit was obtained.

Following the passage of the Ordinance, Plaintiff and the other vehicle-sheltered individuals parking in the City Hall lot were notified of the Ordinance and that they would have to move by September 30, 2019, or tickets would be issued. Plaintiff alleged that a Lacey police officer returned on September 30, 2019 and issued him a citation for violation of the Ordinance and if he did not leave, his vehicle would be impounded. Plaintiff did not leave and on October 1, 2019, an officer returned and informed Plaintiff that if he did not leave, his vehicle would be impounded. Plaintiff left because he could not afford the fees to redeem his vehicle if it was impounded. Plaintiff did not apply for a special permit because he believed that due to outstanding warrants, his application would be denied.

Plaintiff then filed claims that the Ordinance at issue is unconstitutional because it violated his (1) federal and state constitutional right to freedom of travel, (2) federal and state constitutional right to be free from cruel punishment, and (3) Fourth Amendment and Wash. Const. art. I, § 7 rights as applied to the vehicle-sheltered people experiencing homelessness. Plaintiff also asserted that the non-resident parking permit was unconstitutional because (1) it violated federal and state freedom of association by prohibiting permit holders from having visitors, and (2) unbridled discretion was granted to the Lacey Police Department to deny permit applications. Both Plaintiff and Defendant filed motions for summary judgment on each of Plaintiff's claims.

The Court examined each of the claims and held as follows:

Right to Travel – the right to travel does not include a right to live in a certain matter, and thus, is not applicable.

Violation of Eighth Amendment – neither the parking fine, nor the potential impoundment violate the Excessive Fines Clause. The Cruel and Unusual Punishments Clause applies almost exclusively to convicted prisoners, and in rare cases on what the government may criminalize, and since criminal punishment is not at issue, there is no violation.

Violation of Fourth Amendment – while the Court acknowledged that the seizure of a vehicle that is a person's only shelter is an extreme remedy, it determined that such seizure may be reasonable based on the totality of the circumstances, such that injunctive relief barring all seizures is not appropriate.

Non-Resident Parking Permit – Plaintiff lacked standing to challenge the parking permit because he did not apply for such permit and did not intend to apply, thus he cannot demonstrate injury-in-fact.

Though the Court required additional briefings on the Eighth Amendment claims, all of Plaintiff's claims were dismissed by the Court.

Bloom v. City of San Diego, 2018 WL 9539239 (S.D. Cal. 2018)

The Plaintiffs were unhoused people residing in their recreational vehicles ("RVs") to avoid residing on the street or in an unaccommodating shelter as some of the Plaintiffs are disabled. One Plaintiff was ticketed for habitation while he read a book on his couch in his RV. Another Plaintiff was ticketed for habitation when he parked his RV legally on a street while he used a public restroom.

A preliminary injunction was filed by the Plaintiffs to enjoin San Diego from enforcing the two vehicle Ordinances. The first Ordinance was referred to as the "Vehicle Habitation Ordinance", San Diego Muni. Code § 86.0137(f). The Vehicle Habitation Ordinance stated that, "It is unlawful for any *person* to use a vehicle while it is *parked* or *standing* on any street as either temporary or permanent living quarters, abode, or place of habitation either overnight or day by day."

The second Ordinance was the "Nighttime RV Ordinance", San Diego Muni. Code § 86.0139(a), which stated, "Except as provided in section 86.0140 or otherwise expressly provided to the contrary herein, or unless such *parking* or *standing* is authorized by the City manager and appropriate signs permitting such *parking* or *standing* are posted: (a) [i]t is unlawful for any *person* to park or leave *standing* upon any

public street, *park road*, or *parking lot*, any oversized vehicle, *non-motorized vehicle*, or *recreational vehicle* between the hours of 2:00 a.m. and 6:00 a.m.”

Plaintiffs argued that the Vehicle Habitation Ordinance was vague because ordinary people would not understand what constituted the use of a vehicle as a home, rather than just a person enjoying one’s vehicle. Defendants claimed the additional words “abode” and “place of habitation” distinguished the Ordinance from that in *Desertrain* because the San Diego Ordinance added descriptive terms to show the prohibited conduct.

The Court held the Plaintiffs were likely to prevail on their claim that the Vehicle Habitation Ordinance violated Plaintiffs constitutional rights since the Ordinance was vague on its face and arbitrarily enforced. The Court stated that Plaintiffs would suffer irreparable harm if their RVs were impounded and that the balance of hardships was in Plaintiffs favor.

However, the Court denied the Plaintiffs motion to enjoin the “Nighttime RV Ordinance”, stating the Plaintiffs did not show a likelihood of success on the merits with their claims that the Ordinance was vague and arbitrarily enforced. The Court distinguished this Ordinance from the Vehicle Habitation Ordinance, stating that the Nighttime RV Ordinance clearly stated the conduct that would violate the Ordinance. The Nighttime RV Ordinance did not allow a person to leave an oversized vehicle on the street or a parking lot between the hours of 2:00 a.m. and 6:00 a.m.

The Court also found that the Plaintiffs failed to meet their burden of showing that the Ordinance was being arbitrarily applied to unhoused persons. When coming to this conclusion, the Court found that nothing in the Ordinance encouraged arbitrary enforcement or allows for officers to have discretion in interpreting the Ordinance.

Smith v. Reiskin, No. 4:18-CV-01239 (N.D. Cal., Feb. 26, 2018)

James Smith, an unhoused person, filed suit in Superior Court for San Francisco County against Edward Reiskin in his capacity as Director of Transportation of the San Francisco Municipal Transportation Agency (“SFMTA”) for the return of Mr. Smith’s car, which had been towed and impounded due to unpaid parking citations. Smith argued that the towing and impoundment of his car without notice, where his car did not jeopardize public safety and the efficient movement of vehicular traffic, violated his rights under the Fourth and Fourteenth Amendments to the U. S. Constitution.

Smith argued that the towing of his car without a warrant constituted an illegal seizure under the Fourth Amendment. Smith also argued that towing his car without prior notice contravened the Fourteenth

Amendment’s proscription against depriving a person of property without due process of law. Smith argued that he was denied a meaningful opportunity to be heard at a SFMTA post-tow hearing, as the hearing officer did not allow him to confront the evidence against him and declined to consider any legal authority other than past due parking citations. Smith requested the Court issue a temporary restraining order and a preliminary injunction to prevent the sale of his car during the pendency of his case.

After removal to federal Court, Smith’s request for a preliminary injunction was consolidated with a case brought by Sean Kayode. Kayode’s case has facts similar to Smith’s. The motion for a preliminary injunction was heard in the U.S. District Court for the Northern District of California. The Court granted the motion for a preliminary injunction and ordered the return of the car pending a determination on the lawfulness of the seizure. The Court noted the impoundment of a car is a seizure within the meaning of the Fourth Amendment. An exception to the requirement of a warrant is the community caretaking doctrine allowing impoundment where the car is parked in a manner that jeopardizes public safety and the efficient movement of vehicular traffic. Both parties agreed the car was not seized on the basis of the community caretaking doctrine. The Court held that because Kayode could not earn a living as a delivery driver without his car, the balance of interests tipped in Kayode’s favor and he would likely suffer irreparable harm without an injunction. Accordingly, the Court granted the injunction.

Desertrain v. City of Los Angeles, 754 F.3d 1147 (9th Cir. 2014)

The Plaintiffs were four unhoused individuals that brought a suit against Los Angeles for an Ordinance banning vehicle habitation. The Plaintiffs stated the Ordinance violated due process, but did not specifically claim the Ordinance was vague. The District Court granted summary judgment for the City and did not entertain the vagueness arguments as they were not specifically stated in Plaintiffs’ amended Complaint.

On appeal, the Ninth Circuit found that the District Court should have construed the Plaintiffs motion as an argument that the law was vague and that the District Court should have reviewed this claim on its merits. The Court then held that the Ordinance was vague because it failed to provide notice and was arbitrarily enforced against people experiencing homelessness. The Court found that the Ordinance failed to define the term “living quarters”. The Ordinance also did not adequately define what would be in violation of the Ordinance since sleeping in a vehicle or keeping clothing in a vehicle were not needed to violate the Ordinance.

Following this opinion, *Desertrain* is most cited in regard to construing matters raised in opposition to summary

judgment. *Desertrain* was distinguished by the Ninth Circuit in *Perez v. Vitas Healthcare Corp.*, 2017 WL 5973294 (C.D. Cal. 2017) where the Court held that summary judgment could not be used as a way to flesh out inadequate pleadings. In *Perez*, the District Court did not err by refusing to consider Perez's claim for failure to investigate her request for medical leave under the California Family Rights Act. The Court stated Perez likely waived this claim because it was advanced for the first time in opposition to summary judgment as she failed to plead the "necessary factual averments" with respect to the "material elements" of the underlying legal theory.

ELEVENTH CIRCUIT

Williams v. City of Atlanta, No. 1:94-CV-2018 (N.D. Ga. Mar. 28, 1995)

Phillip Williams, a formerly unhoused person, filed this suit in the U.S. District Court for the Northern District of Georgia against the City of Atlanta, arguing that Section 17-1007 of the Atlanta City Code prohibiting any person from remaining in a parking lot if he/she does not have a car parked in the lot was unconstitutionally vague and overbroad and interfered with citizens' right to travel in violation of the First, Fourth, Ninth, and Fourteenth Amendments to the U.S. Constitution. A City of Atlanta police officer arrested Mr. Williams for violating this section of the code when he refused to leave a parking lot. Mr. Williams was incarcerated overnight and appeared in Court the next day, at which time the Assistant City Solicitor informed the Court that the City would not prosecute the case. Mr. Williams subsequently brought this case against the City challenging the constitutionality of the parking lot Ordinance.

The City moved for summary judgment, arguing that Mr. Williams did not have standing to challenge the Ordinance. Mr. Williams alleged that he had standing to challenge the constitutionality of the Ordinance because he had been threatened with arrest twice and arrested once under the Ordinance. Mr. Williams further argued that because the City had a policy of non-prosecution, his only mechanism for challenging the Ordinance was through a civil action. The Court found that Mr. Williams could not establish the "real and immediate" threat necessary for him to be entitled to injunctive relief because he was no longer unhoused and, therefore, was at no greater risk of arrest under the Ordinance than the general population. The District Court dismissed the case without reaching the merits of Mr. Williams' constitutional arguments, finding that he did not have standing.

Mr. Williams moved for reconsideration. In support of reconsideration, Mr. Williams argued that he was "fundamentally homeless" as he lived in a shelter and, therefore, he had standing to maintain a civil action for injunctive relief. The Court granted Mr. Williams' motion, but affirmed its ruling that Mr. Williams did not have

standing, finding that the City had an interest in enforcing the Ordinance and reiterating its prior reasoning that Mr. Williams had not established a likelihood of future harm that was "real and imminent." Mr. Williams appealed to the Eleventh Circuit. While the appeal was pending, the City revised the Ordinance. Mr. Williams maintained a challenge to one section of the Ordinance, which was struck down in an unrelated case, and the appeal was ultimately dismissed.

Hershey v. City of Clearwater, 834 F.2d 937 (11th Cir. 1987)

Donald Hershey, filed suit under the Civil Rights Act against the City of Clearwater and the arresting police officer, arguing that the city Ordinance prohibiting lodging and sleeping in motor vehicles in public areas was unconstitutionally vague under the Fourteenth Amendment to the U.S. Constitution. Hershey was arrested for violating Section 594(2) of the city's municipal corporations code, prohibiting lodging and sleeping in motor vehicles in public areas. The U.S. District Court for the Middle District of Florida granted summary judgment in favor of the city and Hershey appealed to the Eleventh Circuit on grounds that the Ordinance was unconstitutional and that there was material facts under dispute as to the probable cause for arrest.

The Circuit Court affirmed the grant of summary judgment, holding that the city Ordinance was not unconstitutionally overbroad or vague if the prohibition against sleeping was stricken from the Ordinance and that, even if the Ordinance was unconstitutionally overbroad or vague, the police officer's conduct in arresting Hershey did not violate a clearly established statutory or constitutional right.

The Circuit Court specifically held that, even if sleeping can be an expressive conduct, an Ordinance prohibiting lodging in vehicles in a public areas is a reasonable, time, place and manner regulation within the police power of the city, and is, like most legislation, presumptively constitutional. Given that the Ordinance itself and the state law provided for severability of unconstitutional terms, the Circuit Court held that, even if sleeping in a motor vehicle was struck from the Ordinance, the remainder of Ordinance prohibiting the use of motor vehicles as living quarters did effectuate the apparent purpose of the city in passing the Ordinance: to prevent lodging in motor vehicles due to the lack of basic amenities or sanitation facilities. The Circuit Court therefore held that the Ordinance was constitutional and the arrest for seeming violation of this Ordinance could be properly made.

Hershey further contested the grant of summary judgment on grounds that there were material facts in dispute as to the probable cause for arrest. Hershey was visiting from Pennsylvania and therefore had a mattress and various

living goods in his motor vehicle. The Court held that summary judgment may be entered when the moving party sustains its burden showing the absence of any genuine issue as to material fact and the nonmoving party did not go beyond pleadings, by affidavits or depositions, answers to interrogatories or admissions on file, designate what facts remain in dispute.

The arresting police officer submitted an affidavit asserting that she found Hershey lying in the back of a truck on a mattress surrounded by articles of clothing, cooking utensils, etc. and believed him to be lodging in his car. Because Hershey did not respond to this affidavit, and the undisputed facts were sufficient to establish probable cause, the Circuit Court upheld the District Court's summary judgment.

STATE COURT CASES

California

Raiser v. City of Los Angeles, No. B255525 (Cal. Ct. App. Sept. 24, 2015)

Plaintiff, an unhoused individual that lived in his car and kept all his personal belongings there, brought suit against the city of Los Angeles regarding an Ordinance prohibiting individuals from living in cars on the city's public streets and parking lots. The Plaintiff was questioned in his car by police on suspicion of violating the Ordinance on three different occasions between 2009 and 2011 before later receiving a citation from police for violating the Ordinance in 2013. The Plaintiff's suit challenged the constitutionality of the city's Ordinance and alleged that his Fourth Amendment rights were violated during the three incidents in which police questioned him in his car.

The Trial Court granted the city of Los Angeles's request for summary judgment on the Plaintiff's claims. On appeal, the Court of Appeals of California, Second District, First Division, affirmed the Trial Court's grant of summary judgment, though on different grounds than those relied on by the Trial Court. First, the Court affirmed the Trial Court's holding that the Plaintiff lacked standing to challenge the constitutionality of the Ordinance.

While the Trial Court held that the Plaintiff lacked standing because he had never been arrested under the Ordinance, the Court held that the Plaintiff could satisfy the injury-in-fact requirement by showing an intent to engage in the conduct prohibited by the Ordinance and the existence of a credible threat of prosecution. However, the Court held that the Plaintiff still lacked standing because he challenged the Ordinance as unconstitutionally vague, and his admission that he committed the precise conduct prohibited by the Ordinance prevents him from challenging it for vagueness. Second, the Court affirmed the Trial Court's holding that the officers acted within the

bounds of the Fourth Amendment, not because (as the Trial Court held) the Plaintiff admitted to violating the Ordinance, but because Plaintiff's presence overnight in a car containing all of his personal possessions created reasonable suspicion that he was violating the Ordinance.

Homes on Wheels v. City of Santa Barbara, 119 Cal. App. 4th 1173 (Cal. App. 2 Dist. 2004); 2005 WL 2951480 (Cal. App. 2 Dist. Nov. 7, 2005) (not reported in Cal. Rptr. 3d)

A homeless advocacy group and 3 unhoused individuals brought suit in March 2003 challenging the newly enacted Santa Barbara Vehicle Code Sections 22507 and 22507.5, which prohibited the parking of trailers, semis, RV's, and buses on all city streets between the hours of 2:00 and 6:00 a.m. This Ordinance had the effect of requiring unhoused persons living in vehicles to park in a designated area of the city or on private property. The city posted 33 signs throughout the city stating: "No Parking Trailers, Semis, Buses, RV's or Vehicles Over 3/4 Ton Capacity Over 2 Hours or from 2 am to 6 am SBMC 10.44.200 A & B Violator subject to fine and/ or tow-away..." The city did not post signs at all the entrances into the city.

The Plaintiffs filed a Complaint for injunctive, declaratory, and mandamus relief seeking to enjoin enforcement of the Ordinance. The Plaintiffs then moved for a preliminary injunction alleging, inter alia, that the Ordinance exceeded the city's authority under Vehicle Code Sections 22507 and 22507.5 and that the signs did not provide sufficient notice for the Ordinance to be effective under Vehicle Code Section 22507. On March 27, 2003, the Santa Barbara Superior Court granted a temporary restraining order for the Plaintiffs, halting all ticketing under the Ordinance until April 11, 2003. The Trial Court later denied the Plaintiff's motion for a preliminary injunction. The appellate Court affirmed the city's power to enact the Ordinance, but reversed and remanded for a factual determination as to whether the city's signs provided adequate notice of the parking restriction.

On remand, the Trial Court determined that the city did not provide adequate notice of the parking restriction and issued a preliminary injunction to enjoin in the city from enforcing the law. The city appealed. In November 2005, the appellate Court affirmed the lower Court's decision in an unpublished opinion. The Court found that there was no conclusive evidence regarding whether posting "perimeters" was as effective as "posting each block." Therefore, the Court concluded that substantial evidence supported the Trial Court's finding that the city did not provide adequate notice to motorists of the parking restrictions required by the provision at issue.

Washington

Seattle v. Long, No. 98824-2 (Wash. 2020)

Mr. Steven Long, a self-described skilled tradesman who lives in his truck, was issued a citation and had his truck impounded because it had remained parked on property owned by the City of Seattle for an extended period. Mr. Long left the truck parked in that location due to perceived mechanical issues that made driving the vehicle unsafe. On October 5, 2016, the Seattle Police Department dispatched three officers to an area located near Mr. Long's truck for an unrelated Complaint. The officers informed Mr. Long that his truck was on property owned by the City and that pursuant to SMC 11.72.440(B) the truck could not remain on City property for more than 72 hours. A parking officer then affixed a notice to the truck. Mr. Long removed the notice and did not move the truck. The City towed the truck more than 72 hours later, and Mr. Long returned to find his belongings in disarray.

At an October 20, 2016 impound mitigation hearing, Mr. Long requested a contested hearing, which then took place on November 2, 2016. Mr. Long was ordered to pay a fee of approximately \$550 before he could retrieve his vehicle. He appealed to the Seattle Municipal Court for King County. His appeal contended that the citation and impoundment of his truck was unconstitutional under the Eighth and Fourteenth Amendments and also violated the State's Homestead Act. Mr. Long argued that because his truck was not drivable in a safe manner, it was permissible

that he remain living in it at its parked location. Mr. Long argued that the City violated the 14th Amendment by acting with deliberate indifference and leaving him in a position of danger by leaving him without shelter. Mr. Long also argued that because the truck is his homestead, the city cannot take or sell it. Lastly, Mr. Long argued that the impoundment of his truck and citation violated the Excessive Fines Clause of the Eighth Amendment.

On May 10, 2017, the Court affirmed the lower Court's findings in favor of the City. The Court held that because the truck was drivable and Mr. Long made no effort to move the truck within 72 hours, the citation and impoundment were lawful. The Court determined that the officers did not affirmatively place Mr. Long in danger by impounding his truck because they gave him 72 hours' notice to move it. Although the Court agreed that Mr. Long had a homestead in his truck, that property right did not result in a constitutional violation since the officers gave Mr. Long 72 hours' notice to move the truck. The Court found that "nothing in the record supports Mr. Long's allegation that he cannot use his truck for shelter." The Court explained that nothing prevented Mr. Long from living in his truck in Seattle as long as the truck did not remain in one location on City property for more than 72 hours. The Court also determined that the impoundment and citation did not violate the Eighth Amendment's Excessive Fines Clause because the magistrate at the impoundment hearing had reduced the fees.

III. CHALLENGES TO BANS ON LOITERING, LOAFING, AND VAGRANCY

Federal Court Cases

U.S. SUPREME COURT

City of Chicago v. Morales, 527 U.S. 41 (1999)

The City of Chicago challenged the Supreme Court of Illinois' decision that a Gang Congregation Ordinance was unconstitutional for violation of the due process clause of the Fourteenth Amendment of the U.S. Constitution for impermissible vagueness and lack of notice of proscribed conduct. The Ordinance prohibited criminal street gang members from loitering in a public place. The Ordinance allowed a police officer to order persons to disperse if the officer observed any person loitering that the officer reasonably believed to be a gang member.

The Supreme Court affirmed the judgment of the Illinois Supreme Court and ruled the Ordinance violated the due process clause of the fourteenth Amendment to the U.S. Constitution for vagueness. Specifically, the Court ruled that the Ordinance violated the requirement that a legislature establish guidelines to govern law

enforcement. Additionally, the Ordinance failed to give the ordinary citizen adequate notice of what constituted the prohibited conduct – loitering. The Ordinance defined "loitering" as "to remain in any one place with no apparent purpose."

The vagueness the Court found was not uncertainty as to the normal meaning of "loitering" but to the Ordinance's definition of that term. The Court reasoned that the ordinary person would find it difficult to state an "apparent purpose" for why they were standing in a public place with a group of people. "[F]reedom to loiter for innocent purposes," the Court reiterated, is part of the liberty protected by the due process clause of the Fourteenth Amendment. The Law Center filed an amicus brief in support of Plaintiff-appellees.

Kolender v. Lawson, 461 U.S. 352 (1983)

The Plaintiff challenged the constitutionality of a California state statute that required persons who loiter or wander on the streets to provide "credible and reliable"

identification and account for their presence when asked to do so by a police officer. The Supreme Court found that the statute failed to adequately explain what a suspect must do to satisfy its requirements, and thus vested complete discretion in the hands of the police officers enforcing it, encouraging arbitrary enforcement. The Court held that the statute was unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment.

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)

Eight individuals convicted under Jacksonville's vagrancy Ordinance challenged the constitutionality of the law. The Supreme Court overturned the decision of the Florida Circuit Court and found that the Ordinance was void for vagueness under the due process clause of the Fourteenth Amendment on the ground that the Ordinance "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" and "encourages arbitrary and erratic arrests and convictions."

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)

On April 4, 1962, Fred Shuttlesworth was standing with a group of friends just outside a store on the sidewalk. A policeman came over to tell them to move on and not obstruct the sidewalk for pedestrians. He repeated this a number of times, to which Shuttlesworth replied with "You mean to say we can't stand here on the sidewalk?" After Shuttlesworth walked into the adjacent store, the officer arrested him.

Fred Shuttlesworth was charged with violating two Ordinances of the Birmingham General City Code: (1) Section 1142, which stated "it shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on.": and (2) Section 1231, which indicated "it shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer."

The Recorder's Court of the city of Birmingham, Alabama rendered judgment against the Defendant, who then appealed. The Circuit Court held a trial de novo where the Defendant was found guilty, and he appealed. The Court of Appeals of Alabama affirmed the decision and the Supreme Court of Alabama denied certiorari. The Supreme Court of the United States granted certiorari.

Concerning Section 1142, the Supreme Court looked to the Alabama Court of Appeals' narrow construction of the Ordinance, which ruled that the Ordinance applies

"only when a person who stands, loiters, or walks on a street or sidewalk so as to obstruct free passage, refuses to obey a request by an officer to move on." *Winters v. People of State of New York*, 333 U.S. 507 (1948). The Supreme Court noted that, while this construction made the Ordinance sound, the Ordinance taken literally on its face could be applied unconstitutionally, as it violated First Amendment rights to assemble. When Shuttlesworth was on trial, this guidance had not yet been presented by the Court of Appeals. The Supreme Court could not rule out that the Alabama Courts may have applied this Ordinance unconstitutionally and therefore, the conviction under Section 1142 must be dismissed.

With respect to the second Ordinance, the Alabama Court of Appeals confined its reading of Section 1231 as a way to provide for the enforcement of the orders of the officers of the police department in directing such traffic, as the Ordinance was found in the chapter of vehicular traffic. Based on the evidence, the Supreme Court found that there was no evidence to support that the patrolman was trying to direct vehicular traffic, nor that the Defendant was in, on, or around a vehicle at the time that he was told to move on or was arrested. Therefore, SCOTUS held that it was violation of due process to convict Mr. Shuttlesworth without evidence of his guilt of violating the Ordinance cited. The judgment was reversed and the case was remanded to the Court of Appeals.

SECOND CIRCUIT

Ramos v. Town of Vernon, 353 F.3d 171 (2d Cir. 2003)

Plaintiffs sought a preliminary injunction against the enforcement of Vernon, Connecticut's juvenile curfew Ordinance on First Amendment, Fourth Amendment, equal protection, vagueness, due process, and state constitutional grounds. The District Court denied the injunction. The Court found that the Ordinance's exception for First Amendment activities saved it from an overbreadth challenge. The Ordinance, it was found, did not authorize unconstitutional searches and seizures.

In analyzing the equal protection claim, the Court applied intermediate scrutiny to the statute and found that the history and perception of crime in Vernon and some evidence that the Ordinance was effective indicated that it was substantially related to its goals. Further, the Ordinance adequately described the conduct it prohibited, and provided police with reasonable guidelines for its enforcement. Finally, since the Ordinance contained an exception for minors accompanied by their parents, it did not unduly burden parents' liberty interest in raising their children. The Court certified the state constitutional claims to the Connecticut Supreme Court.

The Plaintiffs appealed, and the Second Circuit reversed, applying intermediate scrutiny to hold that the city Ordinance infringes on minors' equal protection rights.

The Court noted that although the curfew Ordinance sought to reduce nighttime juvenile crime and victimization, the city did not consider nighttime aspects of the Ordinance in its drafting process. Furthermore, the Ordinance's age limit is not targeted at those who were likely to cause trouble or to be victimized. Indeed, one of the city's expert witnesses stated that "the adoption of the curfew itself probably could be considered a knee jerk reaction." 107 48 F. Supp. 2d 176 (D. Conn. 1999).

Streetwatch v. National R.R. Passenger Corp., 875 F. Supp. 1055 (S.D.N.Y. 1995)

Plaintiff Streetwatch, an unincorporated membership association operating in New York City to monitor police and private security forces' treatment of unhoused individuals, along with individually named members of Streetwatch and unhoused individuals (collectively, "Plaintiffs") sought an injunction against Defendant National Railroad Passenger Corporation and individually named officers of the Amtrak Police Department (collectively "Amtrak") in the U.S. District Court for the Southern District of New York. Plaintiffs filed claims pursuant to 42 U.S.C. §§ 1983 and 1988, the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, and the common law of the State of New York, among others. Plaintiffs sought to enjoin Amtrak from arresting or ejecting individuals they considered as "undesirables" from Pennsylvania Station ("Penn Station").

Amtrak adopted Rules of Conduct to govern public access to and conduct in Penn Station, which also listed "Prohibited Uses" for conduct, including a catchall prohibition against "[o]therwise engag[ing] in any activity which interferes with the commercial activities of lessees, tenants and their customers." The Rules of Conduct did not expressly forbid walking or wandering around Penn Station, nor did they prohibit anyone from being there for more than a specified period of time. An Amtrak internal memorandum listed groups of "undesirables" (which includes the "homeless, pan handlers, ticket scalpers, and thieves") as guidance for ejecting individuals.

Plaintiffs alleged that numerous individuals have been arrested or ejected solely based on the perception of the arresting officer that they were unhoused or associating with the unhoused, and often without being questioned or offered an explanation of which of the Rules of Conduct they had violated.

The Court entered a preliminary injunction prohibiting Amtrak from continuing to engage in its practice of arresting or ejecting persons who appeared to be unhoused or appeared to be loitering in Penn Station in the absence of evidence that those individuals had committed or were committing crimes. The Court found that, in light of Amtrak's invitation to the public, its ejection practice implicated the Due Process Clause.

The Court held that Amtrak's Rules of Conduct were void for vagueness and that their enforcement impinged on Plaintiffs' right to freedom of movement and due process. However, the Court made clear that the injunction did not sanction sleeping in Penn Station; sitting without a ticket in areas that are now clearly marked as reserved for ticketed passengers; or loitering in private restaurants or other private businesses within Penn Station.

THIRD CIRCUIT

Kreimer v. State of New Jersey, No. 05-1416 (DRD) (D.N.J. 2005)

Richard Kreimer, an unhoused person, filed suit against a public library and others in the United States District Court for the District of New Jersey arguing that certain of the library rules, which had resulted in his expulsion from the library on at least five occasions, were facially invalid under the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment of the U.S. Constitution, and similar provisions under the New Jersey Constitution.

The library rules provided that patrons "not engaged in reading, studying, or using library materials" as well as patrons "whose bodily hygiene is offensive so as to constitute a nuisance to other persons" "shall be required to leave the building". The rules also prohibited patrons from "harass[ing] or annoy[ing] others through noisy or boisterous activities by staring at another person with intent to annoy that person, . . . or talking loudly to others or in monologues, or by behaving in a manner which reasonably can be expected to disturb other patrons."

The library claimed that Mr. Kreimer was expelled because he exhibited offensive and disruptive behavior, including staring at and following patrons and making loud noises, and that his offensive odor prevented other patrons from using parts of the library and library staff from doing their jobs. The District Court granted summary judgment in favor of Mr. Kreimer and issued an injunction prohibiting the enforcement of several of the library rules. On the library's appeal, the Third Circuit reversed and remanded to the District Court, holding that the rules were reasonable "manner" restrictions on the patron's constitutional right to receive information and, therefore, not invalid.

With respect to the First Amendment claim, the Court held that as a "limited public forum," the library was obligated only to permit the public to exercise rights that are consistent with the nature of the library. The Court found the challenged rules to be "reasonable," "sufficiently narrow," and to leave open "alternative channels for communication" in the sense that patrons could still use the library upon complying with the rules. While recognizing that the rules may disproportionately affect the unhoused who have limited access to bathing

facilities, the Court found such fact to be “irrelevant” to a facial challenge and not sufficient to justify obstructing other patrons’ right to access the library. The Court similarly rejected Mr. Kreimer’s assertions that the rules were overbroad and vague.

With respect to the Fourteenth Amendment claims, the Court found that the rules were not arbitrary. The Court further found that the record did not support the District Court’s determination that the library acted with a “discriminatory intent,” but that instead supported a finding that the library enacted the rules “to provide a fair method to expel any disruptive patron, so as to achieve optimum Library use.”

With respect to the New Jersey Constitutional claims, the Court distinguished prior cases upon which the District Court had relied. In particular, the Court emphasized the civil nature of this case and that the District Court had not taken into account the Court’s findings that the library constitutes a “limited public forum” and that a violation of the rules would disrupt the smooth functioning of the library.

Gaffney v. City of Allentown, 1997 U.S. Dist. LEXIS 14565 (D. Pa. 1997)

Plaintiffs challenged a juvenile curfew Ordinance on due process and equal protection grounds. The Court applied strict scrutiny and found the Ordinance unconstitutional. The Court held that the statute burdened a minor’s right to move freely and that the case did not present factors justifying differential treatment of minors that would allow the Court to employ a lesser standard of review.

Although the parties agreed that the city had a compelling interest in passing the Ordinance, i.e., the protection of minors from nighttime crime and the prevention of the same, it nevertheless failed because it was not narrowly tailored to advance that interest. The statistical evidence the city presented to the Court showed no correlation between the passage of the Ordinance and the incidence of juvenile crime, and the city did not present evidence that comparatively more juveniles were victims of nighttime crime.

Kreimer v. City of Newark, Case No. 08-cv-2364 (D.N.J.)

Plaintiff Richard Kreimer, an unhoused individual, brought a § 1983 action against the City of Newark, New Jersey Transit, and members of the New Jersey Transit police for attempted enforcement of an anti-loitering Ordinance that had been ruled unconstitutional in 1982 and for denying him access to a train even though he was a ticketed passenger. The Court granted the Defendants’ motion to dismiss, finding that the individual Defendants were protected by qualified immunity and that the Plaintiff had failed to adequately allege constitutional violations.

FOURTH CIRCUIT

NAACP Anne Arundel County Branch v. City of Annapolis, 133 F. Supp. 2d 795 (D. Md. 2001)

The NAACP brought a facial challenge on federal and state constitutional grounds to an Annapolis Ordinance prohibiting loitering within certain posted drug-loitering free zones. The Ordinance made it a misdemeanor for a person observed, *inter alia*, “making hand signals associated with drug related activity” or “engaging in a pattern of any other conduct normally associated by law enforcement with the illegal distribution, purchase or possession of drugs” within a designated drug-loitering free zone to disobey the order of a police officer to move on.

After finding that both the individual members of the NAACP and the NAACP itself had standing to bring the lawsuit, the District Court ruled that the Ordinance was unconstitutionally vague and overbroad. The Court held that the plain language of the Ordinance contained no *mens rea* requirement, and that, as it was interpreting a state law, the Court had no authority to read a specific intent requirement into the Ordinance. Without the narrowing device of the *mens rea* requirement, the Ordinance was void for vagueness since it failed to provide adequate warning to the ordinary citizen to enable her to conform her conduct to the law and it vested unbridled discretion in police officers enforcing the Ordinance.

The Ordinance was also overbroad since without the specific intent requirement it reached a host of activities ordinarily protected by the constitution, such as selling lawful goods, communicating to motorists, and soliciting contributions.

Schleifer v. City of Charlottesville, 159 F.3d 843 (4th Cir. 1998), cert. denied, 1999 U.S. LEXIS 1908 (1999)

The Plaintiffs challenged a juvenile curfew Ordinance on due process and equal protection grounds. The District Court upheld the Ordinance, and the Fourth Circuit affirmed. Recognizing the greater state latitude in regulating the conduct of minors, the Court applied intermediate scrutiny to the statute. The Ordinance sought to advance compelling state interests, i.e., the reduction of juvenile crime, the protection of juveniles from crime, and the strengthening of parental responsibility for children.

The Court found that the Ordinance was substantially related to these interests, as the city had adequate information that the Ordinance would create a safer community and protect juveniles from crime. Further, the Court found the Ordinance narrow enough to survive strict

scrutiny, were it to be applied. Nor did the Ordinance burden parents' privacy interests in raising their children. The Fourth Circuit also rejected the Plaintiffs' vagueness claim, citing the Ordinance's exceptions for First Amendment activities.

FIFTH CIRCUIT

Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993), cert. denied, 511 U.S. 1127 (1994)

Elizabeth Qutb and three other parents filed suit against the Mayor of Dallas, TX, seeking a permanent injunction against the enforcement of a juvenile curfew Ordinance enacted in Dallas, arguing that the Ordinance violated their (and their children's) rights under the First, Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution. The juvenile curfew Ordinance made it a misdemeanor for persons under the age of seventeen to use the city streets or be present in public places between the hours of 11 P.M. and 6 A.M., with a limited number of exceptions. "Public places" were defined as places where the public had access, or privately owned establishments to which the public was invited.

The District Court granted the injunction, enjoining enforcement of the Ordinance. The city appealed to the Circuit Court, which reversed the District Court's decision, holding that the Ordinance did not violate the United States or Texas Constitutions.

Concerning the minors' equal protection claim, the Court assumed (without deciding) that the right to move about freely is a fundamental right. Therefore, the Court applied a strict scrutiny test, holding that the city was pursuing a legitimate interest in protecting juveniles and preventing juvenile crime. Further, the Court disagreed with the District Court's finding that the city's failure to offer statistical evidence supporting a nocturnal juvenile crime problem failed to meet its burden of proving that the Ordinance was narrowly tailored to a legitimate interest. Because of the number of exemptions outlined in the Ordinance, such as being able to attend association activities, being on the sidewalk in front of one's home, and permitting interstate travel, the Court distinguished this case from *Johnson v. Opelousas*, where it struck down a juvenile curfew Ordinance for being unconstitutionally "overbroad". Ultimately, the Fifth Circuit found that the Ordinance was the least restrictive means in which to carry out the city's legitimate interest.

The Court also rejected the Plaintiffs' argument that their first Amendment rights of association were violated, relying on the Supreme Court's decision in *Dallas v. Stanglin* that there is no "generalized right of social association". The Court also rejected the parental Plaintiffs claim that the Ordinance violated their fundamental rights of privacy under the U.S. and Texas Constitutions.

SIXTH CIRCUIT

Johnson v. City of Cincinnati, 310 F.3d 484, 2002 WL 31119105 (6th Cir. 2002)

Patricia Johnson and Michael Au France filed suit in the United States District Court for the Southern District of Ohio ("District Court") against the City of Cincinnati (the "City"), arguing that the City's drug-exclusion zone Ordinance (Cincinnati Municipal Code Section 755-5) violated their rights under the First and Fourteenth Amendments to the U.S. Constitution and Mr. Au France further alleged that enforcement of the Ordinance against him deprived him of his rights to be free of cruel and unusual punishment and double jeopardy.

Under the City's Ordinance, any individual arrested or taken into custody from any drug-exclusion zone for one of an enumerated list of drug offenses was excluded from the "public streets, side-walks and all other public ways" in all drug exclusion zones for a period of up to 90 days (such period terminating on acquittal, dismissal of charges, or failure to prosecute), such exclusionary period being extended for one year if the individual was convicted on the drug charges. The Ordinance had a variance procedure for individuals residing or employed within any drug-exclusion zone and provided an appeal process for any individual receiving an exclusion notice based on violation of the Ordinance.

Following her arrest for marijuana trafficking in the Over the Rhine drug-exclusion zone, Ms. Johnson was subsequently arrested for violating the Ordinance when she reentered such drug-exclusion zone before the termination of the one year exclusionary period. Mr. Au France, an unhoused man, was arrested and convicted for multiple Ordinance violations as a result of re-entering the Over the Rhine drug-exclusion zone following arrests for various drug-related crimes; in total he alleged that he was prohibited from entering the drug-exclusion zone for a period of four years.

The District Court granted summary judgment in favor of the Plaintiffs, and the city appealed to the United States Court of Appeals of the Sixth Circuit. The Circuit Court confirmed the District Court's decision, holding that the Ordinance violated (i) substantive due process in prohibiting freedom of local travel through public spaces and roadways and (ii) the Plaintiffs' right of freedom of association. The Circuit Court did not address the cruel and unusual punishment or double jeopardy claims.

Considering the substantive due process claim, the Circuit Court first defined the scope of the asserted right and then asked whether the concept of the asserted right was present in the nation's history and implicit in the concept of ordered liberty. The Circuit Court was careful to describe the asserted right of intrastate travel as "the right to travel locally through public spaces and roadways,"

as opposed to a more general right to freedom of movement.

Based on a review of case law and the practical significance of a right to localized travel, the Circuit Court held that the U.S. Constitution protects a right to travel locally through public spaces and roadways. Applying strict scrutiny review, where the government cannot infringe on a right unless that infringement is “narrowly tailored to serve a compelling state interest”, the Circuit Court held that the Ordinance violated this right as it was not “narrowly tailored” to protect the City’s compelling interest in protecting the health and welfare of residents of drug-exclusion zones. The Ordinance was found to broadly exclude individuals from drug-exclusion zones regardless for their reason for traveling in such zones and did not require a finding that an individual at question is likely to engage in additional drug activity in such zones.

The Circuit Court rejected the City’s claim that the Ordinance was narrowly tailored because other attempts at curbing crime in such areas had failed, noting that the City had failed to provide sufficient evidence to prove that less restrictive methods had failed.

Considering the freedom of association claim, the Circuit Court noted that the freedom of association at play in this case was the freedom of intimate association, which protects an individual’s right to enter into and maintain intimate relationships without undue intrusion from the State. The Circuit Court then considered whether the Ordinance violated each Plaintiff’s freedom of association. Ms. Johnson claimed that her exclusion from the Over the Rhine drug-exclusion zone had violated her freedom of association right to participate in the upbringing of her grandchild, as her grandchildren lived in the zone and she helped take care of them.

Mr. Au France claimed that his exclusion from the Over the Rhine drug-exclusion zone had violated his freedom of association right to visit his attorney, whose office was located within the zone. The Circuit Court held that the Ordinance had violated each Plaintiff’s freedom of association rights as delineated. In the case of Mr. Au France, the Circuit Court noted that the exclusion was particularly problematic, since, as an unhoused man, there was no other realistic means for Mr. Au France to communicate with his attorney other than visiting him in his office.

SEVENTH CIRCUIT

Hodgkins v. Peterson, 355 F.3d 1048 (7th Cir. 2004)

A parent and her minor children brought a class action to seek a preliminary injunction against the enforcement of Indiana’s juvenile curfew Ordinance on First Amendment and due process grounds. The District Court maintained that a First Amendment exception was necessary in a

juvenile curfew Ordinance to ensure that it was not overly broad. The Plaintiffs argued that since a minor arrested under the Ordinance could use the First Amendment only as an affirmative defense, the Ordinance unduly chilled a minor’s First Amendment rights.

The District Court found no evidence, however, that the threat of arrest actually chilled minors’ exercise of their First Amendment rights. The Court also found that the Ordinance left ample alternative channels for minors’ communication. The Court went on to find that the right of a parent to allow her minor children to be in public during curfew hours was not a fundamental right, and accordingly applied intermediate scrutiny to the statute. The Ordinance survived intermediate scrutiny, because of its limited hours of operation and numerous exceptions. The Plaintiffs appealed, and the Seventh Circuit reversed.

While the Court recognized that the curfew Ordinance did not have a disproportionate impact on First Amendment rights, it did regulate the ability of minors to participate in a range of traditionally protected forms of speech and expression, including political rallies and various evening religious services. The Seventh Circuit instructed the District Court to permanently enjoin enforcement of the curfew law. Given the findings based on the First Amendment claim, the Court did not reach the due process claim.

Leal v. Town of Cicero, 2000 WL 343232 (N.D. Ill. March 31, 2000)

The Plaintiff was arrested for violating a Cicero Ordinance prohibiting loitering on a street corner after a police officer has made a request that the individual move on. The officer had observed the Plaintiff doing no more than remaining in a certain area for a short period of time. The Plaintiff challenged the Ordinance on vagueness grounds, and the Court agreed that the law was unconstitutionally vague. The fact that the Ordinance made the police officer’s request to move on the basis for any potential arrest, as opposed to the loitering per se, did not save it from constitutional scrutiny. As in *City of Chicago v. Morales*, if the loitering is harmless or justified, then the dispersal order itself is an unjustified impairment of liberty. Additionally, the Ordinance invited uneven police enforcement, as it contained no guidelines for the exercise of official discretion.

EIGHTH CIRCUIT

Rodgers and Dillback v. Bryant, No. 17-3219 (8th Cir. 2019)

In a previous law suit involving the same Plaintiffs, *Rodgers, et al. v. Bryant*, No. 4:16-CV-00775-BRW (E.D. Ark. Nov. 22, 2016), the District Court for the Eastern District of Arkansas held that the Arkansas statute that made it a crime to linger or remain “in a public place or

on the premises of another person for the purpose of begging” was unconstitutional and permanently enjoined the state from enforcing it.

In April 2017, Arkansas amended the statute to make it unlawful to linger or remain in certain public spaces for the purpose of begging in a harassing or threatening manner, in a way likely to cause alarm to the other person and under circumstances that create a traffic hazard or impediment. Plaintiffs, Michael Andrew Rodgers and Glynn Dilbeck, had not been charged with violating the amended Arkansas statute, although both men were charged under previous versions of the statute and had been threatened with citation under the current iteration of the statute.

The Plaintiffs again asked for the Court to enjoin the state from enforcing the statute. The state argued that the 1) Plaintiffs did not have standing because they have not been charged under the amended statute and because they are still able to panhandle so long as it is not harassing or does not otherwise create a traffic hazard, 2) the Court should abstain because the statute may be subject to narrow construction by the Arkansas Supreme Court and 3) that the statute was not facially unconstitutional. On the issue of standing, the Court, stating that “a Plaintiff has standing to attack an overly-broad statute when the statute’s very existence causes the Plaintiff to forego a constitutionally protected activity,” found that the two Plaintiffs did have standing to challenge the statute.

The Court also declined to abstain as it found that the statute was not readily subject to narrowing construction by state Courts, and its deterrent effect on constitutionally-protected speech was both real and substantial. Finally, the Court found that the Arkansas statute did not pass the strict scrutiny standard of review applicable to the content-based statute. The state asserted that its compelling interest for the statute was public safety and motor vehicle safety. The Court rejected this interest, however, as the state was unable to provide a rationale for distinguishing this type of speech from other speech that could create public safety or motor vehicle safety hazards, such as stumping for political candidates on the side of the road.

The Court also found that law enforcement officials had other, existing laws at their disposal to address behavior that could pose public safety or motor vehicle safety dangers, such as disorderly-conduct, coercion, assault and stalking laws. In deciding to grant Plaintiff’s request for a Preliminary Injunction, the Court concluded that the Plaintiffs were likely to succeed based on the merits because the statute runs afoul of the First Amendment and was not narrowly tailored to promote a compelling government interest. The Court emphasized that “criminalizing protected speech is never insignificant.”

The state was further enjoined from enforcing the statute.

Johnson v. Board of Police Com’rs, 351 F. Supp. 2d 929 (E.D. Mo. 2004)

On September 17, 2004, Chad Johnson, an unhoused person, and twelve other unhoused and former unhoused people (collectively, “Plaintiffs”) filed suit in the U.S. District Court for the Eastern District of Missouri against the St. Louis Board of Police Commissioners, Captain Mary J. Warnecke, and the City of St. Louis (“Defendants”), pursuant to 42 U.S.C. § 1983.

Plaintiffs asserted that Defendants committed violations of their constitutional rights under the Fourth, Fifth, Thirteenth and Fourteenth Amendments by arresting Plaintiffs in the absence of probable cause, inaccurate or fabricated charges, and intimidation tactics such as the throwing of firecrackers by police officers. Plaintiffs further asserted to have been subjected to forced labor in the form of community service work before being found guilty of any crime and to have had their property unlawfully taken. Plaintiffs alleged that their arrests were part of an overarching policy to discourage unhoused or unhoused -appearing individuals from being in the Downtown area of St. Louis.

Plaintiffs sought injunctive and declaratory relief and damages against Defendants. Plaintiffs also filed instant Motion for Temporary Restraining Order (TRO) and Preliminary Injunction, listing eleven activities from which Defendants should be enjoined. These activities included making arrests or stops without probable cause or reasonable suspicion; holding unhoused or unhoused -appearing individuals in jail for more time than that needed to obtain a warrant; ordering such individuals to remove themselves from public places; interfering with such individuals’ rights to exercise the rights incident to any license or permit; having such individuals perform manual labor before being found guilty; and other listed activities.

First, the Court concluded that federal subject matter jurisdiction existed to consider Plaintiff’s Motion, holding that Plaintiffs’ Motion raised cognizable constitutional claims. Thus, the Court rejected Defendants’ argument that the Younger abstention doctrine prevented the Court from hearing the case.

Considering relevant factors to be assessed by a District Court for granting injunctive relief (*Dataphase Sys., Inc. v. C.L. Sys. Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)), the Court held that preliminary injunctive relief was warranted. Specifically, the Court found that (i) a threat of irreparable harm, not compensable by legal or equitable relief after a trial on the merits, was probable, and the balance of equities on this factor weighed in favor of granting injunctive relief; (ii) Plaintiffs demonstrated a fair chance of success at trial; (iii) the great harm to Plaintiffs outweighed

any harm to Defendants, given the possibility to draw injunctive relief to minimize the harm to Defendants; and (iv) an order prohibiting Defendants' conduct in the future was necessary to protect the public interest and restore the public's faith in the fair application of law.

The Court granted Plaintiffs partial Motion for TRO and Preliminary Injunction, preventing Defendant St. Louis Board of Police Commissioners from directing or allowing the removal of individuals from public areas where such individuals have a lawful right to be without (1) probable cause to believe that a crime has been or is being committed, or (2) a need to clear such public area for reasons of security or public safety.

The Court further granted Plaintiffs injunctive relief against Defendant City of St. Louis to prevent any judicial imposition of punishment for any municipal Ordinance violation before a determination of an accused person's guilt under an Ordinance has been made. Finally, the Court ordered that no bond or other security was required, taking into account that most Plaintiffs appeared to lack sufficient resources from which to provide security.

The lawsuit was ultimately settled. In the settlement, Defendants agreed to pay to each Plaintiff a sum of \$1,200.00. The St. Louis Board of Police Commissioners further agreed to convey to police officers information regarding policies requiring or prohibiting certain conducts listed in the Settlement Agreement. The City of St. Louis agreed not to direct, allow or implement the imposition of community service or any other punishment on any individual accused of municipal Ordinance violation before the accused individual is found guilty, and to promptly release from confinement in a Division of Corrections' facility any individual for whom the Division has received a release packet from the St. Louis Metropolitan Police Department and in no event shall such an individual be held for more than 24 hours.

NINTH CIRCUIT

Langi v. City and County of Honolulu, Civil No. 06-428 DAE/LEK (D. Haw. Aug. 6, 2006)

In March 2006, Defendants Julia Matsui Estrella and Utu Langi, homeless advocates, along with fifty to sixty others, marched to the city hall grounds to protest the nightly closure of Ala Moana Beach Park. The closure displaced more than 200 unhoused individuals; no adequate living alternatives were provided. Estrella and Langi were cited for simple trespass on city property and ultimately arrested for criminal trespass in the second degree.

In August 2007, the ACLU filed a motion in criminal Court on behalf of Estrella and Langi, alleging that the city conduct unlawfully interfered with Estrella and Langi's First Amendment rights to free expression and assembly and subjected them to unlawful arrest. The motion also

alleged violations of the Fourth Amendment right to be free from unlawful seizure and arrest and the Fourteenth Amendment right to equal protection, and alleged claims of false arrest/ false imprisonment, battery and negligent infliction of emotional distress.

In 2007, the Plaintiffs voluntarily dismissed the case.

Nakata v. City and County of Honolulu, Civil No. CV 06 004 36 SOM BMK (D. Haw. Aug. 10, 2006)

In a case related to and settled simultaneously with Langi v. City and County of Honolulu, Reverend Robert Nakata and other homeless advocates sued the city and county of Honolulu alleging that they had been harassed and unlawfully threatened with arrest during the course of March and April 2006 protests against the nightly closure of Ala Moana Beach Park, where over 200 unhoused individuals regularly slept. The lawsuit specifically charged that the city unlawfully restrained free speech by subjecting protests by people experiencing homelessness and their advocates to more restrictive conditions than other members of the public.

In January 2007, in conjunction with the settlement of the Langi case, the Nakata parties entered into a settlement agreement. Under the terms of the settlements of the cases, the city agreed to pay \$65,250 to settle claims of damages, attorneys' fees and other costs, with the majority of the money designated for one or more non-profit organizations, including H-5 Project (Hawaii Helping the Hungry Have Hope), whose mission is to assist Honolulu's unhoused population. In addition, the city agreed to implement training for Honolulu law enforcement personnel on the use of trespass laws on public property and recent changes in the law. Lastly, the city agreed to notify and consult with the ACLU of Hawaii in the future concerning the public's right of access to the grounds of City Hall.

Justin v. City of Los Angeles, No. CV-00-12352 LGB, 2000 U.S. Dist. LEXIS 17881 (C.D. Cal. Dec. 5, 2000)

A group of unhoused people living on the streets and in shelters of Los Angeles filed suit alleging a violation of their First and Fourth Amendment rights and then filed for a temporary restraining order (TRO) in federal District Court. The Plaintiffs were ultimately seeking only injunctive relief. The Plaintiffs sought the TRO to stop Defendants from using two anti-loitering statutes, California Penal Code § 647(e) and Los Angeles Municipal Code § 41.18(a), to harass Plaintiffs.

The Court denied the TRO as to preventing the authorities from using the codes to ask unhoused individuals to "move along." However, the Court granted the TRO as to all other acts because Plaintiffs established that they had shown a substantial likelihood of prevailing on the merits, would suffer irreparable harm if the TRO was not granted,

and that the balance of equities tipped in their favor.

The case was settled with a permanent injunction in force for forty-eight months and the possibility of a Court-granted extension for up to an additional forty-eight months. The Defendants did not admit liability but were enjoined from conducting detentions or 'Terry' stops without reasonable suspicion.

Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997)

Minors and their parents brought a § 1983 action against the City of San Diego and city officials, challenging the constitutionality of the city's juvenile curfew Ordinance. The Ordinance made it unlawful for any minors—under the age of 18—to “loiter, idle, wander, stroll or play... between the hours of ten o'clock P.M. and daylight time following....” The Ordinance also created criminal liability for parents who permitted minors to violate the curfew.

The Plaintiffs' challenged the constitutionality of the Ordinance on its face. The United States District Court for the Southern District of California reviewed the Ordinance under strict scrutiny and concluded that the curfew only imposed a minimal burden on minors and their parents. Thus, the Ordinance was narrowly tailored to address the city's compelling interest in reducing juvenile crime and victimization. The U.S. Court of Appeals for the Ninth Circuit reversed the District Court after reviewing the Ordinance under the vagueness doctrine, equal protection analysis, first Amendment analysis, and parents' fundamental right to rear their children.

When reviewing the Ordinance for vagueness, the Ninth Circuit determined that a narrow reading rendered most of the exceptions to the Ordinance superfluous, while a broad reading would not allow for fair notice of potential violations. Therefore, the Ninth Circuit concluded the phrase “loiter, wander, idle, stroll or play” was unconstitutionally vague. Under the equal protection analysis, the Ninth Circuit applied strict scrutiny and held the city did have a compelling interest in reducing juvenile crime and victimization, but the Ordinance was not narrowly tailored because the Ordinance burdened minors' fundamentals rights, such as right to free movement and travel, without providing adequate exceptions.

Next, the Ninth Circuit reviewed the minors' first Amendment claim, holding that the Ordinance was not a reasonable time, place, and manner restriction. Thus, the Ordinance was also unconstitutional under the first Amendment because it does not sufficiently exempt first Amendment activities from the curfew. Finally, the Ninth Circuit examined the parents' rights to rear their children and held that the Ordinance was “an exercise of sweeping state control irrespective of parents' wishes.” The Ordinance was determined to be unconstitutional.

DISTRICT OF COLUMBIA CIRCUIT

Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999)

The District Court granted summary judgment to Plaintiff's challenge of a juvenile curfew Ordinance and found it unconstitutional on due process and vagueness grounds. A divided panel of the D.C. Circuit initially affirmed, but upon a rehearing en banc, the Ordinance was upheld. The Court refused to recognize a fundamental right for juveniles to be in a public place without adult supervision during curfew hours, nor was it willing to acknowledge a fundamental right for parents to allow their children to be in public places at night. The Court applied intermediate scrutiny to the Ordinance and held that the District had adequate factual bases to support its passage of the Ordinance. In addition, the Court found the Ordinance enhanced parental authority as opposed to challenging

Richard v. Nevada, No. CV-S-90-51 (D. Nev. Apr. 25, 1991)

After Franciscan clergymen were serving breakfast to unhoused persons on public property in Las Vegas in 1989, several of such unhoused persons walked to a nearby privately-owned railroad track to sit down and eat. Police began arresting the unhoused people eating by the railroad tracks. The clergymen approached the railroad tracks and were asked to leave by the police. As they were leaving, the clergymen were also arrested after having been on the tracks for less than two minutes.

Plaintiffs, consisting of the Franciscan clergymen, homeless advocates, and unhoused individuals, filed suit in the U.S. District Court, District of Nevada, against the State of Nevada and the Las Vegas Metro Police Department (LVMPD) claiming that the Nevada criminal vagrancy and loitering statutes, Nev. Rev. Stat. Sections 207.030(1)(h) & (i) and the related provisions of the Las Vegas Municipal Code Sections 10.74.010 & 10.74.020, violated their First, Fourth, Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.

The Court found that Nev. Rev. Stat. 207.030(1)(h) on vagrancy was identical to a statute that the United States Supreme Court in *Kolender v. Lawson*, 461 U.S. 352 (1983), struck down as being unconstitutionally vague. As with *Kolender*, since the statute did not provide guidance of what a person must do to satisfy a police officer that such person is not a vagrant, the Court found that the statute did not provide fair notice as to what types of conduct were proscribed and what types were permitted. Accordingly, the Court found that the statute was unconstitutionally vague within the meaning of the due process clause of the Fourteenth Amendment.

However, the Court did not find the language of Nev. Rev. Stat. Section 207.030(1)(i) and Las Vegas Municipal Code

Sections 10.74.010 & 10.74.020 as vague and found that it was possible to give a narrowing construction to the language of such statute and Ordinances. As such, the Court found that the state, rather than a federal Court, should make the determination in the first instance and certified the issue to the Nevada Supreme Court.

STATE COURT CASES

Colorado

City of Salida v. Edelstein, No. 97CR62 (Colo. Dist. Ct. 1998)

The Defendants were arrested for violating a municipal Ordinance prohibiting anyone from loitering in one place for more than five minutes after 11:00 p.m. at night. One Defendant had been speaking with friends on the sidewalk outside his home, while another Defendant had been observing a police officer issue loitering citations to other individuals.

The Defendants challenged the Ordinance on First Amendment, due process, and vagueness grounds.

The Municipal Court found the Ordinance unconstitutional, and the District Court affirmed. The Court held that the Ordinance interfered with citizens' fundamental rights to stand and walk about in public places. The Ordinance was not narrowly drawn to regulate that right, and the city failed to convince the Court

that any plausible safety concerns existed to justify the Ordinance. Additionally, the Court found the Ordinance void for vagueness, since it failed to provide law enforcement with proper standards to prevent its arbitrary and discriminatory enforcement.

Georgia

Johnson v. Athens - Clarke County, 529 S.E.2d 613 (Ga. 2000)

The Plaintiff was arrested for violating an Athens municipal Ordinance prohibiting loitering or prowling. A policeman had observed Johnson at a particular intersection four times over a two-day period. At trial, the policeman testified that the location where he arrested Johnson was a known drug area, although the state presented no evidence of drug activity.

The Georgia Supreme Court found the Ordinance void for vagueness, since there was nothing in the Ordinance's language that would put an innocent person on notice that particular behavior was forbidden. There was no way a person of average intelligence could be aware of what locations were known drug areas and what innocent seeming conduct could seem to be drug-related in the opinion of a police officer. The Ordinance also failed scrutiny because it did not provide adequate safeguards against arbitrary or discriminatory enforcement.

III. CHALLENGES TO BANS ON SITTING OR LYING DOWN IN PUBLIC

Federal Court Cases

FIFTH CIRCUIT

Henry v. City of New Orleans, No. 03-2493 (E.D. La. 2005)

In September 2003, five unhoused Plaintiffs filed a § 1983 action against New Orleans and the New Orleans Police Department alleging violations of their First, Fourth, Ninth, and Fourteenth Amendment rights because the Plaintiffs were arrested or given citations for sitting on the sidewalk outside their employer's door waiting for their paychecks.

Approximately two months after the suit was filed, the police department made an announcement that it was changing its policy in dealing with homeless persons on the streets. The police department's new policy included discontinuing mass round-ups and arrests for obstructing the sidewalk. Under the new policy, police had to call for a homeless assistance unit when encountering homeless people on the street, instead of arresting people. Federal and local funds were dedicated to the new outreach

program and to the construction of a new shelter. The program also included the creation of more shelter beds in an existing shelter, the expansion of shelter hours, subsidies by the city for shelter fees and homeless contact sheets for all officers.

In April 2005, the claims of three of the Plaintiffs settled, with the two individuals who were issued citations receiving \$500 each and the individual who spent 12 hours in jail receiving \$1,000. The claims of the remaining Plaintiffs were withdrawn and dismissed after those Plaintiffs could not be reached.

NINTH CIRCUIT

Roulette v. City of Seattle, 78 F.3d 1425 (9th Cir. 1996)

Unhoused residents of Seattle challenged the city's Ordinances that prohibited sitting or lying on downtown sidewalks during certain hours and aggressive begging. The Plaintiffs alleged violations of their rights of freedom of speech, due process, equal protection, and the right to travel.

The District Court granted the city's motion for summary judgment, rejecting Plaintiffs' vagueness, substantive due process, equal protection, right to travel, and First Amendment challenges to the sidewalk Ordinance. In addition, the Court also dismissed Plaintiffs' challenge to the aggressive begging Ordinance on vagueness and overbreadth grounds. However, the Court did limit the construction of the Ordinance to prohibit only threats that would make a reasonable person fearful of harm, and struck down the section of the Ordinance that listed criteria for determining whether or not there was the intent to intimidate.

On appeal, the Ninth Circuit affirmed the District Court's decision, upholding the sidewalk Ordinance. The Court of Appeals rejected Plaintiffs' facial substantive due process and First Amendment challenges, holding that sitting or lying on the sidewalk is not integral to, or commonly associated with, expression. In dissent, Judge Pregerson asserted that Seattle's time, place, and manner restrictions on expressive content are not narrowly tailored to serve a significant government interest and do not leave open ample alternative channels of expression, and thus constitute a violation of Plaintiffs' First Amendment rights. The Ninth Circuit denied Plaintiffs' petition for rehearing en banc. The Law Center filed an amicus brief on behalf of Plaintiffs-appellants.

Seattle v. McConahy, 937 P.2d 1133 (Wash. Ct. App. 1997)

Sarah McConahy, a formerly unhoused young person, and John Hoff, an advocate for the unhoused, were cited under the "Seattle sitting Ordinance," which prohibited sitting or lying on sidewalks in the downtown area of the city and other neighborhood commercial zones between 7:00 a.m. and 9:00 p.m. Hoff and McConahy challenged the Ordinance on several state constitutional grounds, including alleging that the Ordinance violated their substantive due process and free expression rights, and that it violated Washington's Privileges and Immunities Clause.

Hoff also argued that the officers violated Washington's ban on discrimination against persons with disabilities when they cited him, while McConahy alleged that the Ordinance violated her right to travel. Hoff was cited for violating the Ordinance while he was leaning against a building, reading a book with leaflets advertising a protest against the Ordinance in his lap. McConahy was cited for violating the Ordinance while sitting on a street bulb eating pizza with friends.

The Superior Court upheld the Ordinance, and Hoff and McConahy appealed to the Court of Appeals. The Court of Appeals affirmed the Superior Court's decision, holding that (1) the Ordinance did not violate due process, privileges and immunities clause, or right to travel, and (2) sitting was not expressive conduct and,

therefore, not protected by the state constitutional right to freedom of expression.

Considering the substantive due process claim, the Court held that the City's Ordinance furthers legitimate police power interests, reducing petty crime and promoting pedestrian safety and economic vitality, in a manner that infringes only minimally on appellants' freedom of movement. The Ordinance was limited in scope, leaving benches and parks available as alternative places to sit and rest. The Court also found that, as a reasonable legislative response to a local safety and welfare problem, the Ordinance was a "rather benign tool" to achieve legitimate objectives.

The Court also rejected the appellants' claims that the Ordinance violated the Privileges and Immunities Clause, the right to travel, and the state's ban on discrimination against persons with disabilities. First, the Court found nothing in the record to support Hoff's and McConahy's contention that the Ordinance disparately affected poor or unhoused, thereby violating the state Privileges and Immunities Clause. Applying minimum constitutional scrutiny, the Court found that the classes the Ordinance created were those who are and are not patronizing commercial establishments or attending organized events, the Ordinance applied to all members of each class in the same way, and the distinctions drawn were rational and directly related to the legislative purposes of increased pedestrian safety, reduction of petty crime, and urban revitalization.

Second, the Court found that the sitting Ordinance did not implicate the right to travel, as it did not exact a penalty for moving within the state, prevent unhoused people from living on the streets of Seattle, or make it more difficult for people to migrate from state to state.

Third, the Court found that Hoff was unable to support his contention that the citing officers violated the state ban on discrimination against disabled people because he could not show that the City discriminated against him because of his disability. Rather, there was ample evidence that officers ticketed him because he persisted in sitting on the sidewalk after they warned him that he was violating the Ordinance.

Finally, the Court rejected the appellants' argument that the Ordinance impermissibly burdened their right to free expression under the state constitution, agreeing with the Trial Court that the appellants were engaged in pure conduct, not expressive conduct, when they were cited. The Court found that neither reading a book with leaflets in one's lap, nor eating pizza while wearing clothing marked with political slogans, was expressive conduct. Additionally, the Court disagreed that sitting was central to the appellants' messages, and found that the Ordinance was not overbroad because sitting does not have inherent expressive value.

Berkeley Community Health Project v. City of Berkeley, 902 F. Supp. 1084 (N.D. Cal. 1995)

In February, 1994, Plaintiffs challenged two recently enacted Berkeley, CA Ordinances prohibiting sitting or lying down on a sidewalk within six feet of the face of a building during certain hours and soliciting in certain locations or in a “coerc[ive], threaten[ing], hound[ing] or intimidat[ing]” manner. The Plaintiffs alleged violations of their rights under the First and Fourteenth Amendments to the U.S. Constitution and various provisions of the California Constitution.

The U.S. District Court for the Northern District of California issued a preliminary injunction forbidding enforcement of the anti-solicitation Ordinance, finding that it was a content-based regulation of speech in violation of the Liberty of Speech Clause of the California Constitution. The Court also issued a preliminary

injunction prohibiting enforcement of the restriction on sitting, finding that sitting can sometimes constitute expressive activity, and that the Ordinance did not further a substantial government interest unrelated to expression, was not narrowly tailored, and did not leave open ample alternative channels of communication.

The Defendants appealed the Court’s decision on the anti-solicitation Ordinance to the Ninth Circuit, but the case was settled before the appeal was heard. As part of the settlement, the City repealed the Sitting Ordinance and related provisions of § 13.36.100 regulating sitting and lying on sidewalks in commercial districts, amended the Solicitation Ordinance to remove provisions relating to solicitation after dark from persons entering or exiting automobiles within six feet of building fronts adjacent to the public right of way, and paid BCHP \$110,000.00 in attorneys’ fees or costs.

IV. CHALLENGES TO BANS OR RESTRICTIONS ON PANHANDLING

Federal Court Cases

FIRST CIRCUIT

Petrello v. Manchester, No. 1:2016-CV-0008 (D.N.H. 2017)

Theresa M. Petrello filed suit against the city of Manchester, New Hampshire and Ryan J. Brandreth (a member of the Manchester police department) in the U.S. District Court for the District of New Hampshire under 42 U.S.C. § 1983, (1) arguing that the city’s application of RSA 644:2(c), New Hampshire’s disorderly conduct statute, against the Plaintiff violated the First, Fourth and Fourteenth Amendments to the U.S. Constitution and (2) and seeking to enjoin the application of the city’s Anti-Panhandling Ordinance on grounds that the Ordinance violated the First Amendment to the U.S. Constitution.

Ms. Petrello was an unhoused resident who engaged in panhandling on the streets of Manchester – as a matter of policy, she would not step in the roadway to solicit or collect donations. Mr. Brandreth observed a motorist making a donation to Ms. Petrello, which caused another motorist to “miss” a green light before it turned red. Officer Brandreth cited Ms. Petrello for violation of the disorderly conduct statute by panhandling from the sidewalk and disrupting traffic.

The suit against Mr. Brandreth was dismissed on qualified immunity grounds. With respect to the suit against the city of Manchester, without holding whether strict or intermediate scrutiny applied, the Court held that the application of the city’s disorderly conduct statute against Ms. Petrello violated the First Amendment to the

U.S. Constitution, and enjoined the city from applying the statute against passive panhandlers soliciting from public sidewalks under similar circumstances. The Court reasoned that this was a de facto ban on panhandling in a public forum, and there were less restrictive means to achieve the city’s goals of limiting traffic congestion, including fining motorists that impeded traffic.

On similar grounds, the Court enjoined the city from enforcing its Anti-Panhandling Ordinance, which restricted interactions between pedestrians and vehicles on the road because it was not narrowly tailored. The Ordinance was not narrowly tailored because it (1) banned all interactions, regardless of whether they obstructed traffic, (2) applied citywide and (3) penalized only panhandlers and not motorists. The Court therefore held there were less speech-restrictive means to achieve the city’s goals of reducing traffic congestion. The Court held that there was no violation of Ms. Petrello’s Fourth Amendment rights because Officer Brandreth had reasonable suspicion to detain Ms. Petrello in light of the disruption to traffic.

Cutting v. City of Portland, No. 14-1421 (1st Cir. 2015)

Plaintiffs sought an injunction preventing enforcement of an Ordinance restricting people from standing or sitting on any traffic median. The Plaintiffs, consisting of individuals who used the medians when panhandling or when holding political signs, argued that the restriction infringed on their rights under the First and Fourteenth Amendments.

The Court granted permanent injunctive relief in Plaintiffs’ favor, finding that the Ordinance was a content-

based restriction on speech that unconstitutionally favored campaign signs over all other categories of speech. On appeal, the First Circuit affirmed, concluding that the Ordinance's prohibitions on standing, sitting, staying, driving, or parking on median strips violated the First Amendment because the Ordinance indiscriminately banned virtually all expressive activity in all of the city's median strips and thus was not narrowly tailored to serve the city's interest in protecting public safety.

Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014) and Thayer v. City of Worcester, 144 F. Supp. 3d 218 (D. Mass. 2015)

Plaintiffs sought a preliminary injunction against enforcement of two City of Worcester Ordinances restricting panhandling. Plaintiffs alleged that the Ordinances, which prohibited aggressive panhandling and walking on traffic medians for purposes of soliciting donations, were content-based restrictions on speech in violation of the First Amendment right to free speech.

On appeal, the First Circuit held that the laws did not violate the First Amendment, but the judgment of the First Circuit was vacated following *Reed*, and the matter was remanded to the Trial Court for further consideration in light of the new precedent. On remand, the Trial Court found that the Ordinances failed to pass muster under the First Amendment because they were not sufficiently tailored to the public interests they were purportedly designed to address.

McLaughlin v. City of Lowell, No. 14-10270-DPW (D. Mass. 2015)

In 2013, the city of Lowell passed an Ordinance limiting panhandling. The Ordinance banned all vocal panhandling in downtown Lowell and aggressive panhandling behaviors city wide. Panhandling was defined in the Ordinance as the solicitation of any item of value through a request for immediate donation. Aggressive panhandling was defined in the Ordinance to include a variety of activities, including continuing to panhandle after the person has "given a negative response to such soliciting," panhandling from anyone who is waiting in line or panhandling within 20 feet of a bank, ATM, mass transportation facility, public restroom, or pay telephone.

The original Ordinance provided an exemption for organized charities seeking donations for third parties, such as the Salvation Army, but that exemption was later revoked. A second exemption was added in 2015 for panhandling involving passively standing, sitting, or performing music that did not involve a vocal request for donation.

The Ordinance was challenged by two unhoused men who panhandled in Lowell. Plaintiffs claimed the Ordinance violated their First Amendment rights as

well as the Due Process and Equal Protection clauses of the Fourteenth Amendment. The Court reiterated that panhandling is an expressive act and constitutes a form of protected speech under the First Amendment "which clearly limits how panhandling may be regulated." The Court reviewed the downtown and citywide panhandling restrictions separately.

In reviewing the downtown panhandling Ordinance, the Court found that the Ordinance was plainly content-based as the Ordinance "distinguishes solicitations for immediate donations from all others." The Court cited *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), as requiring panhandling regulations to be viewed as content-based. The Court reasoned that, based on *McCullen v. Coakley*, 134 S.Ct. 2518 (2014), a regulation is content-based if it requires law enforcement to "examine the content of the message that is conveyed to determine whether a violation has occurred." The Court found that the downtown panhandling Ordinance was content-based because every police officer enforcing the Ordinance would have to listen to the person's solicitation to determine whether they were asking for an immediate donation to then determine whether a violation of the Ordinance occurred. As such, the Court applied strict scrutiny and found that the city lacked a compelling interest for the ban.

The Court held that "the promotion of tourism and business has never been found to be a compelling government interest for the purposes of the First Amendment." For similar reasons, the Court found that the city-wide aggressive panhandling regulation also constituted a content-based restriction on speech. In applying a strict scrutiny standard of review to the aggressive panhandling Ordinance, the Court found that while public safety is a compelling state interest, the Ordinance was not the least restrictive means for achieving such goal. In coming to that conclusion, the Court reviewed each of the activities deemed to be aggressive panhandling under the Ordinance individually and found them not be the least restrictive means of achieving public safety. The Court granted Plaintiff's request for summary judgment.

SECOND CIRCUIT

Brown v. Kelly, No. 08 Civ. 2173 (SAS) (S.D.N.Y. 2010)

Michael Brown (the "Plaintiff") filed suit against Raymond Kelly, the Commissioner of the New York City Police Department (NYPD), and the City of New York (together, the "Defendants") in the United States District Court, Southern District of New York (the "Court"). Brown filed a putative class action suit alleging that NYPD officers had continued to unlawfully arrest, summons, and prosecute individuals for panhandling despite the 1993 Second Circuit ruling in *Loper v. New York City Police Department* that declared N.Y. Penal Law § 240.35(1)—a

law declaring a person guilty of loitering when wandering in public with the purpose of begging—unconstitutional.

Plaintiff moved for a judgment of civil contempt against the Defendants and the imposition of coercive sanctions against Defendants for each prospective incident of enforcement. The Court denied Plaintiff's motion for a judgment of civil contempt and the imposition of coercive sanctions, but acknowledged that NYPD had failed to follow a 2005 Court Order directing Defendants to stop enforcing § 240.35(1).

The Court used a three-part test to determine whether it could hold Defendants in civil contempt for failing to comply with the previous Court Order. The Court first looked at whether the order with which Defendants had failed to comply was clear and unambiguous and found that the 2005 Order in question clearly directed Defendants to stop enforcing § 240.35(1). Second, the Court looked at whether the non-compliance with the Order was clear and convincing. The Court held that the non-compliance by Defendants was clear, as the number of unconstitutional summonses for violations of § 240.35(1) fell by only 6% during the nineteen months after the Order compared to the same time period before the Order.

The Court also took into consideration Defendants' blatant disrespect towards the Order and *Loper*. The final element of the test requires the Court to find that Defendant had not diligently attempted to comply with the Order in a reasonable manner. Here, the Court did not find that NYPD or the City of New York had failed to attempt to comply in a reasonable manner, despite years of ignoring *Loper*, because NYPD began taking responsibility for its noncompliance around December 2006. Specifically, the NYPD had created supplemental lesson plans and training materials to reiterate the unenforceability of § 240.35(1), and sent in the paychecks of all uniformed officers a reminder that enforcing § 240.35(1) could result in disciplinary action. For these reasons, the Court found that the NYPD had attempted to comply with the Order in a reasonable manner. Based on this finding, the Court denied Plaintiff's motion for an order adjudging Defendants to be in civil contempt and declined to impose coercive sanctions. However, the Court noted that "better late than never" compliance will not always save a party from a finding of civil contempt.

Despite denying his motion, the Court awarded the Plaintiff attorneys' fees. The Court reasoned that, because Defendants continuously defied the 2005 Order, the Plaintiff had no choice but to bring the contempt proceeding. Additionally, the Court said it was prepared to revisit Defendants' behavior every two months until no additional summonses for violations of the unconstitutional statute were issued.

Loper v. NYC PD, 766 F. Supp. 1280 (S.D.N.Y. 1991)

Jennifer Loper and William Kaye sued the New York City Police Department alleging that a New York state statute (N.Y. Penal Law 240.35(1)) banning loitering in a public place "for the purpose of begging" was unconstitutional. The U.S. District Court (S.D.N.Y.) held that the statute violated the First Amendment, and the Second Circuit affirmed.

Plaintiffs were two individuals experiencing homelessness who begged on the streets and public areas of New York City. The District Court granted the Plaintiffs' motion to bring this suit as a class, which was defined as all "needy persons who live in the State of New York, who beg on the public streets or in the public parks of New York City," with "needy person" defined as "someone who, because of poverty, is unable to pay for the necessities of life, such as food, shelter, clothing, medical care, and transportation."

In response to the Defendant's argument that the Plaintiffs lacked standing, the District Court found that the named Plaintiffs had suffered a concrete injury. While only a small subset of the class had actually been arrested for begging under the statute (and the named Plaintiffs have not been arrested under it), since the NYPD invoked it when telling people to stop begging and move on, the statute was used as "a source of authority for restricting the Plaintiffs' assumed rights."

Plaintiffs alleged that the statute violated the First, Eighth and Fourteenth Amendments of the U.S. Constitution and sought declaratory relief. The District Court limited its analysis to the First Amendment; it granted the Plaintiffs' motion for summary judgment and found that the statute was unconstitutional.

The District Court held that begging by individuals experiencing homelessness was the same kind of speech and expressive conduct, and therefore deserving of the same kind of protection, as that of agents of corporate charities that are permitted to solicit donations in person on the streets of New York City.

The District Court applied a combination of the traditional O'Brien test, and the standard used to assess time, place and manner restrictions on "pure speech" in traditional public fora. The crux of these tests, summarized the District Court, is that "regulations must be neutral, support substantial governmental interest, and not completely ban the speech at issue."

The District Court found that the regulations were not neutral and discriminated on the basis of the content of the message, as solicitors of a corporate charity would be permitted to beg in the manner prohibited by the statute. The statute also completely banned the speech at issue—no alternative means of begging in New York City are

permitted. The District Court also undertook a balancing of the competing interests; its conclusion was that while the state and the public have an interest in avoiding undesired solicitations and maintaining order, the “interest in permitting free speech and the message begging sends about our society predominates.”

The NYPD appealed to the Second Circuit, arguing that begging has “no expressive element,” and thus this form of speech is granted only limited protection under the First Amendment. The Second Circuit disagreed, stating that this statute prohibited speech and communicative conduct, and that the District Court’s First Amendment analysis was correct.

The Second Circuit distinguished this case from *Young v. New York City Transit Authority* (2d Cir., 1990), in which the Second Circuit upheld a ban on begging in the New York City subway system. There, the Second Circuit held that the subway system was not a true public forum, and the confined atmosphere presented a special condition that warranted a limit on expressive activity. Importantly, the statute in *Young* fared differently under the First Amendment O’Brien test since it kept open alternative channels for begging (namely, sidewalks and public parks). The present statute prohibited begging throughout the entire city, most of which—sidewalks public parks—falls into the category “of public property traditionally held open to the public for expressive activity” and is a true public forum.

The Second Circuit found that the statute was not narrowly tailored to achieve the end of any state interest, even a theoretically compelling one like prohibiting evils sometimes associated with begging (fraud, harassment, obstruction of traffic). Nor was the statute content neutral, as it permitted solicitation from representatives of charitable organizations.

Young v. NY Transit Authority, 903 F.2d 146 (2nd Cir. 1990)

The Legal Action Center for the Homeless (“LACH”) filed suit against the New York Transit Authority (“TA”), among others, in the District Court on behalf of itself and two unhoused men, William B. Young and Joseph Walley, as representative Plaintiffs for a class of unhoused and needy persons who begged and panhandled in the New York City subway system. LACH argued that 21 N.Y.C.R.R. § 1050.6, prohibiting panhandling or begging upon any Metropolitan Transportation Authority (“MTA”) transit facility or conveyance, contravened the rights to free speech, due process, and equal protection of the law, in violation of the First and Fourteenth Amendments of the United States Constitution.

The District Court agreed, permanently enjoining the various Defendants from enforcing the prohibition against begging in public transit facilities and declaring that

N.Y. Penal Law § 240.35 violated the New York State Constitution.

On appeal, the Second Circuit applied the Supreme Court’s standard in *U. S. v. O’Brien*, 391 U.S. 367 (1968), concluding that (1) the TA was within the bounds of its rule-making authority, (2) the TA’s regulation advanced a substantial government interest, (3) the governmental interest was unrelated to the suppression of free speech in that it was content neutral and not being applied because of any disagreement with the message being presented, and (4) a total ban of begging or panhandling was a reasonable time, place, or manner restriction and was narrowly tailored, in that the government interest would be achieved less effectively without the restriction. See also *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

In reaching its conclusion, the Second Circuit cited *Spence v. Washington*, 418 U.S. 405 (1974) and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), distinguishing begging from organized charitable solicitation, in that begging is not inseparably intertwined with a “particularized message” but that its primary purpose is to collect money – not to communicate information, disseminate and propagate views and ideas, and advocate for causes. The Second Circuit also returned time and again to both the safety and “smooth and proper functioning” of the system and the negative emotional impact of beggars or panhandlers on TA passengers (“begging in the subway often amounts to nothing less than assault” and “a menace to the common good”).

Although N.Y. Penal Law § 240.35 was implicated at the District Court level for similarly prohibiting loitering, remaining, or wandering about in a public place for the purpose of begging, the Second Circuit found that the this penal statute was unrelated to the TA’s regulation, and the Plaintiffs did not have standing to contest that penal statute, because they were never prohibited from begging or panhandling, requested to desist or leave by any Port Authority official, or arrested or prosecuted for begging or panhandling, demonstrating no “real and immediate” possibility of injury by that law. The Second Circuit also observed that the District Court raised and pressed the issue of the New York Penal Law – not the Plaintiffs.

Ultimately, the Second Circuit held that 21 N.Y.C.R.R. § 1050.6 did not violate the First Amendment, reversing and vacating the District Court’s judgment permanently enjoining the various Defendants from enforcing the prohibition against begging in public transit facilities, and vacating the District Court’s judgment declaring that N.Y. Penal Law § 240.35 violated the New York State Constitution.

FOURTH CIRCUIT

NLCHP v. Greensboro, No. 1:18-CV-686 (M.D.N.C. 2018)

On July 24, 2018, the City of Greensboro (the “City”) enacted Section 20-1, which made “aggressive solicitation” a misdemeanor offense. Section 20-1 applies to actions conducted in public for the purpose of collecting money or contributions for one’s self (i.e., panhandling, begging, or charitable or political soliciting). On August 8, 2018, NLCHP challenged Section 20-1 on First Amendment grounds in U.S. District Court for the Middle District of North Carolina. NLCHP filed the lawsuit on behalf of three individual Greensboro residents experiencing homelessness (the “Plaintiffs”) and on its own behalf.

Six days following the suit, the City repealed Section 20-1 in an emergency meeting. NLCHP amended its Complaint to focus on the past denial of free speech rights and the resulting damages. The City moved to dismiss the amended Complaint.

In opposition to the City’s motion to dismiss, NLCHP argued that the Plaintiffs (including NLCHP) have standing because they suffered a redressable injury-in-fact. With respect to the standing of the individual Plaintiffs, NLCHP argued that Section 20-1 had chilled the individuals’ ability to solicit money and caused them to lose financial resources. According to NLCHP, the Plaintiffs faced a credible threat of prosecution if they engaged in solicitation regardless of whether the law was in effect, which resulted in them chilling solicitation as a form of free speech. NLCHP thus argued that Plaintiff’s injuries only could be redressed if the law was repealed and nominal and compensatory damages were awarded.

The opposition argued that NLCHP had standing because Section 20-1 frustrated its organizational purpose of combating homelessness by creating legal barriers preventing people in poverty from obtaining money to live. Further, the City made overt requests to NLCHP for help in evaluating Section 20-1, its effect, and potential alternatives. Because of the assistance NLCHP provided to the City, NLCHP was forced to divert resources away from its primary activities to evaluate Section 20-1, provide testimony, and assess whether it violated the Constitution. NLCHP argued that its injuries were redressable through declaratory relief and nominal and compensatory damages.

Reynolds v. Middleton, 779 F.3d 222 (4th Cir. 2015)

Robert Reynolds, an unhoused resident of Henrico County, Virginia, brought a First Amendment challenge against a local Ordinance prohibiting the solicitation of contributions of any nature from the drivers or passengers of motor vehicles on highways located within the county. The District Court granted summary judgment in favor

of the county, holding that the Ordinance was content-neutral and a narrowly tailored time, place, and manner restriction on speech. Reynolds appealed. On appeal, Reynolds argued that the county failed to prove that the Ordinance was narrowly tailored to serve a significant government interest.

The Court noted that the Ordinance burdened a wide range of protected speech, including all forms of leafletting in addition to prohibiting solicitations of any kind of contribution, whether political or charitable, or selling or attempting to sell goods or services. The Court also found that there was no evidence of a county-wide problem that would justify the county-wide sweep of the statute, and thus the Ordinance burdened more speech than necessary. Nor was there any evidence that the county ever tried to improve traffic safety by prosecuting any roadway solicitors who actually obstructed traffic, or that it ever considered prohibiting roadway solicitation only at those locations where it could not be done safely.

Based on this reasoning, the Court held that the county could not carry its burden of demonstrating that the Ordinance was narrowly tailored. Thus, the Court vacated the District Court’s ruling granting summary judgment in favor of the county, and remanded for further factual development. In July 2015, the case was voluntarily dismissed based on an unspecified change in the Plaintiff’s circumstances.

Clatterbuck v City of Charlottesville, 708 F.3d 549 (4th Cir. 2013) and Clatterbuck v City of Charlottesville, 92 F.Supp.3d 478 (W.D. Va. 2015)

The Plaintiffs, who regularly begged at a downtown mall in Charlottesville, filed an action under § 1983 challenging the constitutionality of an Ordinance restricting panhandling in National Law Center on Homelessness & Poverty | 55 the area. The District Court dismissed the action, finding the Ordinance to be a content neutral, permissible time, manner, place restriction. The Plaintiffs appealed and the city cross-appealed the determination that the Plaintiffs had standing.

The Court of Appeals for the Fourth Circuit reversed and remanded, finding that the Plaintiffs had standing to challenge the law and that the District Court had erred in dismissing the case.

The Court found that Ordinance was not content neutral as it prohibited solicitations that requested immediate donations or things of value, yet allowed donations of things that have no “value.” The Court also accepted Plaintiffs’ argument that the city enacted the Ordinance to reduce the presence of impoverished people on the downtown mall in violation of the First Amendment, noting that the Ordinance contained no statement of purpose and none of the evidence properly before the Court indicated the city’s reasons for enacting it.

On remand, the District Court found that the City of Charlottesville failed to carry its burden of showing the content-neutrality of the Ordinance, which “plainly distinguishes between types of solicitations on its face”; thus holding the Ordinance to be content-based. Accordingly, the city’s motion for summary judgment was denied and Plaintiffs’ motion for summary judgment was granted. The Court enjoined the city from enforcing the Ordinance and Plaintiffs were directed to submit petitions for damages and costs. The city appealed the decision, but parties reached an undisclosed settlement arrangement and the case was dismissed.

Chase v. Town of Ocean City, 825 F. Supp. 2d 599 (D. Md. 2011)

The Plaintiff, a spray paint artist and street performer, challenged the constitutionality of Ordinances that restricted “peddling, soliciting, hawking or street performing” on the boardwalk, prohibited all commercial activity on and near the boardwalk, and imposed licensing requirements. In a motion for a preliminary injunction, the Plaintiff argued that the Ordinances were content-based restrictions that unconstitutionally infringed on his right to free expression under the First Amendment.

The Court granted the motion in part and denied the motion in part. In reaching its decision, the Court found that the Ordinance was a reasonable time, place, and manner restriction. However, the Court found that the city had failed to demonstrate that the Ordinance was narrowly tailored to serve a significant government interest and had failed to leave open an adequate alternative channel of communication. The Court further found that the law’s registration scheme broadly restricted speech and failed to strike a balance between the speech affected and governmental interests.

Jones v. Wasileski, Case No. 09 CV 00032 (W.D. Va., filed Feb. 5, 2009)

Plaintiff Reuben Jones, an unhoused individual proceeding pro se, brought suit under § 1983 against five individual Roanoke police officers and the Roanoke police chief for arresting or citing the Plaintiff for violating an Ordinance prohibiting aggressive soliciting. Each citation or arrest occurred while Jones was standing on a highway on-ramp or street median holding a sign stating “If Jesus was right here, would you help him? God bless you!” The Plaintiff alleged that these arrests and citations violated his First Amendment rights. The Court granted the Defendants’ motion for summary judgment finding they were subject to qualified immunity. The Court further found that the Ordinance prohibiting solicitation in certain areas, such as roadways, was content neutral and furthered the government’s significant interest in ensuring safe and efficient roadways.

FIFTH CIRCUIT

Yvette Gbalazeh, et al. v. City of Dallas, 394 F.Supp.3d 666 (N.D. Texas, July 19, 2019)

Plaintiffs alleged that they had been cited under three City of Dallas (“Dallas”) panhandling laws, and that all three violated their First and Fourth Amendment rights. The three laws were:

Ordinance § 31-35 (“section 31-35”) prohibits solicitation by coercion, after sunset, and in certain specified areas of the City.

Ordinance § 28-63.3 (“section 28-63.3”) prohibits solicitation of occupants of vehicles from public property adjacent to the roadway. Section 28-63.3 defines solicitation as, either orally or in writing, (1) asking for a ride, employment, goods, services, financial aid, monetary gifts, or any article representing monetary value, for any purpose; or (2) offering to sell something; or (3) giving away goods, services or publications; or (4) asking for signatures on a petition.

Texas Transportation Code § 552.007 (“section 552.007”) prohibits a person standing in a roadway to solicit a ride, contribution, employment, or business from an occupant of a vehicle.

In addition to retroactive relief regarding their previous convictions, they sought injunctive and declaratory relief stating the laws were unconstitutional and preventing future enforcement. Dallas filed motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The Court granted in part and denied in part the motion to dismiss for lack of subject matter jurisdiction, and the motion to dismiss for failure to state a claim was denied. The District Court specifically held that:

Plaintiffs did not have an adequate opportunity to raise their constitutional claims in state Court.

As a matter of first impression, the District Court could distinguish between retroactive and prospective relief sought by the Plaintiffs.

Plaintiffs sufficiently alleged threat of future prosecution under the city’s laws to establish the injury-in-fact required for standing.

Plaintiffs’ claims in their Second Amended Complaint related back to their original Complaint.

Plaintiffs plausibly alleged violations of § 1983, the First Amendment, and the Fourth Amendment.

Blitch v. City of Slidell, 260 F.Supp.3d 656 (E.D. La., June 22, 2017)

Panhandlers, including Blitch, brought an action against the city of Slidell (“Slidell”) challenging a city panhandling

Ordinance that required would-be panhandlers to register with the chief of police and wear identification before asking their fellow citizens for money. Plaintiffs alleged that the Ordinance violated their rights under the First Amendment. The parties each moved for summary judgment, and the District Court granted Plaintiffs' motion, denied Slidell's, and entered a permanent injunction against enforcement of the city's Ordinance. The Court held specifically as follows:

Plaintiffs had a first Amendment right to panhandle in Slidell. The distinction between an individual asking for charity and an organization asking for charity should not be "a significant one for First Amendment purposes." *Cf. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.")

Slidell's Ordinance was subject to strict scrutiny. Because the city was imposing unique content-based burdens on certain types of non-commercial solicitation, the panhandling Ordinance must be analyzed under strict scrutiny. Under strict scrutiny, the panhandling permitting requirement "can stand only" if Slidell can prove the scheme "furthers a compelling interest and is narrowly tailored to achieve that interest." Slidell's Ordinance was insufficiently tailored to achieve its stated end and unnecessarily burdened protected speech.

The panhandling Ordinance was substantially overbroad and facially invalid under the First Amendment. The Ordinance unconstitutionally required a prior permit to panhandle on the public streets and sidewalks of Slidell. Those streets and sidewalks were likely the prime location to panhandle as well as the location where most of the panhandling in Slidell occurred. Therefore, even if the Ordinance had some legitimate sweep insofar as Slidell may constitutionally require a permit to panhandle at some locations within city limits, that legitimate sweep was inevitably dwarfed by the law's unconstitutional applications.

On July 12, 2016, the Slidell City Council adopted Slidell City Code §11-207(a) requiring any individual who intended to panhandle on public streets to first obtain a permit from the Chief of Police (or his designee) and then to display the permit on his or her chest when panhandling. The permit registration process included a number of steps and pieces of information (address, telephone numbers, email addresses), as well as various restrictions on eligibility.

Plaintiffs Gary Blitch, David Knight and Daniel Snyder, adult residents of Slidell, Louisiana who actively solicited

alms in the city, filed suit in the United States District Court in the Eastern District of Louisiana, claiming that the Ordinance was unconstitutional, violating their right to free speech.

The threshold question for the District Court to address was whether the desire to ask for charity was protected free speech by the First Amendment. *Villa. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). The District Court concluded that it was, based on the Supreme Court's recognition that the solicitation of funds by charitable organizations is protected by the First Amendment. The District Court indicated that there wasn't a significant difference between an individual or an organization asking for charity, for purposes of the First Amendment. *Lopez v. N.Y.C. Police Dept.* 999 F.2d 699, 794 (2d Cir. 1993).

In so concluding, the District Court considered the Plaintiffs' argument that the Ordinance was overbroad, meaning a "substantial number of [the panhandling Ordinance's] applications" were unconstitutional. The Court agreed with the Plaintiffs' argument, applying strict scrutiny to the Ordinance on the basis that panhandling usually occurs in a public forum and that the Ordinance was not content-neutral. As such, the Court found that the panhandlers' speech was being regulated by its subject and its purpose. Slidell argued that strict scrutiny did not apply because (1) Slidell was only regulating the speech, rather than banning it entirely, (2) Slidell's intention was not to suppress speech, and (3) Slidell, as in *Schaumburg*, was imposing reasonable regulations on solicitation generally.

The District Court rejected all of these arguments, indicating that because Slidell was imposing unique content-based burdens on certain types of non-commercial solicitation, the panhandling Ordinance had to be analyzed under strict scrutiny.

Applying a strict scrutiny standard, the Ordinance could only pass if Slidell could prove that it furthered a (1) compelling interest and (2) was narrowly tailored to achieve that interest. While the District Court agreed that public safety was a compelling interest, it noted that Slidell failed to prove that the Ordinance had a public safety issue. Specifically, even if the Court took Slidell's argument on its face that there was an increasing trend of aggressive panhandling and that having panhandlers wear nametags would promote public safety, Slidell had not shown that the Ordinance was the "least restrictive means to further" public safety.

The Court suggested that less restrictive alternatives such as allocating additional police resources to enforce rules against aggressive panhandling or installing cameras at locations frequented by panhandlers were available. Accordingly, the Court held that the Ordinance was overbroad. The Court granted the motion for

summary judgment and a permanent injunction against enforcement of the Ordinance.

SIXTH CIRCUIT

Vaduva v. City of Xenia 726 F.3d 867 (6th Cir. 2013)

Mich. Comp. Laws Ann. § 750.167(1)(h) “provides that ‘[a] person is a disorderly person if the person is any of the following: . . . (h) A person found begging in a public place.’”

Plaintiffs challenged the statute under the First and Fourteenth Amendments. The parties filed cross-motions for summary judgment. The District Court ruled for the Plaintiffs and the Michigan Attorney General appealed.

The Sixth Circuit held “begging, or the soliciting of alms, is a form of solicitation that the First Amendment protects.” The Court found “hundreds” of cases of unconstitutional applications and “sustaining the facial challenge in this case is appropriate because the risk exists that, if left on the books, the statute would chill a substantial amount of speech protected by the First Amendment.” “Michigan’s interest in preventing fraud can be better served by a statute that, instead of directly prohibiting begging, is more narrowly tailored to the specific conduct, such as fraud, that Michigan seeks to prohibit.”

Speet v. Schuette, 726 F.3d 867 (6th Cir. 2013)

James Speet (“Speet”) and Ernest Sims (“Sims”), who had both engaged at times in panhandling in Grand Rapids, Michigan, filed suit in the Western District of Michigan arguing that Michigan penal code § 750.167(1)(h) (the “Statute”) was unconstitutional both on its face and as applied because it prohibited all “begging” in public places. Speet and Sims argued that the Statute violated their rights under the First and Fourteenth Amendments to the U.S. Constitution. They immediately moved for summary judgment on their claims that the Statute was facially unconstitutional. The District Court granted their motion for summary judgment and the Sixth Circuit Court of Appeals affirmed the District Court’s determination that the Statute was facially invalid under the First Amendment, and therefore did not reach the question of whether the Statute was facially invalid under the Fourteenth Amendment.

The Sixth Circuit held that begging is speech, not conduct, and therefore protected by the First Amendment, reasoning that begging is a type of charitable appeal for funds. It rejected Michigan’s contention that begging is conduct and not speech.

Because the challenge before it was a facial one, the Sixth Circuit then turned to whether the Statute was substantially overbroad, and held that it was because it made speech protected under the First Amendment

illegal. The Sixth Circuit was further aided in this analysis by records provided by Speet and Sims regarding 490 incident reports concerning enforcement of the Statute, all of which involved individuals that were exercising what the Sixth Circuit determined to be protected speech.

Finally, the Sixth Circuit ruled that it could not read the Statute to limit its constitutional effect because it categorically banned protected speech, and that, although the prevention of fraud and duress are substantial state interests, if Michigan wished to serve those interests it would need to draft a different statute that is more narrowly tailored.

Contributor v. City of Brentwood, 726 F.3d 861 (6th Cir. 2013)

Vendors for The Contributor, a newspaper written and sold by unhoused and formerly unhoused persons, brought suit challenging the constitutionality of an Ordinance that prohibited the sale or distribution of newspapers on public streets and to the occupants of motor vehicles. The Plaintiffs argued that the Ordinance violated their First Amendment right to free speech as it did not leave open adequate alternative channels of communication.

The District Court for the Middle District of Tennessee disagreed, finding that the Ordinance did leave open adequate alternative channels of communication, and the Sixth Circuit affirmed on appeal, reasoning that it would be an onerous burden to require a municipality to prove the adequacy of alternative channels of communication.

Eggleston v. City of Cincinnati, Case No. 1:10 CV 395 (S.D. Ohio)

Paul Eggleston, an unhoused individual, Greater Cincinnati Coalition for the Homeless, and Grace Place Catholic Worker House, challenged a city policy adopted on June 3, 2010, that conditions certification and funding of shelters on the requirement that they discourage and punish panhandling. The policy would not take effect until enacted as a city Ordinance. The policy would also change the certification entity from the Greater Cincinnati Coalition for the Homeless to a city-funded agency.

Plaintiff Eggleston alleged that he solicited money on the streets to support himself, planned to continue to do so, and as a result would no longer be able to reside at his current shelter or any other shelter in Cincinnati. The Plaintiffs asserted that such a policy violated their First Amendment rights to free speech. On November 11, 2010, the Court dismissed the case without prejudice finding that, because the policy had not yet been adopted as a city Ordinance and was therefore not yet effective, the claims were not ripe. No further action has been taken by the city to adopt the policy as a city Ordinance.

Henry v. City of Cincinnati, 2005 WL 1198814 (S.D. Ohio Apr. 28, 2005)

Four unhoused individuals and the CEO of the Homeless Hotline of Greater Cincinnati brought suit to challenge the constitutionality of a city Ordinance that prohibited engagement in vocal solicitation without a valid registration. The city moved to dismiss on standing grounds. Because the Plaintiffs asserted that they feared arrest due to their solicitation activities without registration, the Court held that Plaintiffs had alleged sufficient facts to overcome the motion to dismiss.

Furthermore, because Plaintiffs claimed that the registration scheme lacked the necessary procedural safeguards, they had standing to challenge the Ordinance's allegedly overbroad registration requirements. The Plaintiffs also alleged that the time, place, and manner restrictions were unconstitutionally vague and that the city Ordinance was not narrowly tailored to serve a compelling government interest, but served as an unconstitutional prior restraint on speech.

The Court rejected the city's argument that the Ordinance regulated only panhandling and that panhandling is merely commercial speech. However, the Court held that the Ordinance was content neutral under the *Hill v. Colorado* standard. The Court characterized the regulation as a time, place, and manner restriction and noted that the Ordinance was not concerned with the message a solicitor communicates by requesting money. Lastly, the Court found that the Ordinance was justified by reference to the act of solicitation, not the content of the speech. Regarding constitutional review under intermediate scrutiny, the Court held that the parties should be afforded an opportunity to present evidence.

In addition, the Court did not dismiss the registration requirement claim because it was not convinced by the city's argument that registration for solicitors was required to prevent fraud. The parties settled in the fall of 2007. The settlement provided for a substantially revised solicitation Ordinance that eliminated the registration requirement altogether and made the time, place, and manner restrictions on panhandling significantly less onerous. In addition, the city agreed to pay \$10,000 in attorneys' fees.

Mancini v. Cleveland, No. 1:17-CV-00410 (N.D. Ohio 2017)

The city of Cleveland had an Ordinance that prohibited solicitations for immediate donation of money or other things of value within 20 feet of certain areas, including bus stops and sidewalk cafes, and within 10 feet of an entrance to a building or parking lot. The Ordinance also prohibited aggressive solicitation, which was defined to include "continuing to solicit from a person after the

person has given a negative response." Further, the Ordinance prohibited individuals from soliciting donations alongside a roadway unless the donation is for a bona fide charity. For this purpose "bona fide" was not defined.

John Mancini and the Northeast Ohio Coalition for the Homeless, represented by the American Civil Liberties Union of Ohio, challenged the Ordinance as a violation of the First Amendment and requested that the Court 1) enjoin the enforcement of the Ordinance and 2) enter a temporary restraining order because Mr. Mancini feared being harassed by law enforcement as retaliation for the lawsuit after he was followed, detained and questioned about his privileged conversations with counsel by law enforcement.

Mr. Mancini was a disabled veteran living in Cleveland who panhandles. As the motion for a Preliminary Injunction stated, Mr. Mancini generally sat on the sidewalk with a sign asking for donations or stood at an intersection with a traffic light and asked for donations. Mr. Mancini had been ticketed four times for panhandling in violation of the challenged Ordinance. The motion also stated that between 2007 and 2015, the Cleveland Police Department issued 5,817 total tickets for panhandling.

Plaintiffs contended that the Ordinance constituted a content-based restriction on speech and that they were likely to prevail. Plaintiffs asserted that they were entitled to a preliminary injunction unless the Ordinance passed strict scrutiny review, with the Government establishing that there was no less restrictive alternative to achieve its compelling interest. Plaintiffs claimed that the City lacked a compelling interest and additionally that the Ordinance was not narrowly tailored to the Government's claimed interest in the free flow of traffic and safety.

After the Court denied the Emergency Motion for a Temporary Restraining Order, the Cleveland City Council repealed the challenged Ordinance. Accordingly, the City filed a Motion to Dismiss the claims as moot, and the parties proceeded to reach a settlement regarding damages.

Northeast Ohio Coalition for the Homeless v. City of Cleveland, 885 F. Supp. 1029 (N.D. Ohio 1995), rev'd on other grounds, 105 F.3d 1107 (6th Cir. 1997). 120 1997 U.S. App. LEXIS 9056 (6th Cir. Apr. 10, 1997). Northeast Ohio Coalition for the Homeless v. City of Cleveland, 522 U.S. 931 (1997).

The Northeast Coalition for the Homeless (the "Coalition"), Richard Clements, The Fruit of Islam of Muhammad's Mosque No. 18 (the "Mosque"), and Steven D. Hill filed suit against the City of Cleveland, arguing that the city Ordinance requiring all "peddlers" to obtain a permit violated the First Amendment as a prior restraint on protected speech.

The permit cost \$50. The Coalition sells a paper to unhoused people for \$.10 each. They then offered the paper to passers-by for a suggested donation of \$1.00. The Mosque also published a paper distributors sell for \$1.00. These distributors kept \$.30 and were also expected to donate an additional \$50 a month to the Mosque. Clements and Hill had been arrested at least once for disseminating their respective publications without a license.

The District Court granted summary judgment in favor of the Coalition, Clements, the Mosque, and Hill. The District Court reasoned that imposition of a flat license tax on the dissemination of religious literature in public by solicitors who seek a donation in return for the publication violated the First Amendment as a prior restraint on protected speech and cited *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943). The City appealed to the Sixth Circuit Court. The Circuit Court reversed and remanded with instructions to enter summary judgment in favor of the city. The Circuit Court held that license fee imposed by the city Ordinance requiring street peddlers to register with the city was not an impermissible prior restriction. Certiorari was denied. *Northeast Ohio Coalition for the Homeless, et al. v. City of Cleveland*, 522 U.S. 931 (1997).

The Circuit Court based its holding on the reasoning that a permit fee imposed before a person can engage in constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest. The Circuit Court found a compelling interest in preventing fraudulent solicitations and that the \$50 fee defrayed the administrative expenses of administering this regulatory scheme. The Circuit Court did not address that the Coalition, most of its distributors, and most Mosque distributors were financially unable to pay this fee, but held that a fee can be more than nominal if it is reasonably related to the expenses incident to the administration of the Ordinance and to the maintenance of public safety and order.

SEVENTH CIRCUIT

Dumiak v. Vill. of Downers Grove, Case No. 19 CV 5604, 2020 U.S. Dist. LEXIS 134050 (N.D. Ill. Jul. 29, 2020)

Plaintiffs sued the Village of Downers Grove, Illinois, alleging that a city Ordinance and a state statute, both criminalizing panhandling, infringed on Plaintiffs' First Amendment rights.

The Village Ordinance made it illegal to "solicit money without a permit" and the state statute made it illegal for any person to "stand on a highway for the purpose of soliciting contributions from the occupant of any vehicle except within a municipality when expressly permitted by Ordinance."

Plaintiffs alleged the Defendants violated their First Amendment rights because the laws "drew unconstitutional distinctions based on content." They also claimed the individual Defendants (six police officers) were "liable for enforcing those laws[.]" The Defendants moved to dismiss.

The Northern District of Illinois held that the "laws are flagrantly unconstitutional under *Reed* and *Norton* (2015) - and reasonably prudent police officers would have so concluded." The motion to dismiss was denied.

Norton v. City of Springfield, Ill., 806 F.3d 411 (7th Cir. 2015)

Plaintiffs, who had been cited for panhandling in violation of a City of Springfield Ordinance filed an action against the city challenging the constitutionality of the Ordinance. Plaintiffs also moved for preliminary injunction. The District Court denied Plaintiff's motion, and Plaintiffs appealed. The Seventh Circuit Court of Appeals initially affirmed, but on petition for rehearing, the Court held that Springfield's anti-panhandling Ordinance was not content-neutral, and thus violated free speech rights under the First Amendment, thus reversing and remanding to the lower Court.

The City of Springfield filed a petition for writ of certiorari, which the Supreme Court of the United States denied. *City of Springfield, Ill v. Norton, et al.*, 577 U.S. 1140, 136 S.Ct. 1173 (Mem.), 194 L.Ed.2d. 178 (2016)

Pindak v. Cook County, No. 10 C 6237, 2013 WL 1222038 (N.D. Ill. March 25, 2013)

The Plaintiff, who had routinely been ordered by security personnel to leave a public plaza where he was peacefully panhandling, filed suit against Cook County along with several public and private entities responsible for managing the property. The Plaintiff argued that the uniform practice of removing panhandlers from the plaza violated the First Amendment both on its face and as applied to him, and sought declaratory, injunctive, and monetary relief.

The Court agreed that the Plaintiff had adequately alleged a widespread practice of banning peaceful panhandling on the plaza and that the Cook County Sheriff knew that his deputies were violating the Plaintiff's First Amendment rights by carrying out the ban.

In January 2016, a jury found that the Cook County Sheriff's failure to adequately train Defendant deputies caused a violation of Plaintiffs' First Amendment rights and awarded the Plaintiff compensatory damages in the amount of \$1,500. In March 2016, the Plaintiff settled with certain remaining Defendants, but her suit against Cook County for attorneys' fees continued. Parties were able to finally resolve the matter in July 2016 and the case was dismissed in January 2017.

Dellantonio v. City of Indianapolis, No. 1:08-cv-0780 (S.D. Ind., filed June 11, 2008)

A class of Plaintiffs sued the city of Indianapolis, alleging that Indianapolis police were illegally prohibiting unhoused individuals from passively soliciting contributions in public by holding out a cup. An existing city Ordinance prohibited only the oral or written solicitation of contributions; passive solicitations are permissible. The Complaint also alleged that, in connection with stops by the police for violations of the Ordinance, the police had illegally seized unhoused persons without cause or reasonable suspicion by detaining them until their identification was reviewed by the police, and had illegally seized their property.

The Plaintiffs alleged that the police's actions related to the interference with lawful solicitations of contributions were violations of the First Amendment, and that the seizure of Plaintiffs without cause or suspicion violated the Fourth Amendment. The Plaintiffs also alleged that the seizure of property related to such police actions violated the Fourth and Fourteenth Amendments. The Plaintiffs sought a permanent injunction against illegal enforcement of the existing anti-solicitation Ordinance as well as an injunction against such illegal seizures of person and property.

The case was settled as to three of the Plaintiffs. Two of the Defendants lost touch with Plaintiffs' counsel and the Court, and were dismissed from the case for failure to prosecute.

Thompson v. City of Chicago, 2002 WL 31115578 (N.D. Ill. Sept. 24, 2002)

Unhoused Plaintiffs, on behalf of themselves and a purported class ("Plaintiffs") brought an action against the City of Chicago (the "City") in the United States District Court for the Northern District of Illinois. Plaintiffs brought their action to challenge § 8-4-010(f) of the Chicago Municipal Code, which states that "[a] person commits disorderly conduct when he knowingly: . . . (f) Goes about begging or soliciting funds on the public ways, except as provided in Chapter 10-8, Sections 10-8-110 through 10-8-170" (the "panhandling Ordinance").

Chapter 10-8 allowed individuals to solicit charitable donations provided they had a permit. Plaintiffs panhandled money from pedestrians on public sidewalks of the City and sought a declaratory judgment stating that the panhandling Ordinance violated the First and Fourth Amendments, a preliminary and then a permanent injunction barring the City from enforcing the panhandling Ordinance and barring the City from harassing Plaintiffs from panhandling, money damages to be determined at trial, costs and attorneys' fees.

The City filed a motion to dismiss Plaintiffs' claim, and the District Court for the Northern District of Illinois denied the motion. The Court held that, although Plaintiffs' § 1983 claims were not exceedingly clear, they met the bare pleading requirements necessary to state a claim for municipal liability. Next, the Court ruled that Plaintiffs had sufficiently alleged that the City had a custom and practice that violated Plaintiffs' First Amendment right to panhandle on public sidewalks. Finally, the Court found that the Plaintiffs had stated a claim under the Fourth Amendment because police officials should have been aware that an Ordinance similar to the panhandling Ordinance had previously been held to violate the Constitution, and thus the police could not have had a good faith belief in the constitutionality of the Ordinance. Accordingly, the Court denied the City's motion to dismiss Plaintiffs' claims.

The parties settled, and the City agreed to pay \$99,000 in damages and an additional \$375,000 in attorney's fees and other administrative costs. The City also repealed the panhandling Ordinance as a result of the lawsuit.

Gresham v. Peterson, 225 F.3d 899 (7th Cir. 2000)

Jimmy Gresham, an unhoused person, filed suit against the city of Indianapolis arguing that the city Ordinance that placed time and place limits on street begging and prohibited "aggressive panhandling" violated his rights under the First and Fourteenth Amendments (City-County General Ordinance No. 78 (1999), Revised Code of Indianapolis and Marion County § 407-102). Gresham sought a preliminary injunction on the grounds that the Ordinance was unconstitutionally vague and violated his right to free speech.

The District Court for the Southern District of Indiana denied the motion and dismissed the case on the merits. Gresham appealed to the U.S. Court of Appeals for the Seventh Circuit and the Circuit Court affirmed the District Court's decision.

In consideration of the First Amendment claim, the Court held that the Ordinance was a valid "time, place and manner" restriction in that it was content neutral, narrowly tailored and left open ample alternative channels of communication. Because the parties agreed that the Ordinance was content neutral, the Court did not rule on this matter. The Plaintiff argued that the total nighttime ban on verbal requests for money was not narrowly tailored, because it was broader than necessary. The Court rejected this argument, finding that because the city limited restrictions to certain times and places when citizens would "naturally feel most insecure in their surroundings," they effectively narrowed the law to what was necessary. The Court also rejected the Plaintiff's argument that the statute failed to provide ample alternative channels of communication, citing that the law

leaves open reasonable ways to reach both the daytime and nighttime crowd.

The Court also rejected Gresham's argument that the definition of aggressive panhandling was unconstitutionally vague. The Court argued that when a federal Court is assessing the constitutionality of a vague law, it must first consider a limiting interpretation from a state Court. Since the Indiana Court had not yet had the opportunity to interpret the law, and the Court would not hold a vague statute unconstitutional if a state Court could reasonably interpret it to be constitutional in some application, the Court ruled that the District Court did not err in refusing to enjoin the Ordinance based on a vagueness claim.

NINTH CIRCUIT

SCREH v. Sacramento, No. 2:2018-CV -00878 (E.D. Cal. 2018)

On November 13, 2017, the City of Sacramento adopted an Ordinance prohibiting solicitation in certain public areas (Ordinance No. 2017-0054). The Ordinance defined solicitation broadly to include any kind of request for "an immediate donation of money or other things of value." Sacramento City Code § 8.134.020 (2017).

The Ordinance established no-solicitation zones on public sidewalks, streets, outdoor dining areas, from anyone stopped at a gas station and within 30 feet of all banks, ATMs, other financial institutions and driveways of business establishments when soliciting from an operator or occupant of a motor vehicle. The Ordinance also prohibited "aggressive" or "intrusive" solicitations in any public place. Such terms were defined to include conduct causing a person to fear bodily harm or loss of property or in instances where the person has indicated that they do not want to be solicited. Violation of the Ordinance was punishable by a fine. Three violations within a six-month period could result in greater sanctions, including up to six months in jail.

The Sacramento Regional Coalition to End Homelessness, the Sacramento Homeless Organizing Committee and James Clark, an unhoused resident of Sacramento, sued Sacramento over the constitutionality of the Ordinance, claiming that the Ordinance's prohibition of "aggressive and intrusive solicitation" constituted a content-based restriction on speech that is presumptively invalid under the First Amendment unless it passes a strict scrutiny standard of review. The Plaintiffs contended that the Sacramento City Council was not presented with any statistics or other evidence that demonstrated a need for the Ordinance. Plaintiffs requested a preliminary injunction to enjoin the enforcement of the Ordinance.

In considering whether Plaintiffs were likely to prevail on its merits, the Court considered that solicitation had been long considered a form of speech protected under the

First Amendment and Article I, Section 2 of the California Constitution. The Court, relying on *Reed v. Town of Gilbert*, 235 S. Ct. 2218 (2015), reiterated that if a law on its face regulates speech based on its content, then it is subject to strict scrutiny regardless of a benign or content-neutral justification. The Court found that Sacramento failed to establish a compelling interest and, further, failed to establish that the Ordinance was the "least restrictive means of achieving the identified compelling interest" as there were other City Ordinances that could have been relied upon to punish the targeted conduct.

The Court rejected the City's argument that the Ordinance was a time, place and manner restriction that did not warrant strict scrutiny based on *Reed*. The Court further found that the Plaintiffs demonstrated that without an order they may suffer immediate and irreparable harm, stating that where serious First Amendment questions are raised the potential for irreparable injury clearly exists. The District Court for the Eastern District of California granted a Preliminary Injunction to enjoin the enforcement of the Ordinance while the matter is litigated. The matter is still pending.

Amy Marschak v. City of Palm Springs, et al., 2017 WL 131550 (C.D. Cal., Jan. 12, 2017)

[The summary below comes from the Complaint itself. The case settled before a final adjudication by the Court.]

Plaintiff was a writer who performed impromptu poetry in public. On March 13, 2015, she was detained and ticketed by a City of Palm Springs ("Palm Springs") police officer while she was performing in a public area. Plaintiff was told that street performances were "against the law." She was given a ticket that cited an Ordinance prohibiting "sitting or lying" on a sidewalk (which she allegedly was not doing), which was later amended to a citation under the local Ordinance that prohibited "obstructing" a public sidewalk (which she also allegedly was not doing). Around the same time, Plaintiff observed that other street performers were also being persecuted/ticketed by Palm Springs police officers on similarly grounds.

Plaintiff retained an attorney and was able to get the charges dismissed. However, because of the mistreatment, Plaintiff had not returned to perform in Palm Springs and was afraid to because of what happened.

In her Complaint, Plaintiff sought to affirm and vindicate the constitutional rights of street performers to express themselves freely in the public areas of Palm Springs without fear of harassment by local police. Insofar as local Ordinances would prohibit her from doing so, she also sought to challenge the constitutionality of those Ordinances. Plaintiff sought monetary compensation and attorneys' fees for the alleged violations of her constitutional rights.

The case settled for an undisclosed amount.

Am. Civil Liberties Union of Idaho, Inc. v. City of Boise, 998 F. Supp. 2d 908 (D. Idaho 2014)

The ACLU of Idaho and local residents challenged a city Ordinance prohibiting panhandling in public areas. The Plaintiffs moved for a preliminary injunction, arguing that the restriction violated the Plaintiff's free speech rights under the First Amendment.

The Court granted the Plaintiffs' motion with respect to certain portions of the panhandling law governing non-aggressive solicitations, finding that the Ordinance was not content neutral, as it only restricted solicitation speech for donations of money or property, treating it differently from other solicitation speech.

The Court further held that the Ordinance was not narrowly tailored to meet a significant governmental interest. However, the Ordinance contained a severability clause and the Court noted that the aggressive solicitation prohibition was likely to survive a constitutional challenge since it related to the safety and protection of its citizens, as was the section restricting solicitation of donations where the solicitor has to step into the roadway.

Pursuant to a settlement, the city repealed the enjoined portions of the Ordinance.

The Law Center served as co-counsel in this case, along with the ACLU of Idaho.

Baldwin v. D'Andrea, No. CV-13-08161-PCT-NVW (D. Ariz. 2013)

Marlene Baldwin, a woman who often traveled to and spent the night in the City of Flagstaff, Arizona, filed suit against the City Attorney of Flagstaff. Flagstaff undercover officers arrested Ms. Baldwin for loitering on public property. "Loitering" under Arizona Revised Statute §13-2905(A)(3) included when "a person intentionally [i]s present in a public place to beg, unless specifically authorized by law[.]" Baldwin argued that the Revised Statute, prohibiting intentionally being in a public space to beg, violated her rights under the First and Fourteenth Amendments of the U.S. Constitution, and under Section 6, Article 2 of the Arizona Constitution.

The United States District Court for the District of Arizona granted the Plaintiff's request for a permanent injunction, enjoining the enforcement of A.R.S §13-2905(A)(3).

The Court found that A.R.S §13-2905(A)(3) was facially invalid under the First Amendment. Plaintiffs successfully argued that the statute was not a time, place or manner restriction, as it covered requests made in any public area at any time of the day or night. Moreover, the provision was a content-based restriction targeted exclusively at requests for money or food and was not narrowly tailored to serve a compelling state interest, particularly because aggressive or disruptive conduct was not a required

element of the provision. As such, the Court found that the state law was directed at Constitutionally protected speech and chilled the free expression of speech provided under the First Amendment.

Wilkinson v. Utah, 860 F.Supp.2d 1284 (D. Utah 2012)

Several Plaintiffs who engaged in panhandling challenged the constitutionality of an Ordinance prohibiting a person from sitting, standing, or loitering on or near a roadway for the purpose of soliciting contributions from the occupant of a vehicle. The Court granted summary judgment in Plaintiffs' favor with respect to the Plaintiffs' First Amendment claims against Utah, finding that the statute was unconstitutional even if construed as a content neutral time, place or manner restriction, because the regulation was not narrowly tailored to serve the government's legitimate interests of traffic and public safety as it was substantially broader than necessary.

Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011) (en banc)

Organizations representing the interests of day laborers challenged an Ordinance barring individuals from standing on a street or highway and soliciting employment, business, or contributions from an occupant of any motor vehicle. The Plaintiffs argued that the Ordinance, on its face, was an unconstitutional restriction on protected speech in violation of the First Amendment.

American Civil Liberties Union of Nevada v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003)

Plaintiffs, including the American Civil Liberties Union of Nevada (ACLU), sued, among other Defendants, the City of Las Vegas and Fremont Street Experience Limited Liability Corporation ("FSELLC"), prohibitions on distributing written material and soliciting funds and restrictions on educational and protest activities at an open mall area. The Plaintiffs sought a preliminary injunction against the enforcement of several Las Vegas Municipal Code sections, as well as rules and policies of the FSELLC.

The District Court granted the preliminary injunction, barring enforcement of a section of the Las Vegas Municipal Code prohibiting leafleting and a "standardless licensing scheme," but did not grant a preliminary injunction regarding enforcement of a second section regarding solicitation.¹²³ The District Court granted Defendants' motion for summary judgment regarding Plaintiff's challenge to the antisolicitation Ordinance. The Court found that the ban on solicitation did not violate the First Amendment because (i) the mall in question was a non-public forum, (ii) the ban on solicitation was viewpoint neutral, and (iii) the ban was reasonable considering the commercial purposes of the mall. The Plaintiffs appealed to the Ninth Circuit.

In its “forum analysis,” the Ninth Circuit emphasized three factors: “the actual use and purposes of the property . . . the area’s physical characteristics, including its location and the existence of clear boundaries delimiting the area . . . and traditional or historic use of both the property in question and other similar properties.” Because the area at issue was used as a public thoroughfare, was open to the public and integrated into the city’s downtown, and, like other “public pedestrian malls and commercial zones,” was historically used as a public forum, the Court held that the mall was a traditional public forum for purposes of the First Amendment.

The Court remanded the case regarding the anti-solicitation Ordinance to the lower Court, where, because the area is a public forum, the city must “show that the limitation is narrowly tailored to serve a significant government interest without ‘burden[ing] substantially more speech than is necessary to further the government’s legitimate interests.”

The city petitioned for a writ of certiorari to the Supreme Court, arguing that the Ninth Circuit decision diverged from the public forum jurisprudence of the Supreme Court and the Seventh and Eleventh Circuits, which would allow the city to treat the property as a non-public forum by changing the property’s primary use.

The city also argued that the decision unduly constricted the government’s ability to make optimal use of publicly owned property for commercial and entertainment purposes. Opposing the city’s petition for writ of certiorari, the ACLU argued that the Ninth Circuit applied traditional forum analysis to the facts of the case, the city and businesses have always faced the Court’s established view that streets and sidewalks are natural public fora, and the Ninth Circuit decision did not involve analysis with respect to when a city can close a public forum because Fremont Street remains open to public pedestrian traffic. The Supreme Court denied the petition for writ of certiorari.

Mason v. City of Tucson, No. 4:98-CV-00288 (D. Ariz. 1998)

Alan Mason, an unhoused man living in Tucson, Arizona, filed suit on July 14, 1998 in the United States District Court for the District of Arizona against the City of Tucson and the Tucson Police Department (together “Defendants”), arguing that the zoning restriction which prohibited Mason from a two mile square area of Tucson violated the Fifth and Fourteenth Amendments in addition to the fundamental right to travel under the U.S. Constitution.

Mason was arrested by the Tucson Police Department for disorderly conduct—panhandling—and asked to sign a “Conditions of Release and/or Sentencing” (“Conditions of Release”) document in order to be released from jail.

The Conditions of Release contained a zoning restriction that ordered Mason to avoid a two mile square area that encompassed most of downtown Tucson area, all city, county, and federal Courthouses, transportation agencies, and social service agencies. However, the Conditions of Release were not signed by a judge. A violation of the Conditions of Release would be considered a violation of A.R.S. § 13-2810(A)(2), “Interfering With A Judicial Proceeding,” which could subject the offender to arrest. After Mason’s release, he was arrested and released twice within the subsequent six days for violating the zoning restriction.

Mason was charged with, and pled guilty to, “Interfering With A Judicial Proceeding”. Following the guilty plea, a City Court Magistrate ruled that Mason was not to be cited for any violation related to the zoning restriction until his matter was litigated. Mason then filed his Complaint for preliminary injunction and application for a temporary restraining order in the United States District Court.

The Court granted in part and denied in part the motion for preliminary injunction. The Court found the zoning restriction against Mason was likely unconstitutional due to the geographic scope imposed—meeting the Plaintiff’s burden of proving the balance of hardships and public interest favors injunctive relief. But, in all other respects, Mason failed to meet his burden. Therefore, the request for preliminary injunction was granted to the extent that the Defendants were enjoined from enforcing the Conditions of Release against Mason; the Defendants were enjoined from enforcing a similar overly board zoning restriction against Mason; and the Defendants were enjoined from enforcing zoning restrictions against Mason unless those restrictions are specifically authorized by a judge.

However, the preliminary injunction to zoning restrictions in general was denied to the extent that zoning restrictions authorized by a judge which are properly tailed in geographical scope are enforceable.

Blair v. Shanahan, 919 F. Supp. 1361 (N.D. Cal. 1996)

Celestus Blair, Jr. brought a civil rights action in U.S. District Court for the Northern District of California, seeking: (i) compensatory and punitive damages from five San Francisco police officers, the City and County of San Francisco (the “City”), and a former police chief of the City for constitutional violations Blair suffered when arrested for allegedly violating § 647(c) of the California Penal Code; (ii) injunctive relief; and (iii) a declaration that § 647(c) was unconstitutional in that it violated the First and Fourteenth Amendments to the Constitution of the United States.

Section 647(c) stated that any person “[w]ho accosts other persons in any public place or in any place open to the

public for the purpose of begging or soliciting alms” is guilty of a misdemeanor. On September 20, 1991, the District Court issued a declaratory judgment that § 647(c) violated the First Amendment because it was a “content-based infringement on free expression” in a public forum, without being “necessary to serve a compelling state interest” or “narrowly drawn to achieve that end.” The District Court also found the provision to be in violation of the Fourteenth Amendment right to equal protection because it “discriminates among speech-related activities in a public forum,” without being “finely tailored to serve substantial state interests”

The District Court did not issue an injunction against further enforcement of § 647(c) because Blair was no longer panhandling and therefore not at risk of irreparable injury. Damages were subsequently agreed upon in a settlement between Blair and the City.

The City appealed the issuance of the declaratory judgment to the Ninth Circuit Court of Appeals. On October 31, 1994, the Ninth Circuit ruled that, because Blair was no longer panhandling and the damages issue had already been settled, Blair no longer had a personal stake in his request for a declaratory judgment and, as a result, the Court lacked jurisdiction to review the District Court’s order declaring § 647(c) unconstitutional. The Court noted that ordinarily a Circuit Court would vacate a District Court judgment that had become moot while on appeal. Here, however, the Court remanded the question of trial judgment vacatur to the District Court with instructions to “balance the consequences and attendant hardships between the competing values of finality of judgment and right to re-litigation of unreviewed disputes,” while also considering the “constitutional nature of the question.”

On remand, the District Court vacated the declaratory judgment on January 30, 1996. After permitting the State of California to intervene and file a brief in support of vacatur, the Court reasoned that failure to vacate the declaratory judgment would cause the State to be “unfairly precluded from appealing the constitutional issue” and would make “further appellate review of the constitutionality of § 647(c) . . . effectively unavailable.” The Court concluded that the “constitutionality of § 647(c) is a significant issue that should not, without good reason, be precluded from appellate review on the merits.”

Sunn v. City and County of Honolulu, 852 F. Supp. 903 (D. Haw. 1994)

A street musician was arrested nine times during 1991 and 1992 for peddling. The State Court later found that the peddling Ordinance did not cover Sunn’s activity, and Sunn subsequently brought suit against the City and County of Honolulu and certain police officers for violation of Sunn’s rights under § 1983 and for common law false arrest.

On March 4, 1994, the Court granted summary judgment regarding the §1983 claim in favor of the individual officers because they had demonstrated the requirements for qualified immunity—a “reasonable officer” could have “reasonably” believed that his or her conduct was lawful in light of clearly established law and the information that the officer had at the time. The City and County of Honolulu (the “City”) subsequently moved for summary judgment based on the § 1983 claims arguing that if the officers had been found to be immune from liability under the statute, vicarious liability could not attach to the City for the officer’s actions.

The District Court found that granting summary judgment in favor of the officers based on qualified immunity did not mean that the Plaintiff did not possibly suffer a violation of his constitutional rights. The city argued that the test used to conclude that the officers had qualified immunity was the same as the test to determine if there had been probable cause for Sunn’s arrests.

The Court indicated that the test to determine whether the officers had qualified immunity was not the same as the test for probable cause and that there were still pending issues of fact concerning probable cause. Therefore, the Court concluded that the officers could potentially be found to have arrested Sunn without probable cause and the city could potentially be held liable for such a Constitutional violation. Accordingly, the city’s motion for summary judgment of the § 1983 claims was denied.

TENTH CIRCUIT

Browne v. Grand Junction, No. 14-CV-00809-CMA-KLM (D. Colo. 2015)

Panhandlers in the City of Grand Junction brought a First Amendment challenge to an Ordinance prohibiting begging, the solicitation of employment, business contributions or sales and the collection of money from the occupant of a vehicle traveling on public streets, and sought a preliminary injunction and temporary restraining order.

The Court found that the provision constituted a content-based restriction on speech that was not narrowly tailored to serve the city’s interest in public safety and ordered a temporary restraining order pending a final ruling on the merits.

On April 2, 2014, the city adopted an emergency Ordinance amending portions of the challenged panhandling Ordinance. Although some of the challenged provisions were omitted in the amended Ordinance, other provisions remained. The District Court removed the temporary restraining order in light of the amended Ordinance, but reserved ruling on Plaintiffs’ claim that the Ordinance violated the First Amendment and their

rights to equal protection and due process. In June 2015, the Court ruled that Plaintiffs had stated valid First Amendment, equal protection, and due process, denying the city's Motion to Dismiss.

Both parties filed cross motions for summary judgment. In September 2015, relying on *Reed v. Town of Gilbert*, the District Court held that the Ordinance was a content-based restriction that did not withstand a strict scrutiny analysis. Accordingly, the Court struck down five subsections of the Ordinance.

The Court granted summary judgment in favor of Defendants on Plaintiffs' equal protection and due process claims. The city was permanently enjoined from enforcing the stricken subsections of the Ordinance, Plaintiff was awarded \$1.00 in nominal damages, and Defendant was required to pay attorneys' fees and costs. Two months later, the parties reached a settlement regarding the payment of attorneys' fees and costs.

ELEVENTH CIRCUIT

Singleton v. City of Montgomery, Alabama, No. 2:20-CV-99-WKW[WO] (M.D. Ala. 2020)

Three unhoused individuals brought a class action lawsuit against the City of Montgomery, Alabama, Hal Taylor in his official capacity as Secretary of the Alabama Law Enforcement Agency, and Derrick Cunningham in his official capacity as the Montgomery County Sheriff. They alleged that the enforcement of two Alabama state statute violated their First and Fourteenth Amendment rights.

The Complaint alleged that Plaintiffs were subject to fines and arrests for asking members of the community for financial assistance. One of the challenged statutes made it a crime if an individual "loiters, remains, or wanders about in a public place for the purpose of begging." The other challenged statute made it a crime to "Stand on a highway for the purpose of soliciting employment, business, or contributions from the occupant of any vehicle..."

After the class was certified, the Plaintiffs reached a settlement agreement with the city of Montgomery, which required the city to cease enforcement of both challenged statutes pending determination of their constitutionality. The settlement also stated that if the remaining lawsuit against the individual Defendants is resolved without any ruling on the constitutionality of the statutes at issue that the City will continue to refrain from enforcing the challenged statutes until either a finding of constitutionality or for ten years from the date of dismissal.

The claims against Secretary Hal Taylor and Sheriff Derrick Cunningham are still pending.

Vigue v. Shoar, 494 F.Supp.3d 1204 (M.D. Fla., Oct. 12, 2020)

Plaintiff was an unhoused resident of St. Johns County, Florida, who stood on public roadways and held signs to solicit charitable donations from passersby. His signs often contained messages like "God Bless, Be Safe" or "Please Care." In busy areas of town, nearly ten thousand people per day might see him. Two Florida laws, FLA. STAT. §§316.2045 (with limited exceptions) and 337.406 (*held unconstitutional by this case*) prohibited individuals from soliciting charity on roadways in the state without a permit issued by a local government. Plaintiff claimed that Shoar, Sheriff of St. Johns County, enforced §§316.2045 and 337.406 against unhoused individuals to ban them from soliciting charitable donations in public spaces, including sidewalks and roadways. Plaintiff contended that these statutes were facially unconstitutional.

On May 6, 2019, the Court entered a preliminary injunction enjoining both Shoar and the Director of the Florida Highway Patrol ("FHP"), from enforcing §316.2045 against Plaintiff during the pendency of this case. In so doing, the Court relied on the decisions of two other District Courts in the Eleventh Circuit that found §316.2045 unconstitutional and issued preliminary and permanent injunctions, as well as on the Florida Attorney General's opinion that subsequent Amendments have not cured the statute's constitutional infirmities. The Court declined, however, to extend the preliminary injunction to §337.406 because at that time, Plaintiff had "not sufficiently shown he ha[d] standing to obtain an injunction against enforcement of a statute under which he ha[d] not been cited." The Court limited injunctive relief to Plaintiff only.

On August 16, 2019, in response to the preliminary injunction, Shoar enacted Policy 41.39 for the St. Johns County Sheriff's Office which provided that officers could not enforce §316.2045(2)–(4), were to limit enforcement of §§316.2045(1) and 337.406, and were to receive training regarding the policy change. The policy was a response to litigation and was subject to change depending on the outcome of the case. Additionally, Sheriff's deputies were told not to arrest, cite, or stop Plaintiff for violations of either statute unless he was committing other crimes.

The FHP settled Plaintiff's claims against it by agreeing not to enforce the statutes at issue. The claims against the Sheriff individually remained.

On cross-motions for summary judgment, Plaintiff sought a ruling only as to the facial challenge. Plaintiff requested that the Court enter a declaratory judgment that both challenged statutes were facially unconstitutional in violation of the First and Fourteenth Amendments, and that the Court enter a permanent

injunction prohibiting Shoar from enforcing both statutes. He also sought damages. Shoar claimed that the evidence “does not support the existence of the alleged official policy, practice and/or custom of the Sheriff.” He also maintained that Plaintiff’s challenge to §337.406 should be denied for lack of standing, and asked that the permanent injunction be denied in its entirety.

The Court granted partial summary judgment for Plaintiff finding the following:

Sheriff Shoar’s deliberate but unwritten decision to enforce the statutes constituted a municipal custom, policy, or practice.

The statute requiring a permit for charitable solicitation on public roadways was insufficiently tailored to serve the asserted compelling interest of safety.

In the absence of adequate procedural safeguards, the Florida statute requiring a permit for charitable solicitation on public rights-of-way was an unconstitutional prior restraint of speech.

Florida’s statute’s general prohibition of charitable solicitation on public rights-of-way was overbroad.

As for damages, the Court held that if Plaintiff wants to pursue more than nominal damages, he should submit a proffer of the legal and factual basis for any compensatory damages.

The Court concluded that both challenged statutes were facially unconstitutional under the First and Fourteenth Amendments. Shoar, in his official capacity as Sheriff of St. Johns County, was permanently enjoined from enforcing Florida Statutes §§316.2045 and 337.406(1), the latter insofar as it pertained to charitable solicitation.

Shoar appealed the Court’s decision to the Eleventh Circuit, where it is currently pending. The latest docket entry is from July 19, 2021, where the Court granted Plaintiff/Appellee’s attorney’s Motion to Withdraw.

Homeless Helping Homeless, Inc. v. City of Tampa, No. 8:15-CV1219-T-23AAS, 2016 WL 4162882 (M.D. Fla., Aug. 5, 2016)

Homeless Helping Homeless, a charity offering emergency shelter to the unhoused, brought suit against the City of Tampa, Florida to challenge a city Ordinance banning the solicitation of “donations or payment” in parts of downtown Tampa. The charity alleged that its staff and volunteers were no longer able to solicit money in parts of downtown Tampa following the city’s ban, causing the charity to lose tens of thousands of dollars and forcing it to reduce services.

The charity sued for an injunction against the City of Tampa’s enforcement of the Ordinance and for a

declaration that the Ordinance unconstitutionally infringed its right to free speech under the First Amendment of the U.S. Constitution and a similar provision in the Florida Constitution. It argued that the Ordinance was a content-based regulation of speech that could not withstand strict scrutiny under the First Amendment. In response, the City of Tampa argued that the Ordinance was not subject to strict scrutiny because it was not content-based on its face.

In a ruling on the pleadings, the Court permanently enjoined the City of Tampa from enforcing its Ordinance after determining that it unconstitutionally infringed the right of free speech protected by the First Amendment of the U.S. Constitution and by the Florida Constitution. The Court agreed with Homeless Helping Homeless that soliciting “donations or payment” is a form of speech protected by the First Amendment, that Tampa’s Ordinance constituted a regulation of that speech in a traditional public forum, and that Tampa’s Ordinance was a content-based regulation of that speech.

Since the city’s Ordinance imposed a content-based regulation of speech in a traditional public forum, the Court held that was presumptively unconstitutional absent a demonstration from the City of Tampa that the Ordinance constituted the least restrictive means of advancing a compelling government interest. After the City of Tampa admitted that no compelling government interest supported the Ordinance, the Court held that the Ordinance failed the strict scrutiny test and did not pass constitutional muster.

The Court’s decision on the constitutionality of the Ordinance turned on its application of the U.S. Supreme Court’s decision in *Reed v. Town of Gilbert*, an opinion which the Court believed dealt with different and factually discrete issues but was “written in such sweeping terms that the opinion appears to govern” the dispute over Tampa’s Ordinance. The Court noted that without *Reed*, which “governs for the moment (despite prominently featuring the badges of a transient reign),” it would have ruled to uphold Tampa’s Ordinance.

Cosac Foundation Inc. v. City of Pembroke Pines, No. 12-62144, 2013 WL 5345817 (S.D. Fla. 2013)

The Plaintiff, who ran a street newspaper distributed by unhoused persons entitled, *The Homeless Voice*, challenged the constitutionality of a permitting scheme governing roadway canvassing and the solicitation of charitable donations. The Plaintiff argued that the Ordinance was unconstitutionally overbroad, underinclusive, and impermissibly restricted speech based on its content. Alternatively, the Plaintiff argued that, even if the Ordinance was content neutral, it could not be upheld as a reasonable time, place, or manner regulation.

The District Court granted the city's motion for partial summary judgment, finding that the Ordinance was content neutral as it applied to people and organizations whether commercial or charitable and it did not distinguish speech on the basis of the views expressed. Further, the Court concluded that the restriction was narrowly tailored to promote a substantial government interest in providing safe roadways and free-flow traffic.

In November 2013, the Court granted the city's Supplemental Motion for Summary Judgment, finding that Plaintiff failed to demonstrate any injury in fact, particularly given that the city provided an affidavit attesting that the application of the Ordinance did not apply to the Plaintiff, and the facts did not suggest that there was any threat that the city would apply its permitting scheme to the Plaintiff.

Booher v. Marion County, No. 5:07-CV-282-Oc-10GRT (M.D. Fla. filed July 11, 2007)

Marion County enacted an Ordinance that prohibited individuals from panhandling or soliciting food, money or gifts for personal use without obtaining a license (for \$100) and wearing a badge identifying the individual as a panhandler. The Ordinance also prohibited panhandling on streets, highways and within 500 feet of highway on and off ramps. The license could be revoked if, among other things, the applicant was convicted of a felony, misdemeanor or violating a local Ordinance involving moral turpitude.

David Booher, an unhoused resident of Marion County, was arrested for panhandling three times in the fall of 2006. On December 18, 2006, Booher applied for a panhandling license but was informed that a background check was required before the license could be issued. He was arrested again for panhandling on December 19, 2006 and his application for a panhandling license was denied on the grounds that he had violated the panhandling Ordinance within the past year. He was arrested at least another nine times for panhandling in the ensuing months.

Mr. Booher filed suit against the county and requested injunctive relief asserting that the Ordinance was facially violated the First and Fourteenth Amendments, and that the Ordinance was applied unconstitutionally to Mr. Booher.

The Complaint argued that the Ordinance was: 1) a content-based restriction on speech, as it restricted speech based on the viewpoint of the speaker; 2) not narrowly tailored to its purpose of road safety; and 3) in violation of the equal protection clause because it preferred individuals panhandling for charitable causes. Further, the Complaint alleged that the \$100 fee for the license was an unconstitutional tax and that the Ordinance should be void for vagueness because it did not define

key terms and provided too much discretion to officers in determining illegal conduct under the Ordinance.

Following Mr. Booher's suit, the county repealed the Ordinance, and the parties reached a settlement.

Chase v. City of Gainesville, No. 1:2006-cv-00044; 2006 WL 2620260 (N.D. Fla., Sept. 11, 2006)

In March 2006, a group of unhoused individuals brought suit to challenge the constitutionality of three anti-solicitation laws under which they had been cited and/or threatened with citations. Two of the laws prohibited holding signs on sidewalks or by the side of the road to solicit charitable contributions. The third law required anyone soliciting charitable contributions on sidewalks or by roadways to obtain a permit.

The Plaintiffs alleged that the laws were content-based, overbroad and vague, and that they constituted prior restraint on speech. The Plaintiffs argued that charitable solicitation was protected speech activity; public streets and sidewalks are traditional public fora; and the permit requirements under the laws at issue were prior restraints on speech. Furthermore, the permit requirements were not subject to narrow, objective and definite standards and adequate procedural safeguards. The Plaintiffs also argued that the laws were not reasonable time, place, and manner regulations; that the laws were overbroad to address the interests of public safety and vehicular safety; and that the laws were void for vagueness for failing to define core terms and phrases, such as "solicit" and "impeding, hindering, stifling, retarding, or restraining traffic."

The Court found that Plaintiffs had shown a substantial likelihood of success on the merits and granted Plaintiffs' motion for a preliminary injunction. The Court noted that the city code only allowed 501(c)(3) organizations, and not individuals, to qualify for a charitable solicitation permit. The Court also found that Plaintiffs' loss of their First Amendment freedoms constituted irreparable injury and that an injunction would not harm the public interest.

In September 2006, the parties agreed to a partial settlement, under which the city and all of its officers and employees would be subject to a permanent injunction enjoining enforcement of the three laws at issue. The parties agreed that "the activity of standing on a public sidewalk, peacefully holding a sign and not otherwise violating any lawful statute, Ordinance, or order is a protected First Amendment activity." The city also agreed to pay reasonable damages to Plaintiffs and reasonable litigation costs and attorney's fees to Plaintiffs' counsel.

In December 2006, the parties reached a full and complete settlement of the case against the Defendant sheriff. The Court granted Plaintiffs' unopposed motion for a permanent injunction against the Defendant sheriff and

for a declaration that the challenged statutes were facially unconstitutional. In July 2007, after the case had been dismissed, the city approved an Ordinance prohibiting “[b]eggars, panhandlers, or solicitors . . . from begging, panhandling, or soliciting from any operator or occupant of a vehicle that is in traffic on a public street”

The Plaintiffs filed a motion for order to show cause why Defendant should not be held in contempt for violating the Court’s order ratifying, approving and adopting the parties’ settlement agreement and issuing a permanent injunction. Plaintiffs noted that an individual could violate the Ordinance even if the individual did not “step into a public roadway, pose any risk to public safety, or impede traffic flow.” Further, the Ordinance would “necessarily include portions of the public sidewalk and would serve to prohibit Plaintiffs and other individuals from peacefully holding a sign and engaging in charitable solicitation on City sidewalks.” In March 2008, the Court denied the motion for order to show cause.

The Court reasoned that for a person to violate the amended Ordinance, “he would have to solicit charitable donations and accept the donation while the vehicle is in a public street currently in use;” which was not contemplated by the permanent injunction. The Court also found no chilling effect on First Amendment protected speech that was the subject of the permanent injunction, on the ground that the amended Ordinance does not prohibit the right to solicit charitable contributions from a sidewalk, but rather restricts transactions in traffic.

Horton v. City of St. Augustine, 272 F.3d 1318 (11th Cir. 2001)

Larry Horton filed suit in the District Court for the Middle District of Florida, against the City of St. Augustine, Florida, arguing that the city Ordinance prohibiting street performing in a four-block area was unconstitutional because it was vague, overbroad, and impermissibly restrictive of speech as to time, place and manner. Horton filed an Application for Preliminary Injunction, which the District Court granted.

The City appealed, and then amended the Ordinance to more clearly define the restricted conduct. After determining that the City’s Amendment did not substantially alter the Ordinance to render the case moot, the Court of Appeals for the Eleventh Circuit reversed and vacated the District Court’s decision, holding that Horton did not show a substantial likelihood of success on his constitutional challenges.

Considering the claim of vagueness, the Circuit Court applied the “Salerno rule,” which states that, for a facial challenge to succeed, the challenger must establish that no set of circumstances exists under which the Ordinance would be valid. In this case, the Court found that Horton

did not meet this burden because the Ordinance specifically identified a four-block area and no less than eight types of street performances that fell within the prohibition. Furthermore, the Ordinance did not authorize or encourage arbitrary or discriminatory enforcement.

The Court also rejected Horton’s argument that the Ordinance was overbroad. The Court found that the Ordinance specified a limited area in which distinct types of expression and physical conduct – not all speech – may not take place. Thus, the Court found that the Ordinance was a step the City may legitimately take in pursuit of its interests, and one that did not impinge to a great degree on one’s freedom of speech.

Regarding Horton’s claim that the Ordinance was impermissibly restrictive of speech as to time, place and manner, the Court noted that, in traditional public fora, such as the city streets and sidewalks in St. Augustine, governments are permitted to “enforce regulations of the time, place, and manner of expression which (1) are content-neutral, (2) are narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels of communication.

Here, the Court found that the Ordinance, as originally enacted and as amended, was not unconstitutional because it did not discriminate based on the viewpoints or opinions of the street performers, was adequately tailored to serve the proffered justification of crowd and traffic control, and left open a wide swath of public space for Horton’s activities outside of the enumerated four-block area. For the foregoing reasons, the appellate Court, finding that Horton did not show a substantial likelihood of success on his constitutional challenges to the Ordinance, reversed, vacated, and remanded the District Court’s order and its entry of a preliminary injunction.

Smith v. City of Ft. Lauderdale, 177 F.3d 954 (11th Cir. 1999)

The issue in this case was whether the City of Fort Lauderdale’s (the “City”) regulation proscribing begging on a certain five-mile strip of beach and two attendant sidewalks violated the protections afforded to the Plaintiff-Appellant class of unhoused people (the “Plaintiffs”) under the First Amendment. The United States Court of Appeals for the Eleventh Circuit (the “Court”) held that the challenged restrictions on speech were narrowly tailored to serve the City’s legitimate interests, and thus affirmed the District Court’s grant of summary judgment in favor of the City.

The controversy in this case began when the City enacted regulations prohibiting “soliciting, begging or panhandling” in an effort “to eliminate nuisance activity on the beach and provide patrons with a pleasant environment in which to recreate” (the “Regulation”).

The Plaintiffs challenged the City's application of the Regulation to a five-mile strip of beach, a one-and-a-half-mile promenade sidewalk between that beach and Highway A1A, and the commercial-area sidewalk on the opposite side of Highway A1A (the "Beach Area"). As an initial matter, the Court determined that the City's application of the Regulation to the Beach Area was a restriction on speech in a public forum. The Court reasoned that the Beach Area is a public forum and that begging, like other charitable solicitation, is speech entitled to First Amendment protection. Given this determination, the Court analyzed the Regulation's legality under the First Amendment.

Pursuant to the First Amendment, in a public forum, the government may "enforce regulations of the time, place, and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." The Plaintiffs conceded that the City had "significant government interest" in providing safe and pleasant environments and eliminating nuisance activity in the Beach Area. However, Plaintiffs argued that the Regulation was not "narrowly tailored" to serve this significant government interest. Accordingly, Plaintiffs had to prove that the Regulation burdened "substantially more speech than is necessary to further the government's legitimate interest."

The Court found that the Plaintiffs failed to meet this burden. First, the Court reasoned that the Regulation's impact on begging was "materially mitigated" by the allowance of begging on other streets, sidewalks, and other public fora throughout the City. Second, the Court found that even though the City could have relied on less-speech-restrictive alternatives (such as proscribing only hostile or aggressive beginning or by confining begging to specific parts of the beach), the Regulation did not need to be the "least restrictive or least intrusive means" of serving the City's significant government interest in order to satisfy the "narrowly tailored" standard. Thus, the Court held that the City's application of the Regulation to the Beach Area did not run afoul of the First Amendment.

Chad v. City of Ft. Lauderdale, 66 F. Supp. 2d 1242 (S.D. Fla. 1998)

Mark Chad sued the City of Fort Lauderdale (the "City") in U.S. District Court for the Southern District of Florida, seeking preliminary injunctive relief as to the City's Beach Rule 7.5(c), adopted on July 20, 1993, prohibiting soliciting, begging or panhandling on Fort Lauderdale's beach and its abutting sidewalk. Chad alleged that he was unemployed, unhoused, disabled, and indigent, and relied on "others for food, shelter and other essentials." Chad sued "the City personally and on behalf of the other estimated 5,000 unhoused persons in Broward

County" who wanted "to solicit contributions of money and food on [the City's] beaches." Rule 7.5(c) contained an enforcement provision that potentially subjected "violators to arrest and prosecution;" however, Chad had "not been arrested for solicitation or threatened with a summons."

The question facing the Court was "whether a preliminary injunction should issue to preserve the status quo until trial on the merits." The Court explained that "a preliminary injunction will issue when the movant shows each of the following: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if an injunction does not issue; (3) proof that the threatened injury to movant outweighs the potential harm caused to the nonmovant; and (4) a showing that the injunction would not disserve public interests."

Regarding the likelihood of success on the merits, the Court noted that "regulation of speech on government property that has traditionally been available for public expression, such as streets and parks, is subject to the highest scrutiny" and survives only if it is "narrowly drawn to achieve a compelling governmental interest." Here, however, the Court concluded that the Plaintiffs had not established that the beach and sidewalk were public forums, and Rule 7.5(c) was therefore "subject only to a limited review – the regulation must be reasonable and not designed to prohibit the activity merely because of disagreement with the views expressed."

The Court found that Rule 7.5(c) "should easily pass muster under this rubric" because it is "clearly viewpoint neutral" and "reasonable in light of the purpose the property is intended to serve." The Court also concluded that, even if the beach is later deemed to be a public forum, Rule 7.5(c) is a reasonable time, place, and manner restriction" on speech because it is "content neutral," "narrowly tailored to serve a significant governmental interest," and "leaves open ample alternative channels for communication." Accordingly, the Court held that the Plaintiffs were "unlikely to succeed on the merits."

Regarding the other requirements for obtaining the preliminary injunction, the Court concluded that there was a substantial threat of irreparable injury to the Plaintiffs; however, that threat was outweighed by the City's interest in maintaining a safe "tourist zone." The Court also held that the public interest would "not be disserved by denial of a preliminary injunction . . .," because (i) it "is in the public interest to maintain safety" and (ii) "Rule 7.5(c) does not appear to violate fundamental rights."

Atchison v. City of Atlanta, No 1:96-CV-1430 (N.D. Ga., July 17, 1996)

Seven unhoused individuals filed suit in federal Court one month prior to the opening of the Olympic Games in Atlanta, challenging Atlanta's Ordinances prohibiting

aggressive panhandling and loitering on parking lots, its enforcement of Georgia's criminal trespass law, and unlawful police harassment under § 1983.

The U.S. District Court for the Northern District of Georgia granted a temporary restraining order barring enforcement of one provision of the parking lot Ordinance, finding that the Plaintiffs were likely to succeed on the merits of their claim that the provision was unconstitutionally vague.¹³² In its ruling on Plaintiffs' motion for a preliminary injunction, the Court held that the provision of the anti-aggressive panhandling Ordinance that prohibited "continuing to request, beg or solicit alms in close proximity to the individual addressed after the person to whom the request is directed has made a negative response" was unconstitutionally vague, and granted a preliminary injunction prohibiting enforcement of that specific provision. The Court found that with the above exception, the Ordinance "appears narrowly tailored to address the significant interests while affording panhandlers ample channels with which to communicate their message."

The Court also rejected the Plaintiffs' equal protection claim, holding that they failed to show a city policy of violating their rights or failing to train police officers. Before the appeal was heard, the case was settled. As part of the settlement, the city agreed to redraft the panhandling and parking lot Ordinances and require various forms of training for its law enforcement officers for the purpose of sensitizing them to the unique struggle and circumstances of unhoused persons and to ensure that their legal rights be fully respected.

DISTRICT OF COLUMBIA CIRCUIT

Community for Creative Non-Violence v. Turner, 893 F.2d 1387 (D.C. Cir. 1990)

On January 15, 1987, The Washington Metropolitan Area Transit Authority ("WMATA") adopted a regulation ("Regulation") to govern "the organized exercise of rights and privileges which deal with political, religious, or social matters and are non-commercial." The Regulation required persons seeking to engage in these free speech activities to first obtain a permit from WMATA. The Regulation also provided WMATA with the right to establish maximum number of people authorized to engage in the free speech activities, limits certain types of free speech activities, and provides for enforcement under applicable local criminal laws and Ordinances.

Following the dismissal of criminal actions against them for violating the Regulation, members of Community for Creative Non-Violence ("CCNV") filed a Complaint charging that the Regulation contravened the First, Fifth and Fourteenth Amendments to the U.S. Constitution. The District Court granted CCNV's motion for partial summary judgment and invalidated the provisions of

the Regulation that required a permit, allowed WMATA to modify or rescind the permit, allowed WMATA to set the maximum number of persons who may engage in free speech activities, and prohibited certain forms of expression.

On appeal, the U.S. Court of Appeals, District of Columbia Circuit (the "Court") affirmed the District Court's decision to invalidate the Regulation's permit requirement, the provisions allowing WMATA to set a maximum number of people who may engage in free speech activities, and requirement to carry out activities in a "conversational tone." The Court found that because the above-ground free areas of the WMATA stations are public forums, any time, place, and manner restrictions must be content-neutral, narrowly tailored to achieve a significant government objection, and leave open alternative channels for communication.

In determining that the permit requirement violated the First Amendment, the Court found that although the requirement was content-neutral, it was vague and overly broad and could restrict forms of free expression that posed little or no threat to WMATA's ability to provide safe and efficient transportation. In striking down the permit requirement, the Court also invalidated the provision of the Regulation that allowed WMATA to modify or rescind the permit.

The Court found that the restriction on the number of persons who may engage in free speech activities, substantially burdened more free speech than necessary to further WMATA's legitimate safety objective, and, therefore, was not a reasonable time, place, or manner restriction. The Court also determined that the requirement for free speech activities to be conducted in a "conversational tone" was vague and would give WMATA impermissibly wide discretion in determining violations. The Court determined, however, that the District Court provided no specific reasons for striking down the Regulation's other restrictions on expressions of free speech (chanting, dancing, shouting, etc.) and reversed and remanded for further development of the factual record. A concurring decision agreed that WMATA's permit requirement violated the First Amendment as overbroad but concluded that such a determination could be made regardless of whether the area covered constituted a public forum.

STATE CASES

District of Columbia

McFarlin v. District of Columbia, 681 A.2d 440 (D.C. 1996)

Willie D. Williams, an unhoused individual, Gerald Patrick McFarlin and Warren L. Taylor, two street musicians, were separately convicted of violating § 3(b) of the District

of Columbia Panhandling Act, D.C.Code § 22-3312(b) which provides: «No person may ask, beg, or solicit alms in any public transportation vehicle; or at any bus, train, or subway station or stop.» (hereinafter referred to as “§ 3(b)). The individuals appealed their convictions, Mr. Williams individually and Mr. McFarlin and Mr. Taylor jointly, which were consolidated before the District of Columbia Court of Appeals (the “Court”).

Williams Appeal

As part of the consolidated case, Mr. Williams challenged § 3(b) on the grounds that it (1) impermissibly burdened speech protected under the First Amendment, and (2) it violated the Fifth Amendment for failing to describe with sufficient specificity the location at which panhandling is prohibited. The Court rejected both arguments and affirmed Mr. Williams’s conviction.

The Court rejected Mr. Williams’s First Amendment argument. First, based on the legislative history and existing regulations, the Court interpreted “subway station or stop” to mean the area within fifteen feet of the escalator entrance to the subway. Second, the Court reasoned that the area within fifteen feet of the escalator entrance could not reasonably be characterized as a “public forum”, which would necessitate a higher standard of review. Because § 3(b) directly advanced the governmental interest asserted and was reasonably narrow, given the necessity of restricting certain activities where congestion of pedestrian traffic posed the greatest danger, the Court found that § 3(b) was not in violation of Mr. Williams’s First Amendment rights.

The Court also rejected with Mr. Williams’s Fifth Amendment argument that § 3(b) was drafted with insufficient specificity. The Court found that “at a subway station or stop”, as construed in light of the existing regulations, provided sufficient «notice to those of ordinary intelligence» and «conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices.» Because Mr. Williams was no further than six feet away from the escalator at the time of his panhandling, the Court found that Mr. Williams must have clearly understood that his conduct would violate § 3(b).

The McFarlin and Taylor Appeals

Mr. McFarlin and Mr. Taylor challenged § 3(b) on the ground that (1) their actions were not prohibited by § 3(b); and (2) § 3(b) was unconstitutional as applied to them, and unconstitutional on its face, because it was overly broad and vague. Although the Court rejected the argument that the Defendant’s conduct not was covered by § 3(b), the Court reversed the convictions on the basis that the Defendants’ actions were not prohibited by § 3(b), never reaching the overbreadth and vagueness argument.

The Court disagreed with Mr. McFarlin’s and Mr. Taylor’s argument that their conduct was not prohibited by § 3(b). The Court noted that, although § 3(b) does not define the terms panhandling and begging, § 3(b) as drafted covered their conduct because their act of inviting donations for their public performance of music constituted solicitation under § 3(b).

The Court however agreed that the Defendants’ actions were not actually prohibited by § 3(b) because government failed to establish that Mr. McFarlin and Mr. Taylor solicited within fifteen feet of the escalator top. On the basis that there was insufficient evidence to prove that these Defendants were within the fifteen feet where their activities were prohibited by § 3(b), the Court remanded directions to enter judgments of acquittal for Mr. McFarlin and Mr. Taylor.

Florida

State of Florida v. O’Daniels, 2005 WL 2373437 (Fla. Dist. Ct. App., Sept. 28, 2005)

Defendant O’Daniels was arrested and charged with violating a city Ordinance requiring street performers and art vendors to have a permit. O’Daniels moved to dismiss the charge, claiming that the Ordinance violated the First and Fourteenth Amendments of the U.S. Constitution and a provision of the Florida Constitution. The county Court found the Ordinance unconstitutional because it unnecessarily infringed on various constitutional rights.

First, the permit-issuing scheme lacked adequate procedural safeguards to avoid unconstitutional censorship. Second, the Ordinance was not content-neutral, was not narrowly tailored to serve a significant government interest, and did not leave open ample alternative channels of communications. Third, the Ordinance was void for vagueness because it failed to give fair notice of the conduct it prohibited and lacked guidelines for police to avoid arbitrary application. Fourth, the Ordinance was facially invalid because it was overbroad. Finally, the Ordinance violated substantive due process.

The city appealed, arguing that the Ordinance was content neutral and was a reasonable time, place, and manner regulation. The city contended that the Ordinance did not violate the First Amendment and was not overbroad in that it only restricted street performers and art vendors in certain areas. Furthermore, the city argued that it provided alternative channels of communication. On appeal, the ACLU of Florida filed a brief amicus curiae supporting O’Daniels. The ACLU’s argument focused on the First Amendment right to artistic expression. The ACLU contended that the Ordinance has a chilling effect because of its permit requirements, criminal penalties, and provisions regarding indemnification. Moreover, the Ordinance unconstitutionally delegates to the private

sector the power of review. The appellate Court affirmed the lower Court's ruling. First, the Court acknowledged that street performances and art vending are protected forms of expression under the First Amendment.

Ledford v. Florida, 652 So. 2d 1254 (Fla. Dist. Ct. App. 1995)

Wayne Dean Ledford was arrested and charged with begging for money in violation of City of St. Petersburg, Fla Code § 20-79. The county Court found the Ordinance constitutional. Mr. Ledford pleaded no contest, reserving the right to appeal the constitutionality of the Ordinance. The Circuit Court for the Sixth Judicial Circuit for Pinellas County affirmed the order and denied the motion to dismiss. Mr. Ledford then filed a petition for a writ of certiorari. The Court of Appeal of Florida, Second District granted the petition and issued the writ, holding the Ordinance to be unconstitutionally overbroad and vague.

The Court held that begging is communication and thus entitled to some degree of First Amendment protection. Furthermore, since the Ordinance restricted speech in a traditional public forum, the regulation was subject to "intense scrutiny" and would survive only if it was narrowly tailored to achieve a compelling government interest, reasonable and viewpoint neutral.

The Court found that protecting citizens from annoyance was not a compelling reason to restrict speech in the context of a traditional public forum. Furthermore, the Court found the Ordinance to be overbroad, because it did not distinguish between aggressive and passive begging. Finally the Court also found the Ordinance to be vague, because it did not define the terms "beg" or "begging" nor did it express its intent. Thus, it did not meet the threshold of providing specific guidelines to prevent arbitrary enforcement. As such, the Ordinance was found unconstitutional.

C.C.B. v. Florida, 458 So.2d 47 (Fla. Dist. Ct. App. 1984)

C.C.B, a child, was convicted by the Circuit Court for Duval County, Florida of violating Jacksonville Municipal Ordinance 330.105, which prohibited all forms of begging or soliciting for alms. C.C.B. filed an appeal with the Court of Appeals of Florida in the First District, asserting that the Circuit Court erred in denying his motion to dismiss the charge on the ground that the Ordinance was unconstitutional.

In challenging the lower Court's decision, C.C.B. argued that Ordinance 330.105 (i) was overbroad because it banned all forms of solicitation for alms or charity, (ii) was in conflict with Chapter 404 of the Jacksonville Ordinance Code, and (iii) lacked precisely drawn standards to prevent the prohibition of activities protected by the First Amendment of the U.S. Constitution.

The Court of Appeals held that the Ordinance was unconstitutional and reversed judgment, agreeing with C.C.B.'s first and third arguments. With respect to the second argument, the City of Jacksonville (the "City") had enacted Municipal Ordinance 404.102 as a regulatory scheme for organizations or groups soliciting for the welfare and happiness of others who cannot or do not help themselves. Ordinance 404.102 required a charitable organization to obtain a permit before soliciting property or financial assistance and Ordinance 404.103 provided that no permit would be required for a charitable organization to solicit among its members voluntarily and without remuneration.

The Court of Appeals held that, when read in pari materia with Chapter 404, Ordinance 330.105 did not prohibit the established First Amendment right of individuals or groups to solicit contributions for religious and charitable purposes, but merely validly limited that right by requiring permits.

However, the Court of Appeals held Ordinance 330.105 to be overbroad by its abridgement, in a more intrusive manner than necessary, of the First Amendment right of individuals to beg or solicit alms for themselves. The City had argued that it had a legitimate and compelling interest under its police power to control undue annoyance on the streets and public places. However, the Court of Appeals stated that this goal needed to be measured and balanced against the rights of those who seek welfare and sustenance for themselves rather than through the efforts of others.

Because of a dearth of precedent in Florida, the Court of Appeals relied on cases from other jurisdictions to arrive at its conclusion. The Court of Appeals found that a total prohibition of begging or soliciting alms for oneself is an unconstitutional abridgment of the right to free speech as guaranteed by the First and Fourteenth Amendments of the U.S. Constitution and Article I, Section 4 of the Constitution of the State of Florida. The Court of Appeals further stated that the City may regulate that right subject to strict guidelines and definite standards closely related to permissible municipal interests, such as could be imposed by a narrowly drawn permit system as was done in other jurisdictions, but the task of specifying which of the legitimate municipal interests in regulating solicitations are to be included in permit conditions is one of legislative nature meant for the City, and not for the Court.

Indiana

Norred v. State, No. 82A01-1303-CR-94, aff'd 996 N.E.2d 868, (Ind. App. 2013)

The Plaintiff was convicted of Class C misdemeanor panhandling, when a Sheriff's deputy saw him asking for money from motorists. The Plaintiff

appealed, arguing that the evidence was insufficient to support his conviction. In view of the deputy's testimony and the Plaintiff's admission that he was trying to get money and had received some, the Court concluded that the evidence was sufficient.

Kentucky

Champion v. Commonwealth, 520 S.W.3d 331 (Ky. 2017)

In 2007, the Lexington-Fayette Urban County Government in Lexington, Kentucky enacted Ordinance 14-5 to establish a blanket prohibition against all "begging and solicitation of alms." The Ordinance criminalized the following behavior with the attendant penalty:

- (1) No person shall beg or solicit upon the public streets or at the intersection of said public streets within the urban county area.
- (2) Any person who violates any provision of this section shall be fined not less than one hundred dollars (\$100.00) or be imprisoned not less than ten (10) days nor more than thirty (30) days or both for each offense.

The Ordinance further specified that any person in the city streets or at city intersections seeking any form of financial contribution may suffer criminal liability despite the Ordinance's title suggesting this prohibition is limited only to solicitation of "alms."

Following the adoption of this Ordinance, Dennis Champion was cited for violating it by standing at a local intersection using a handmade sign and begging for financial assistance. When Champion failed to appear for Court, a bench warrant issued; he was later arrested, arraigned, and entered a conditional guilty plea in exchange for a three-day jail sentence for which he was credited with time served.

Champion appealed the constitutionality of the Ordinance. He first argued that the local government lacked the power to criminalize particular behavior, thus questioning the legitimacy of the Ordinance itself. Next, he argued that the Ordinance was an unconstitutional regulation of speech in violation of the First Amendment. The matter made its way to the Kentucky Supreme Court and the Court agreed with Champion.

In reaching its conclusion, the Court first wrote:

On its face, Ordinance 14-5 singles out speech for criminal liability based solely on its particularized message. Only citizens seeking financial assistance on public streets and intersections face prosecution. For example, someone standing at a prominent Lexington intersection displaying a sign that reads "Jesus loves you," or one that says "Not my President" has no fear of criminal liability under the Ordinance. But another person displaying a sign on

public streets reading "Homeless please help" may be convicted of a misdemeanor. The only thing distinguishing these two people is the content of their messages. Thus, to enforce Ordinance 14-5, law enforcement would have to examine the content of the message conveyed to determine whether a violation has occurred. This then, in effect, prohibits public discussion in a traditional public forum of an entire topic. And as a result, this Ordinance is unambiguously content-based and is presumptively unconstitutional.

In light of this, the Court applied strict scrutiny to the presumptively invalid Ordinance pursuant to which Lexington bore the burden of establishing that its speech limited should survive. Lexington justified the Ordinance on the basis that it was necessary to the city's desire to ensure public safety and the free flow of traffic. In other words, the act of stepping into streets to get money from a motorist and then moving to the next vehicle in line delays traffic and put the pedestrian at risk.

The Court rejected this argument because it was unaccompanied by evidence that panhandling caused traffic delays and or that pedestrian panhandling caused accidents. It further explained that the interest in public safety and traffic flow was underinclusive and did not explain how panhandling was a greater risk than other similar conduct, such as asking for directions. (The Court also observed that the behavior for which Champion was cited was the holding of a sign at an intersection as opposed to approaching vehicles and there was no proof that he targeted motorists). Lastly, the Court observed that the Ordinance applied to targeting pedestrians for donations as well, an act having no impact on traffic flow or safety.

The Court explained that a broader Ordinance could be implemented such that all persons could be prohibited from approaching vehicles. But, in the form adopted and challenged, the Kentucky Supreme Court concluded that the Ordinance was an unconstitutional regulation of speech.

Massachusetts

Benefit v. Cambridge, 424 Mass. 918 (Mass. 1997)

Craig Benefit, an unemployed and unhoused man, filed a Complaint in Massachusetts Superior Court seeking: (1) a declaration that a Massachusetts statute permitting the imprisonment of panhandlers was unconstitutional under the First and Fourteenth Amendments to the United States Constitution, and Articles 1 and 16 of the Declaration of Rights of the Massachusetts Constitution; (2) an injunction preventing the City of Cambridge, MA and other Defendants from "threatening, intimidating, harassing, arresting and prosecuting" him when he was peacefully begging in public places; and (3) damages and attorney's fees.

The Massachusetts statute (G. L. c. 272, § 66; enacted in 1866) provided that “[p]ersons wandering abroad and begging, or who go about from door to door or in public or private ways, areas to which the general public is invited, or in other places for the purpose of begging or to receive alms, and who are not licensed” may be imprisoned for up to six months. A judge in the Massachusetts Superior Court ordered that “a declaration enter, declaring that G. L. c. 272, § 66 was an overbroad and unconstitutional regulation of speech protected by the First Amendment to the United States Constitution and violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.” The Court preliminarily enjoined Defendants from enforcing the statute. The Massachusetts Supreme Judicial Court (SJC) affirmed the declaration and the preliminary injunction.

The SJC rejected the District Attorney’s argument that Benefit lacked standing to seek declaratory relief. Although criminal charges had been disposed of, the SJC concluded that a real dispute existed due to “a continuing threat, indeed a likelihood, of continued prosecution under G. L. c. 272, § 66.”

Considering the constitutional issue, the SJC held that G. L. c. 272, § 66 violated the First Amendment to the United States Constitution because it banned constitutionally protected speech in traditional public forums. The SJC concluded that (a) the peaceful begging engaged in by Benefit involved communicative activity protected by the First Amendment; (b) the criminal sanction, imposed on that activity by G. L. c. 272, § 66, was content- and viewpoint-based and banned the activity in traditional public forums; and (c) as a result, the statute was subject to strict scrutiny, a test which it could not pass. The SJC did not need to consider the Plaintiff’s equal protection claim under the Fourteenth Amendment or the State constitutional claims.

Minnesota

State of Minnesota v. McDonald, No. 03085478 (Minn. Dist. Ct. 2004)

The State of Minnesota brought suit against Ned Devon McDonald for begging along public roads in violation of Minneapolis City Ordinance 365.60, which prohibited the solicitation of money in public or private places aside from solicitation for private charities. McDonald filed a motion to dismiss on the grounds that begging was expressive conduct protected by the First Amendment’s guarantee of the right to free speech, and that the Ordinance was not a constitutional regulation of excessive conduct. The Fourth Judicial District Court of Minnesota granted the motion to dismiss the suit.

The District Court utilized the test for expressive conduct in *Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727, requiring that there be both intent to convey a particularized message and the ability of observers to perceive that message. The District Court, recognizing that neither the state of Minnesota nor the Eighth Circuit had decided whether begging constituted expressive speech, turned to *Loper v. New York City Police Department*, 999 F.2d 699, which held that begging is a form of expressive speech indicating the need for food, shelter, clothing, or other assistance.

The Court, at Plaintiff’s urging, also considered the precedent of *United States v. O’Brien*, 391 U.S. 367, which held that speech could be regulated or constrained if there was a compelling government interest for narrowly tailored regulation of the non-speech element of the communication (i.e., burning a draft card could be prohibited because the government had a compelling interest in preserving the cards, independent of the speech conveyed by the act).

The District Court held that the logic of *Loper* was persuasive as applied to the facts of the case, as it found begging to be communicative conduct with little to distinguish from the speech of charity solicitors. The District Court further rejected the State’s argument that there was a content neutral, compelling government interest in banning begging to prevent intimidating solicitation and fear, as the interest categorically ascribed behaviors differently between groups (charity workers and beggars) in an overgeneralized and overly broad manner, making it neither content neutral nor a compelling interest. The Court granted McDonald’s motion to dismiss.

Nevada

Heathcott v. Las Vegas Metropolitan Police Officers, No. CV-S-93- 045 (D. Nev., Mar. 3, 1994)

Russell Heathcott, an unhoused person, filed suit in the U.S. District Court for the District of Nevada against Las Vegas Metropolitan Police officers and the City of Las Vegas for violating his rights under the First, Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution, and Article 1, Sections 8 and 18 of the Constitution of Nevada. Heathcott sought damages for two separate arrests and incarcerations.

The first arrest (for obstructing a police officer) occurred when Heathcott declined to provide identification when officers accosted him at his camp in a deserted area. Heathcott, an epileptic, suffered multiple injuries after the officers confiscated his medication. The second arrest occurred on a public sidewalk, where Heathcott engaged in conversation with other pedestrians but did not ask for or receive money. Upon declining to identify himself to a police officer he was arrested for obstruction and loitering

to beg. The city subsequently dropped the loitering charge, and Heathcott brought civil suit.

Heathcott argued that Las Vegas Municipal Code Section 10.44.010 (making loitering to beg without charitable solicitation purpose a misdemeanor) was facially unconstitutional. The Court agreed and granted summary judgment in favor of Heathcott, noting that solicitation is a form of speech for First Amendment purposes and that sidewalks are areas traditionally held open to the public for expressive activity.

The Court reasoned that begging peacefully poses no serious threat to the public, and that if such conduct were accompanied by fraud, intimidation or harassment, then separate statutes would allow police to make an arrest. Because the total prohibition on begging in Section 10.44.010 was neither narrowly tailored nor accompanied by a compelling state interest as required by *U.S. v. O'Brien*, 391 U.S. 367 (1968), the Court declared the Ordinance void and unenforceable.

New Mexico

ACLU of New Mexico v. City of Albuquerque, No. 2004-00355 (N.M. Dist. Ct. Bernalillo County 2004)

American Civil Liberties Union of New Mexico and Kenneth D. Seagroves filed suit in 2004 against the City of Albuquerque, alleging that the city's "Safety in Public Places Ordinance" violated the Seagroves' rights under the New Mexico Constitution. Plaintiffs sought a declaratory judgment that the Ordinance violated the Plaintiffs' rights under the New Mexico Constitution, as well as a permanent enjoinder of the Ordinance.

The ACLU and Seagroves brought suit on behalf of citizens in Albuquerque, New Mexico who panhandle in order to gain supplemental income. The Ordinance in question criminalized twenty-five different public behaviors, including panhandling at certain times and in certain places in the city of Albuquerque. Plaintiffs argued that the Ordinance is unconstitutionally vague, in that it did not provide appropriate notice of what behavior was prohibited, and it violated Plaintiffs' right to free speech and due process.

Additionally, Plaintiffs requested that the Court issue a temporary restraining order to enjoin the Ordinance from taking effect. Plaintiffs argued that they would be adversely affected if the Ordinance took effect, as they would face criminal prosecution if they continued to panhandle. Therefore, Plaintiffs argued that they could establish the necessary elements for a temporary restraining order: that the movant will suffer irreparable harm unless the injunction issues; there is a substantial likelihood the movant ultimately will prevail on the merits; the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party;

and the injunction will not be contrary to the public interest.

New York

People v. Hoffstead, 905 N.Y.S.2d 736 (N.Y. App. Term, Second Dep't. 2010)

Defendant Eric Hoffstead was arrested for loitering for the purposes of begging under penal law §240.35 and was searched incident to the arrest. The search yielded a pipe with residue of a controlled substance. Hoffstead moved to dismiss arguing that the loitering statute was unconstitutional, the arrest for loitering was unlawful, that the substance recovered following his arrest consequently had to be suppressed, and thus the controlled substance charge must also be dismissed. The City Court agreed with Hoffstead. The People of the State of New York appealed.

On the constitutional issue, the New York Supreme Court Appellate Division found the loitering statute to be unconstitutional and affirmed the City Court's decision. It first found that begging is as inseparable from speech as it is from charitable solicitation and cited *Loper v. New York City Police Dept.*, 999 F.2d 699 (2d Cir. 1993) for that proposition. Having found begging to be a form of protected speech, the Appellate Court applied strict scrutiny to the loitering law. The loitering law failed strict scrutiny as the purpose of the law (maintaining public order, reducing citizen fear of coercive encounters with panhandlers, and preventing fraud) could be achieved with less restrictive means than a "sweeping prohibition of all begging in all public places at all times." *The People of the State of New York v. Eric Hoffstead*, 905 N.Y.S.2d 736 (App Term, 2d Dept 2010).

Having found the loitering law unconstitutional and the arrest unlawful, the Appellate Court next considered the People's alternative argument that Hoffstead's arrest was lawful because probable cause existed to arrest him for an offense other than loitering. The People asserted that probable cause existed under Penal Law §240.26 (dealing with harassment), as the arresting officer testified that Hoffstead had followed a young male for several blocks and was then handed a pack of cigarettes. The Appellate Court found that there was no evidentiary basis for finding probable cause to arrest Hoffstead for harassment. As a result, the City Court's order to dismiss the controlled substance charge was also affirmed.

People v. Schrader, 162 Misc. 2d 789, 617 N.Y.S. 2d 429 (Crim. Ct. 1994)

Defendant Eric Schrader was begging for money/panhandling in the New York City subway and was charged with unlawful solicitation. Defendant moved to have the case dismissed. The Criminal Court held that: (1) begging was a form of protected speech under the New

York State and federal constitutions; but (2) the transit system was a nonpublic forum; and (3) a ban on begging by individuals in the subway was a reasonable limitation on speech in a nonpublic forum which was reasonable safety precaution and was not viewpoint-based.

Defendant claimed that he was panhandling in the New York City subway, and that he was cited for a violation under 21 NYCRR 1050.6(b)(2), which banned all begging in the New York City transit system. Defendant moved to dismiss the charge of unlawful solicitation based on a theory that the New York City Transit Authority's ("TA") ban was in violation of the freedom of speech provisions of the New York State and federal constitutions. In particular, Defendant argued that Article 1, § 8 of the New York State Constitution provided greater protection of free speech than the First Amendment to the United States Constitution, and that 21 NYCRR 1050.6(b)(2) did not pass constitutional muster under New York's broader free speech protections. The People contended that begging is a form of conduct without a particularized message, and is thus not entitled to free speech protections under either the New York State or federal constitutions.

The Court first established that begging is a form of protected free speech under both the federal and state constitutions. In particular, the Court held that there is no substantive difference between a charitable organization's solicitation of money from passersby (a previously established form of protected free speech, see *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980)) and a single individual's solicitation of those same passersby. The Court also agreed with the Defendant's characterization that the New York State Constitution's freedom of speech protections are greater than those provided under the First Amendment of the U.S. Constitution. To that end, the Court rejected the People's argument that begging is mere conduct that is not entitled to free speech protection and concluded that begging is a form of protected speech under both the federal and New York State constitutions.

The Court then looked to the specific facts of the case at hand. In particular, the Court reviewed whether the TA's outright ban of begging in the transit system violated the free speech protections of the New York Constitution. Here, the Court applied forum analysis to determine whether any form of protected free speech may be banned within the limited boundaries of the New York City transit system. The Court concluded that the transit system was a nonpublic forum, or at best, a limited public forum, and that the TA was well within its rights to limit free speech, so long as those limitations were reasonable and not viewpoint-based.

The Court was persuaded by the People's argument that the ban on begging was a reasonable safety precaution because such a ban helps avoid accidents (in terms of

assaults and thefts) and congestion within the system. Moreover, the Court distinguished between a ban on individual begging and solicitation by charitable organizations, as registered charities, unlike beggars, may be investigated and overseen, limiting the risk of fraud or violence. Finally, the Court determined that the ban was viewpoint neutral, because the message that Defendant puts forth, i.e., the need to aid the unhoused and needy, was a message that is allowed to be expressed by registered charities.

Based on the analysis above, the Court determined that the TA's ban on begging in the transit system was valid under the New York State and federal constitutions. Thus, Defendant's motion was denied.

Ohio

State v. Burnett, 93 Ohio St. 3d 419 (Ohio 2001)

Chapter 755 of the Cincinnati Municipal Code subjected a person to exclusion for ninety days from the public streets, sidewalks, and other public ways in all drug-exclusion zones if the person was arrested or taken into custody within any drug-exclusion zone for any of several enumerated offenses. If the offender was subsequently convicted of the crime for which he or she was arrested, the offender was prohibited for one year from the date of conviction from being on any public street, sidewalk, or other public way in all drug-exclusion zones.

George Burnett, an unhoused person, argued as part of his defense that the one-year exclusion (Burnett did not challenge the 90 day exclusion) was unconstitutional because it violated the freedom of assembly and association guaranteed by the First Amendment and the right to travel guaranteed by the Fourteenth Amendment to the U.S. Constitution. The Trial Court overruled Burnett's motion to dismiss. Burnett appealed to the First District Court of Appeals, and the judgment of the Trial Court was affirmed.

The Supreme Court of Ohio held that because the Ordinance prohibited access only to a particular area of the city, and because Burnett did not demonstrate that he personally had been denied his First Amendment freedoms, the Ordinance did not burden the right of association guaranteed by the First Amendment. On its face, the Ordinance did not prohibit or interfere with fundamental, personal relationships. Nor did the Ordinance facially infringe the rights of a citizen to associate with other citizens for the purpose of engaging in protected First Amendment activities.

Nevertheless, the Court held that the Ordinance impermissibly burdened the right to interstate travel. The Court held that the right to intrastate travel is a fundamental right because it is deeply rooted in American history and traditions. The Court found that while the

Ordinance served a compelling interest, it was not narrowly tailored to restrict only those interests associated with illegal drug activity, but also restricted a substantial amount of innocent conduct. Therefore, the Ordinance was an unconstitutional violation of the right to travel as guaranteed by the Fourteenth Amendment. The judgment was reversed on this basis and on the basis that the Ordinance violated Section 3, Article XVIII of the Ohio Constitution.

City of Cleveland v. Ezell, 121 Ohio App.3d 570, 700 N.E.2d 621 (Ohio App. Ct. 1997)

Defendants Ezell, Wiggins, and Hargrove, members of an Islamic sect that encouraged its members to distribute its religious newspaper, filed suit against the City of Cleveland, Ohio. The Defendants were each arrested for violating Cleveland Ordinance No. 1163-95 Section 471.06 by soliciting sales of newspapers to vehicles stopped at traffic lights. The Ordinance generally prohibited any person from standing on a street or highway and transferring any items to motorists or passengers in any vehicle, or repeatedly stopping, beckoning to, or attempting to stop vehicular traffic through bodily gestures.

Defendants argued that the Ordinance was both overbroad and impermissibly vague on its face. Specifically, Defendants argued that the Ordinance was unconstitutionally vague and overbroad because it failed to distinguish between criminal conduct, and conduct that was otherwise innocent, such as hailing a taxi, or paying a taxi driver for a cab fare.

The Court of Appeals of Ohio, Eighth District, Cuyahoga County, denied Defendants' motion because the Ordinance was not aimed at abridging the expression of ideas, but rather at restricting conduct that could cause serious physical injury to both solicitors and motorists through clear and precise language. As such, the Court found that the Ordinance is neither vague nor overbroad.

The Chief Judge dissented, stating that under the public-forum doctrine, the Ordinance as applied to Defendants was unconstitutional. The Chief Judge recognized that Defendants were selling the religious newspaper on a public street, and that a public street is a typical public forum. As such, the Chief Judge contended that because the Ordinance burdened more public speech than necessary to serve a safety interest, it was unconstitutional as applied to Defendants.

Texas

State of Texas v. John Francis Curran, No. 553926 (Tex. Mun. Ct. City of Austin 2005)

In 2003, the Austin police issued John Curran, an unhoused man, a \$500 ticket for holding a sign asking for donations at a downtown intersection. The Ordinance

prohibited people from soliciting "services, employment, business or contributions from an occupant of a motor vehicle." The Municipal Court judge declared the city Ordinance prohibiting panhandling to be unconstitutional because the law violated the First Amendment, explaining that it was not "narrowly tailored in time, place, and manner."

Washington

City of Lakewood v. Willis, 375 P.3d 1056 (Wash. 2016) (en banc)

Robert Willis, an unhoused resident of Lakewood, Washington, was convicted of violating a municipal Ordinance that prohibited "asking for money or goods as a charity, whether by words, bodily gestures, signs or other means . . . at on and off ramps leading to and from state intersections from any City roadway or overpass." Willis was issued a criminal citation for begging after a police officer saw him walk into the traffic lanes at an exit ramp off Interstate 5.

Willis appealed his conviction and raised several constitutional challenges to the anti-begging Ordinance. Specifically, Willis argued that the entire Ordinance violated his First Amendment free speech rights, was unconstitutionally vague in violation of the Fourteenth Amendment's due process clause, and violated the Fourteenth Amendment's equal protection clause by criminalizing poverty.

The Court of Appeals affirmed Willis's conviction, and the Washington Supreme Court accepted his petition for review. The Washington Supreme Court identified several errors with the lower appellate Courts' analyses. First, both the superior Court and the Court of Appeals rejected Willis' First Amendment challenge because they concluded that governments may restrict speech "in" a freeway ramp. In other words, because the trial record contained evidence that Willis entered the lane of vehicle travel in the ramp, the Courts concluded that his speech occurred in a non-public forum and his constitutional challenge had to fail. In doing so, the Washington Supreme Court noted, the lower Courts rewrote the Ordinance so that it prohibited speech "in" free ramps instead of "at" both ramps and intersections.

Thus, the Supreme Court held that the lower Courts erred in rejecting Willis' facial First Amendment challenge, as his actual conduct was irrelevant as to whether the Ordinance was constitutional. Second, the Supreme Court reversed Willis' conviction because the provisions of the Ordinance under which Willis was convicted imposed content-based restrictions in a substantial number of locations that are traditional public forums (i.e., streets intersecting with freeway ramps). Accordingly, the Supreme Court concluded that those provisions were facially overbroad under the First Amendment.

V. THE NECESSITY DEFENSE

STATE COURT CASES

California

In re Eichorn, 69 Cal. App. 4th 382 (2000)

James Warner Eichorn was convicted of a misdemeanor violation of a Santa Ana City Ordinance banning sleeping in certain designated public areas. At trial, Mr. Eichorn attempted to bring a necessity defense based on the fact that he was unhoused and no shelter beds in the area were available during the night he was sleeping in the park. The Court determined that Mr. Eichorn had not made a sufficient showing to allow the jury to consider his necessity defense, and his conviction was ultimately affirmed. Following that, Eichorn petitioned for writ of habeas corpus based on the unconstitutionality of the city Ordinance under which he was charged.

The California Court of Appeal found that the lower Court had erroneously concluded that Mr. Eichorn's necessity defense was insufficient because he did offer substantial and uncontradicted evidence that he was sleeping outside because his alternatives were inadequate. Because Mr. Eichorn should have been permitted to raise a necessity defense to the charges, the Court granted his writ and remanded the cause with directions to set aside the judgment of conviction.

Iowa

Iowa City of Des Moines v. Webster, 861 N.W.2d 878 (Iowa App. 2014)

After unhoused individuals had been living under a bridge in the City of Des Moines for approximately ten months, the City of Des Moines posted a notice indicating they were illegally encroaching on the property of the City of Des Moines. The city gave them twelve days to either vacate the premises or be subject to immediate forcible removal or arrest. The only shelter in Des Moines was often over-capacity in the cold weather months, and if the individuals took shelter there when it was overcapacity, they would be forced to sleep on a hard bench (no beds remaining) and abandon their possessions (no storage facility at the shelter).

In order to prevent the city from evicting them from their encampments under the bridge, the Plaintiffs asserted the necessity defense, which allows an individual to enter and remain on another's property without permission in an emergency situation when such entry is reasonably necessary to prevent serious harm. The privilege must be exercised at a reasonable time and in a reasonable manner. An administrative hearing was held and the administrative hearing officer found that the Plaintiffs successfully asserted the "necessity defense" and

concluded that the lack of available beds in the city shelter coupled with the cold weather created a necessity for the individuals to continue residing under the bridge. The city appealed.

The Court of Appeals for Iowa reversed and held that the necessity defense did not apply. The Court held that the appellees' decision to remain in their encroachments under the bridge—endangering their lives and the lives of first responders—was not reasonably necessary to prevent the harm of staying in a crowded shelter and leaving their possessions unattended. Moreover, the Court held that, unlike a "violent storm suddenly overtaking a ship," cold weather is not an "emergency" as anticipated under the relevant section of the Restatement of Torts. Rather, the Court said that the unhoused Plaintiffs had constructed their encroachments in the warmer months, and in the colder months a 'warm and safe' shelter was available. Therefore, the Court found that the Plaintiff's decision to remain under the bridge was not reasonably necessary in light of all the circumstances.

Massachusetts

Commonwealth of Massachusetts v. Magadini, 474 Mass. 593 (2016)

The Defendant was arrested in 2014 on seven counts of criminal trespass. In each instance, the police found the Magadini in privately-owned buildings where he was the subject of no trespass orders. Four of the charges occurred during the evening, nighttime, or early morning hours of cold winter days. The Defendant generally lived outside year-round, but during the winter months he tried to find sheltered areas to take refuge from the severe weather.

The Court noted that Defendant had unsuccessfully attempted to rent an apartment, but did find lodgings at a local shelter for three months. However, at the end of such three-month period, the shelter refused him entry due to other issues. Before trial and during the charge conference, the Defendant requested a jury instruction on the defense of necessity, asserting that his conduct was justified as the only lawful alternative for an unhoused person facing the "clear and imminent danger" of exposure to the elements.

The trial judge denied the request, concluding that the Defendant had legal alternatives to trespassing available. The Defendant was convicted on all seven counts and the judge imposed concurrent sentences of thirty days in a house of correction as to each conviction. On appeal, The Supreme Judicial Court of Massachusetts held that the Defendant satisfied the foundational elements entitling him to the defense of necessity. The Court reasoned

that the common-law defense of necessity “exonerates one who commits a crime under the ‘pressure of circumstances’ if the harm that would have resulted from compliance with the law [...] exceeds the harm actually resulting from the Defendant’s violation of the law.” As such, the necessity defense may excuse unlawful conduct “where the value protected by the law is, as a matter of public policy, eclipsed by a superseding value.”

While the Commonwealth argued the Defendant did not present evidence that he was unable to rent an apartment or gain entry to a shelter and thus did not satisfy the ‘no legal alternative’ requirement, the Court held that the Court does not require a Defendant to show he or she exhausted all conceivable alternatives. Instead, a jury only needs to find that no alternatives were available. The Court also held that a Defendant need not show that he or she must leave his or her home town (an argument presented by the Commonwealth) in order to demonstrate no legal alternatives existed at the time of the incident. Ultimately, the Court found that on all but one occasion, the extreme weather coupled with Magadini’s inability to secure shelter entitled the Defendant to a jury instruction on the defense of necessity. The Court vacated those six convictions and remanded for a new trial.

Oregon

City of Eugene v. Adams, 313 Or. App. 67 (Or. Ct. App. 2021)

The Defendant was cited for criminal trespass after sleeping in front of an elevator to a private building, which blocked employees’ access to businesses located in the building. After denying a motion to dismiss by the

Defendant, the City of Eugene filed a motion *in limine* to prohibit the Defendant from asserting the defense of necessity, which the Trial Court granted. On appeal, the Defendant argued that the Trial Court’s denial of the defense of necessity and decision to not instruct the jury as to necessity was in error.

The Defendant testified that he did not have specific concerns about being assaulted or fear of any specific people who might harm him on the night he was cited. Rather, his concerns of assault or other danger were more generalized. The Defendant described the possibility of being harmed as a “random issue.” The Defendant also testified that he received \$1,000 per month of income from the US Department of Veteran Affairs (“VA”) and chose not to be housed by the VA to avoid “case management.” Further testimony established that the Defendant chose not to seek shelter services with a local housing organization because of his perception of how they operated.

The appellate Court upheld the Trial Court’s decision stating that, for purposes of a necessity defense, the imminent threat must be “one that is immediate, ready to take place, or near at hand,” and that “vague, unspecified, or generalized potential harms are insufficient.” Further, “to show that the injury that the Defendant sought to avoid was ‘imminent,’” as it relates to a defense of necessity, “a Defendant must show that the threat of injury existed at the time that Defendant committed his offense.” The appellate Court determined that the Defendant failed to demonstrate any imminent threat on the night he was cited.

VI. CHALLENGES TO FOOD SHARING AND ADVOCACY FEDERAL COURT CASES

Federal Court Cases

THIRD CIRCUIT

Chosen 300 Ministries, Inc. v. City of Philadelphia, 2012 WL 3235317 (E.D. Pa. Aug. 9, 2012)

A collection of approximately fifteen religious organizations that had been providing food to hungry and unhoused people in outdoor parks for up to twenty years sought a preliminary injunction to block enforcement of regulations banning outdoor food sharing in all Philadelphia city parks. Plaintiffs argued that the regulations interfered with their free exercise of religion rights under the First Amendment and the Pennsylvania Religious Freedom Protection Act (PRFPA).

The District Court granted the preliminary injunction and held that the policy violated the Plaintiffs’ rights under

the PRFPA. The Court also found that the regulations imposed a substantial burden on Plaintiffs’ exercise of religion by preventing them from sharing food with unhoused people where they were found. The Court did not address the First Amendment issue out of judicial restraint. In September 2012, the parties entered into an interim agreement whereby the city agreed to suspend enforcement of the food sharing ban, engage in discussions with Plaintiffs regarding the city’s outdoor food sharing issues, and pay the Plaintiffs’ attorneys’ fees.

FOURTH CIRCUIT

Stuart Circle Parish v. Board of Zoning Appeals of the City of Richmond, 946 F. Supp. 1225 (E.D. Va. 1996)

Stuart Circle Parish, a partnership of six churches of different dominations in the Stuart Circle area of Richmond, Virginia, sought a temporary restraining order

and permanent injunctive relief to bar enforcement against them of a zoning code limiting feeding and housing programs for unhoused individuals. The Ordinance limited feeding and housing programs to up to thirty unhoused individuals for up to seven days between October and April.

The Plaintiffs conducted a “meal ministry” for forty-five minutes every Sunday, to provide “worship, hospitality, pastoral care, and a healthful meal to the urban poor of Richmond.” Some, but not all, of the attendees were unhoused. Neighbors of the host church complained to the city’s zoning administrator, alleging unruly behavior by attendees of the meal ministry. The zoning administrator found that Plaintiffs violated the city Ordinance limiting feeding and housing programs. Although Plaintiffs appealed, the Board of Zoning Appeals upheld the determination.

FIFTH CIRCUIT

Big Hart Ministries Ass’n, Inc. v. City of Dallas, 2011 WL 5346109 (N.D. Tex. Nov. 4, 2011)

Plaintiffs, Big Hart Ministries in its capacity as a 501(c)3 organization and on behalf of the unhoused population of the City of Dallas (the “City”), Rip Parker Homeless Ministry in its capacity as an Association and on behalf of the unhoused population of Dallas and William Edwards, in his individual capacity and on behalf of the unhoused population of Dallas, (collectively the “Plaintiffs”) filed a Complaint seeking injunctive and declaratory relief stating that the City of Dallas’s Food Establishments Ordinance (the “Ordinance”) burdened the fundamental rights of free exercise of religion, due process of law as guaranteed by the United States Constitution and the Texas Religious Freedom Restoration Act.

Plaintiffs were religious organizations that believed their religious faith required them to share food with the unhoused and minister to them by sharing religious teachings. The Ordinance permitted church, civic or other charitable organizations to serve food to the unhoused. Under the Ordinance, The Director of the Department of Environmental Health Services must approve the location; and the site must provide handwashing facilities for food servers and restroom facilities for food servers and unhoused. Additionally, the site owner must have given permission, there must be temperature controlled food storage, and the organization had to have at least one person present who had taken a city-sponsored food preparation class. The organization also had to have met annual training requirements for safe food handling. Plaintiffs argued the Ordinance was overly burdensome and restricted their ability to provide food to the unhoused and minister to them.

Plaintiffs moved for summary judgment that the Ordinance was impermissibly vague. The City moved for

summary judgment and made a motion to strike. City argued that Plaintiffs lacked standing as they had suffered no harm traceable to the Ordinance as Plaintiffs continued to feed the unhoused in compliance with the Ordinance in the same manner as before the Ordinance. The Court noted there was credible evidence from Plaintiffs that law enforcement threatened them with tickets, fines or arrests when Plaintiffs fed unhoused individuals in violation of the Ordinance. As there was an alleged injury-in-fact, the Court found the Plaintiffs had standing.

The Court reviewed the Texas Religious Freedom Act, which prevents any government agency from substantially burdening a person’s free exercise of religion. The City argued that the Ordinance did not impose a substantial burden on Plaintiffs free exercise of religion. Plaintiffs argued that the Ordinance’s requirements substantially burdened religious expression as it severely affected their ability to seek out unhoused individuals and share food in accordance with their religious beliefs. Since the Ordinance was enacted, far fewer unhoused people had been fed and Plaintiffs had lost volunteers who feared repercussions from the City for violating the Ordinance.

The Court found that Plaintiffs submitted sufficient evidence from which a jury could conclude that the Ordinance substantially burdened the Plaintiffs free exercise of religion. The Court declined to address Plaintiffs constitutional claims as the Plaintiffs case could be addressed on state statutory grounds. The Court dismissed Plaintiffs motion for partial summary judgment, dismissed the City’s motion for summary judgment and dismissed the City’s motion to strike.

SIXTH CIRCUIT

Layman Lessons Church and Welcome Baptist Church, Inc. v. Metropolitan Gov’t of Nashville/Davidson Co., No. 3:18-CV-0107 (M.D. Tenn. April 18, 2019)

The action was based on Plaintiff’s use of property which was zoned as a commercial neighborhood. Plaintiff claimed Defendant was discriminating against Plaintiff through arbitrary, capricious enforcement of codes and Ordinances, regulations and laws: denying use of the land for religious activities, denying use of paved parking area for mobile food pantries, tortious interference with Plaintiff’s existing contract with a landlord to conduct religious activities, operate mobile food pantries, mobile showers and laundry services for people experiencing homelessness, as well as other causes of action. Plaintiff alleged that Defendant violated the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), First and Fourteenth Amendments and TN’s Religious Freedom Restoration Act. Defendant filed a Motion to Dismiss.

Plaintiff alleged misuse of both zoning and non-zoning regulations by Defendant to prevent Plaintiff’s use of the property under RLUIPA. The Court found that Plaintiff

sufficiently alleged violations of 42 U.S.C. § 2000cc and granted in part and denied in part Defendant's motion to dismiss Plaintiff's RLUIPA claims.

Plaintiff alleged that Defendant violated Plaintiff's First Amendment rights to free exercise of religion and its Fourteenth Amendments rights to equal protection, under 42 U.S.C. § 1983. The Court held that Plaintiff alleged no specific policy, custom or practice sufficient to hold Defendants liable and therefore, dismissed the Section 1983 claims.

Plaintiff also alleged that Defendant conspired to interfere with Plaintiff's constitutional rights in violation of 42 U.S.C. § 1985 and 1986. The Court held that Plaintiff did not sufficiently state a claim and dismissed those claims.

The Court found that Plaintiff sufficiently alleged a substantial burden for a claim for violation of the Tennessee Religious Freedom Restoration Act because Plaintiff was not allowed to use the property for its religious activities, such as sorting and distributing donated goods to the poor and unhoused in Nashville. Therefore, the claims survived Defendant's motion to dismiss.

The Plaintiff's claims that remained were I (denying use of the land for religious activities), II (denying use of paved parking area for mobile food pantries), III (illegal refusal to correct an illegal storm water pipe that flooded property, and IX (tortious interference with Plaintiff's existing contract with a landlord to conduct religious activity. Case updates were not readily available at the time of this writing.

Layman Lessons, Inc. v. City of Millersville, 2008 WL 686399 (M.D. Tenn. Mar. 7, 2008)

In 2005, Layman Lessons set up Blessingdales Charity Store, which was both a place to store donated clothing and personal items and distribute them to the needy, and a retail store to sell these items to raise money. Layman Lessons applied for a Certificate of Occupancy, but its application was placed on hold due to a then pending Ordinance that would have limited Layman Lessons' use of the property as planned. In addition, the city required the construction of a "buffer strip," such as a fence or landscaping to serve as a buffer between properties. Layman Lessons' property only abutted commercial properties, however, and buffer strips were typically only required on properties abutting residential property.

In 2006, Layman Lessons filed a Complaint, alleging that the city's actions violated its rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and its constitutional rights under the First and Fourteenth Amendments and the Tennessee Constitution. In March 2008, the Court ruled on both parties' respective motions for summary judgment, granting in part and denying in part each motion.

The Court found Layman Lessons did not state a valid claim under RLUIPA for enforcement of the buffer strip requirement as it was not a substantial burden and was neutral. Because the city planner did not have authority to unilaterally deny an application for a Certificate of Occupancy, the Court did not find the city liable under § 1983 for the city planner's actions. The Court also found that Layman Lessons failed to prove its Equal Protection claim. However, the Court granted Layman Lessons' summary judgment motion on its claim that city actions (aside from the city planner's actions) that delayed issuance of a Certificate of Occupancy burdened Layman Lessons' free exercise rights in violation of the RLUIPA.

SEVENTH CIRCUIT

Family Life Church v. City of Elgin, 2008 WL 2440658 (N.D. Ill. June 18, 2008)

Family Life Church invited H.E.L.P.S., A Ministry of Caring ("HELPS") to operate a shelter in its church and challenged the city's requirement to obtain a conditional use permit and the delays it encountered in obtaining the permit. Responding to a Complaint that HELPS was operating the shelter without proper approval, a city code enforcement officer inspecting the premises found three violations, including the lack of a permit to run a shelter and the lack of an occupancy permit for the building.

When HELPS applied for the permit in September 2006, a further inspection purportedly revealed 105 building, fire and life-safety code violations. In October 2006, the city insisted the shelter be shut down until the permits were obtained. In November 2006, the City of Elgin zoning board recommended that the permit application be approved subject to certain conditions. When the matter was still not on the city council's agenda on January 11, 2007, Family Life and Frank Cherye, an unhoused individual, filed a lawsuit in federal Court. The Court denied Plaintiffs' request for a temporary restraining order against the city.

The permit was granted on May 9, 2007. The Court granted the city's motion for summary judgment, as it found that the permit application process and accompanying delays did not violate Plaintiffs' rights under the First Amendment's free exercise clause and the "substantial burden" provision of the federal Religious Land Use and Institutionalized Persons Act (the "Act"). The Court found that the permit requirement was facially neutral and that the eight-month permit process did not rise to the level of a substantial burden. Furthermore, the Court found that much of the delay was self-imposed: Family Life prematurely opened the shelter before seeking a permit and then had to close down the shelter during the pending permit process. With the same reasoning, the Court rejected Family Life's equal protection claim and claim of disparate treatment under the Act, as well as Family Life's state claim under the Illinois Religious Freedom Restoration Act.

Finally, the Court rejected Cherrye's individual equal protection claim regarding the city's requirement that unhoused persons staying at a particular shelter for more than three days demonstrate a connection with the city prior to entering the shelter. Because this residency requirement did not require someone to live in Elgin for any particular period of time, the Court applied a rational basis standard and found that the requirement did not violate Cherrye's fundamental right to travel.

EIGHTH CIRCUIT

Raymond Redlich, et al. v. City of St. Louis, No. 4:19-CV-00019-NAB (E.D. Mo. July 22, 2021)

Plaintiffs brought this action based on municipal citations that were issued for distributing bologna sandwiches to the unhoused without a temporary food permit in violation of a City Ordinance (regarding foodborne illness and distribution of food). Plaintiffs brought their claims under the First and Fourteenth Amendments, as well as state constitutional provisions related to the rights of conscience and the protection of religious expression. Both Parties moved for Summary Judgment.

Specifically, Plaintiffs contended that the City's enforcement of the Ordinance made it unlawful for Plaintiffs to fulfill their religious obligation to share food with the hungry because Plaintiffs could not reasonably comply with the City's regulatory requirements. The City argued that the Ordinance did not constitute a substantial burden such to trigger First Amendment concerns and that the Ordinance was neutral and a law of general applicability. Plaintiffs argued that the City selectively enforced the Ordinance based on whether or not food is shared with unhoused persons. The City argued that the Ordinance's Amendment reflected an effort to accommodate those who wish to share food with the unhoused because it reduced the permit fee for charitable food distribution and waived the 14-day limit for charitable food operations.

The Court opined that the permit application allowed the City to know the location and time of any food distribution so that a Health Department inspector could appear at the event to ensure the food had been prepared and handled in accordance with the Food Code (to prevent foodborne illness). The Court found that Plaintiffs did not demonstrate that complying with the Ordinance, or availing themselves of food sharing ministry alternatives that do not implicate the Ordinance, would substantially burden their religious exercise, and they could not show a substantial burden implicating the Free Exercise Clause. The Court also ruled that the Ordinance and its Amendment were content neutral and generally applicable. As such, the Court found that the Ordinance passed a rational basis review and granted the City's motion for summary judgment as to the First Amendment claims.

Plaintiffs further alleged that their freedom of speech was violated because sharing food with unhoused persons was expressive conduct that Plaintiffs used to spread their Christian message. The City argued that the distribution of sandwiches was not inherently expressive conduct and that even if it was expressive conduct, the Ordinance was not directed at any speech or religious exercise.

The Court ruled that it did not need to decide whether Plaintiffs' food sharing constituted expressive conduct because Plaintiffs' free speech claim failed on other grounds. The Court further ruled that the Ordinance met the *O'Brien* test because the City identified the important and substantial government interest of preventing foodborne illness.

Additionally, Plaintiffs alleged that the City's selective, discriminatory enforcement of the Ordinance against Plaintiffs created a differential treatment that affected Plaintiffs' right to associate with unhoused persons, implicating their freedom to associate under the First Amendment.

In the alternative, Plaintiffs alleged that the City's application of the Ordinance also violated the Equal Protection Clause because it denied unhoused persons the freedom to make choices that all other persons enjoyed. The City argued that the Ordinance did not substantially burden Plaintiffs' rights to association or equal protection, or alternatively, that then Ordinance satisfied the rational basis and strict scrutiny review.

The Court found that Plaintiffs could not establish a violation of their equal protection or associational rights, and therefore granted the City's motion for summary judgment on these grounds.

The Court ruled that because the federal claims were dismissed, the state claims would likewise be dismissed, ultimately granting the City's motion for summary judgment on all grounds.

NINTH CIRCUIT

Pacific Beach United Methodist Church v. City of San Diego, No. 07-CV-2305- LAB-PCL (S.D. Cal. Dec. 7, 2007)

Plaintiffs, the Pacific Beach Unified Methodist Church (the "Church") and its Pastor, filed suit in the United States District Court for the Southern District of California, against the City of San Diego and affiliated governmental entities, seeking injunctive relief and damages. The Complaint alleged that Plaintiffs' inspection and proposed enforcement of a zoning Ordinance (the "Ordinance"), barring the Plaintiffs from hosting unhoused and poor community members onto Church grounds, infringe upon the Plaintiffs' right to freedom of speech and religion, as well as civil rights, under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution

and California Constitution, as well under the Religious Land Use and Institutionalized Persons Act of 2000 (the “RLUIPA”).

The Ordinance regulated “Residential Zones” (as defined in the Ordinance) and listed “Homeless Day Centers” as a prohibited use within the zone. A Homeless Day Center is defined as providing basic services, personal hygiene, information and referral, employment, mail, or telephone services during daylight hours. The Ordinance provided a carve out for “church[es],” a permitted use category.

The Church operated within a Residential Zone but was itself classified as the permitted use category of church under the Ordinance. Plaintiffs occasionally, and on Church grounds, provided community food, care, and ministry on Wednesday nights on church property to unhoused, low-income, and poor people within and beyond the church’s congregation (the “Wednesday Night Ministry”). These gatherings included a meal as well as spiritual practices and free medical and dental examinations for low-income attendees. Plaintiffs asserted that providing support, food, water, and religious worship are core tenets of their faith and had been central to the practices of the Methodist Church, Judeo-Christian faiths, and other faiths, for centuries.

Plaintiffs chiefly argued that the threat of a zoning violation impermissibly imposed a substantial burden on Plaintiffs’ religious exercise, including a religious assembly and institution, and the Defendants were motivated by a desire to deprive the poor and unhoused from participating in religious activities based on impermissible discrimination of wealth and economic position.

Plaintiffs argued their practices, including Wednesday Night Ministry and other Church gatherings, were not subject to the Ordinance for several reasons. First, the Church fell within the permitted use. Second, the Church did not operate a Homeless Day Center. Finally, even if the Plaintiffs did provide any of the enumerated services related to a Homeless Day Center, it was privileged to do so as a necessary element of practicing their faith, as protected under the First Amendment to the United States and California Constitutions and RLUIPA. Further, Plaintiffs asserted the Defendants’ inspection of Church grounds earlier that year and subsequent threat of punishment unconstitutionally chilled Plaintiffs’ religious freedom of expression. Enforcement of the Ordinance would create a substantial and impermissible burden on Plaintiffs’ protected religious exercise.

The case settled, and the action was dismissed without prejudice on April 21, 2008.

Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022 (9th Cir. 2006)

Santa Monica Food Not Bombs, an all-volunteer organization dedicated to nonviolent social change, and other organizations and individuals seeking to share food with unhoused individuals brought suit against the City of Santa Monica, California, alleging that certain permit requirements and limitations on outdoor meal programs violated Plaintiffs’ rights under the First and Fourteenth Amendments of the U.S. Constitution, and various provisions of the California Constitution.

The District Court granted Santa Monica’s motion for summary judgment, holding that the challenged Ordinances were not facially unconstitutional. Food Not Bombs appealed to the Ninth Circuit. The Ninth Circuit held that Food Not Bombs’ challenges to an Ordinance prohibiting banners outside of city-sponsored events and an Ordinance prohibiting food distribution on sidewalks were moot because those Ordinances had been amended after the suit was filed.

The Court held that one of the Ordinances being challenged, which required permits for parades, events drawing 150 people or more, and events involving setting up tents, was a content-neutral time, place, and manner regulation that did not violate the First Amendment. The Court found the Ordinance was not directed to communicative activity as such, and the object of the permitting scheme was “to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible” under the park district’s rules, and to assure financial accountability for damage the event may cause.

In addition, an instruction to the Ordinance provided that “no consideration may be given to the message of the event, the content of speech, the identity or associational relationships of the applicant, or to any assumptions or predictions as to the amount of hostility which may be aroused in the public by the content of speech or message conveyed by the event.” Food Not Bombs also contended that the events Ordinance was not sufficiently narrowly tailored.

The Court rejected this argument as applied to sidewalks and park paths because a limiting instruction limited the application of the Ordinance to activities that are “likely to interfere” with traffic flow. However, the Court held that the Ordinance was insufficiently narrowly tailored with respect to all other city streets and public ways, to which the limiting instruction did not apply. The Court also found that there were ample alternatives for speech.

Sacco v. City of Las Vegas, No. 2:06-CV-0714-RCJ-LRL (D. Nev. June 12, 2006)

Eight Plaintiffs, including five individuals and one non-profit organization (Las Vegas Food Not Bombs) (collectively, the “Plaintiffs”), filed a Complaint in the United States District Court for the District of Nevada against the City of Las Vegas, Nevada, various City Council members, the Las Vegas Mayor, the Las Vegas City Manager, the Las Vegas Department of Leisure Services, the Las Vegas Metropolitan Police Department and the Las Vegas Deputy City Marshalls (collectively, the “Defendants”) for declaratory relief stating that Las Vegas Municipal Code Section 13.36.055 violated freedom of speech, free exercise of religion, freedom of assembly, the Equal Protection and Due Process clauses of the United States Constitution and Article 1, Section 9 of the Nevada Constitution. Plaintiffs sought to enjoin the City of Las Vegas from enforcement of Section 13.36.055.

Plaintiffs were social activists that regularly provided food and water to unhoused individuals in the Las Vegas area and participated in political protests related to poverty, homelessness and other social issues. On July 19, 2006, the Las Vegas City Council unanimously passed a bill to amend Las Vegas Municipal Code Ordinance 13.36.055 to prohibit the following activity in any Las Vegas City park: “the providing of food or meals to the indigent for free or for a nominal fee.” The Ordinance further defined “indigent person” as one “whom a reasonable ordinary person would believe to be entitled to apply for or receive assistance under NRS 428.”

The District Court granted injunctive relief and enjoined Defendants from enforcement of the law as presently written, finding the Ordinance to be unconstitutionally vague and that it failed rational basis review under the Equal Protection Clause of the Fourteenth Amendment.

The Ordinance was found to be unconstitutionally vague because it required two subjective determinations be made – first, whether the person receiving the food was indigent and second, whether the person providing the food was improperly providing food to the unhoused or sharing food legally. The Ordinance was found to fail the rational basis review under the Equal Protection Clause because it impermissibly discriminates against indigent individuals without any showing that one-on-one or small group feedings contribute to the problems the City was seeking to address by the Ordinance. The District Court provided the City with instructions on how to revise the Ordinance to cure its constitutional defects, which the City did not choose to do, resulting in the District Court entering a permanent injunction against the enforcement of the Ordinance.

The Plaintiffs also sought to void (i) the City’s group use and special event permitting Ordinances (which generally require advance permitting and payment of a fee) on

the basis that such Ordinances violated the Free Speech Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the vagueness protections contained in the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment, and (ii) the City’s Ordinance allowing City parks to be designated as “children’s only” parks on the basis that such Ordinance violated the First Amendment and Equal Protection Clause of the Fourteenth Amendment. The District Court denied the Plaintiffs’ motion for Summary Judgment on these claims and granted Defendants’ Counter-Motion for Summary Judgment.

McHenry v. Agnos, 983 F.2d 1076 (9th Cir. 1993)

Keith McHenry, co-founder and member of Food Not Bombs (“FNB”), filed suit in the United States District Court for the Northern District of California (the “Northern District Court”) on July 17, 1989, against various San Francisco city officials, the San Francisco Superior Court and the San Francisco Police Department (collectively, “Defendants”), alleging that the Defendants violated his civil rights under the First Amendment to the U.S. Constitution when the Superior Court enjoined Mr. Henry from distributing food in a public park without a permit in violation of San Francisco health and public park ordinances regulating such activity. The city police department arrested Mr. Henry in connection with FNB activity.

The Northern District Court granted summary judgment in favor of Defendants, and Mr. Henry appealed that decision to the United States Court of Appeals for the Ninth Circuit. Mr. Henry also alleged for the first time on appeal that the underlying Ordinances were facially invalid. The San Francisco Health Code (San Francisco, CA., Health Code Sections 452(1988)) required food distribution entities to obtain and maintain a permit and the San Francisco Park Code (San Francisco, CA., Sections 7.03, 7.03(k) (1987)) required parties to secure a permit before, among other things, distributing food to more than 25 persons in a public park (collectively, the “Permit Ordinances”).

The Ninth Circuit Court affirmed the Northern District Court’s decision, holding that the Permit Ordinances were reasonable time, place and manner restrictions, without reaching the question of whether Mr. McHenry’s food distribution constituted an expression that was protected under the First Amendment. The Ninth Circuit Court noted that the First Amendment provides that expression, whether oral, written or symbolized by conduct, is subject to reasonable time, place and manner restrictions. Restrictions are considered reasonable provided that they are justified without reference to the content of regulated speech, are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication.

In examining Mr. Henry's First Amendment claim, the Ninth Circuit Court held that the Permit Ordinances were (i) content neutral, (ii) narrowly tailored to serve the city's significant interests and (iii) did not foreclose Mr. Henry from alternative forms of communication (i.e., feeding the unhoused elsewhere or at the park, after obtaining a permit). The Court accepted Defendants' assertion that the city had a significant interest in regulating the quality of the food offered to the public and ensuring the sanitation of facilities where such food is served. The Court also accepted the city's assertion that it had an interest in preserving the beauty and conditions of scarce park property.

Finally, the Ninth Circuit Court declined to examine Mr. Henry's claim that the Permit Ordinances were facially invalid because such claims were not raised at the Northern District Court level.

ELEVENTH CIRCUIT

Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale, No. 15-60185-CIV-ZLOCH (S.D. Fla. August 16, 2019)

Fort Lauderdale Food Not Bombs ("Plaintiffs" or "FLFNB") and some of its individual members filed suit against the City of Ft. Lauderdale alleging that their First and Fourteenth Amendment rights had been violated by enacting an Ordinance restricting food sharing in public. The Plaintiffs, who publicly shared food as part of their political protests, argued that the Ordinance violated their First Amendment rights to expressive conduct and association. They also argued that the Ordinance and associated rule restricting food sharing were unconstitutionally vague.

Both Parties moved for summary judgment, and the Court granted the City of Ft. Lauderdale's motion after finding that the Plaintiffs' conduct was not expressive conduct under the First Amendment and that the Plaintiffs' expressive association rights were not implicated. The Court further held that the challenged law was not unconstitutionally vague.

Plaintiffs appealed the ruling to the Eleventh Circuit which reversed the Court's holding that Plaintiffs' food sharing is not expressive conduct protected by the First Amendment and charged the Court with determining "whether Ordinance C-14-42 and Park Rule 2.2 violate the First Amendment and whether they are unconstitutionally vague." The Eleventh Circuit remanded the case and charged the District Court with determining if the Ordinance and the Park Rule were unconstitutional in light of the Eleventh Circuit Holding. The Court ordered the Parties to submit supplemental briefs. The City challenged Plaintiffs' standing and argued that the Ordinance and the Park Rule were lawful, content-neutral time, place or manner restrictions and that they were not unconstitutionally vague.

The District Court ruled that although Plaintiffs' food sharing is expressive conduct and the restrictions imposed on said conduct implicated Plaintiffs' First Amendment freedoms, the Court Ordinance and Park Rule did not violate the Plaintiffs' rights. Furthermore, the core restrictions imposed by the Ordinance and the Park Rule were lawful as content-neutral time, place, or manner restrictions.

The undisputed facts did not allow for an as-applied challenge to the permitting schemes included in the Ordinance and the Park Rule, and because the Ordinance and the Park Rule were regulations of truly general application, their permitting schemes were not susceptible to a facial challenge. The Court also held that the Ordinance and the Park Rule did not infringe on Plaintiffs' rights to engage in expressive association. Lastly, the Court held that the Ordinance and the Park Rule clearly applied to Plaintiffs' conduct and that they were not void for vagueness, whether considered together or separately. The summary judgment motion of the City was entered on all counts.

FLFNB appealed for a second time in an effort to challenge Ft. Lauderdale's efforts to shut down the practice of sharing food with people experiencing homelessness in downtown Stranahan Park. In the second appeal, the Court had to decide whether the Ft. Lauderdale Park Rule 2.2 (which requires City permission for social service food-sharing events in all city parks) could withstand First Amendment scrutiny as applied to FLFNB's demonstrations. On August 31, 2021, the Court ruled that it could not. As written, it violated the First Amendment because it was not narrowly drawn to further a substantial government interest and was unrelated to the suppression of free expression, nor as applied, did it amount to a reasonable time, place, and manner regulation on expression in a public forum. The Court reversed the District Court's order granting summary judgment in favor of the city and remanded for further proceedings consistent with this opinion.

Wright v. City of St. Petersburg, No. 15-10315, 2016 WL 4269796 (11th Cir. Aug. 15, 2016)

An ordained minister and co-director of an addiction recovery program brought a §1983 action against the city of St. Petersburg, Florida regarding an Ordinance that prevented him from entering a public park. Plaintiff, who frequently performed ministerial outreach and advocacy work for the poor and unhoused in the park, was arrested and issued a "trespass warning" after interfering with a police investigation in the park. Under the city Ordinance, the Plaintiff's "trespass warning" prohibited him from re-entering the park for one year.

The Plaintiff filed a Complaint against the city, alleging that the Ordinance interfered with his ministerial outreach to the poor and unhoused in the park, and therefore

violated the First and Fourteenth Amendments.

The District Court granted the city's motion for summary judgment, concluding that the Ordinance was a reasonable regulation of the time, place, and manner of speech in the park. On appeal, the Eleventh Circuit affirmed the District Court's ruling. The Court held that the city Ordinance does not violate the First Amendment on its face or as applied to the Plaintiff because it did not inevitably single him out based on his expressive activity, and he did not receive his "trespass warning" because he was engaged in expressive conduct protected by the First Amendment. Likewise, the Court rejected the Plaintiff's arguments that a portion of the Ordinance violated the First and Fourteenth Amendment as a censorial prior restraint on speech.

Jimenez v. Daytona, 2016 WL 11626974 (M.D. Fla. 2016)

Plaintiffs, Gilbert Jimenez and Debbie Jimenez, co-founders of the religious ministry Spreading The Word Without Saying A Word, filed a Complaint alleging that the City of Daytona Beach, Florida, violated their rights under the First and Fourteenth Amendments to the U.S. Constitution. Plaintiffs were issued a citation and arrested for using a city park without a permit and for trespassing. Plaintiffs alleged that city policies banning the conducting of their ministry at that specific park in the city or any other public park violate their First and Fourteenth Amendment rights under the U.S. Constitution.

Subsequent to the citation, Plaintiffs were asked to obtain permits for "outdoor events" and a "facility use." The city code defined "outdoor event" as "(a) a 'parade' ...; (b) a 'block party'; (c) 'filming activity'; or (d) an 'organized outdoor activity involving 100 or more persons gathered on city property...and which involves one or more of the following on such property: potentially dangerous activities such as daredevil acts; public sales and consumption of foods or services...."

Plaintiffs alleged that the Ordinance did not require a permit or the permission of the city to engage in religious expression that involved the sharing of food at no cost with others regardless of how many people may be present at any time. A facility use permit was required for any person to "have the exclusive use" of any city park or "any portion thereof." Plaintiffs claimed that the reference in the Ordinance to "any portion" is so overbroad that no person or group can conduct any First Amendment protected expressive activity in a city park.

Plaintiff's permit applications were also denied based on a city policy that prohibited the "provision of food," with the denial letter specifically noting that the event seemed to be "for the purpose of providing the social service of distributing food to persons in need," and that "social services is not a permitted use of City parks." Plaintiffs

further asserted that the city policy violated their First Amendment rights in that the rules constitute an unlawful prior restraint on speech that prohibited Plaintiffs from engaging in their constitutionally protected religious expression through their ministry with unhoused persons and those in need.

Plaintiffs also claimed that have a constitutionally protected liberty interest to be in public places, including city parks. They contended that the denial of the permit for "outdoor events," when the activity conducted by the ministry did not meet the definition of "outdoor event" under the city Ordinance, and violated their First and Fourteenth Amendment rights.

In March 2016, the parties reached a settlement that lifted the food-sharing ban. The City Commission approved changes to parks policies and city Ordinances as part of the agreement and agreed to pay damages and attorneys' fees in exchange for dismissal of the lawsuit. The City also rescinded trespass warnings issued to individuals, many of whom were unhoused, for city parks under the trespass policy challenged by the lawsuit.

First Vagabonds Church of God v. City of Orlando, --- F.3d ---, 2011 WL 1366778 (11th Cir. April 12, 2011.), vacating 578 F.Supp.2d 1353 (M.D. Fla. filed Oct. 12, 2006); Case No. 6:2006-CV-1583

First Vagabonds Church of God and Orlando Food Not Bombs, as well as members of both organizations in their individual capacities, filed suit against the City of Orlando ("City"), arguing that their First Amendment rights were violated by a municipal Ordinance restricting the number of permits for feeding unhoused people in a two-mile radius surrounding the city center. The Plaintiffs asserted that their feedings of people experiencing homelessness in Lake Eola Park – located in the heart of Orlando and adjacent to relatively well-to-do neighborhoods – were political statements and expressive conduct protected by the First Amendment and that the City's Ordinance was a thinly-veiled means of suppressing speech on behalf of wealthier City residents who disliked the presence of unhoused people.

The District Court concurred with the Plaintiffs, holding that the Plaintiffs' First Amendment rights were violated and enjoining the City from enforcing the Ordinance.

The U.S. Court of Appeals for the Eleventh Circuit reversed the District Court with respect to the First Amendment claim, finding that even if it accepted that the Plaintiffs' actions were expressive conduct protected by the First Amendment, the City's Ordinance was a reasonable time, place, or manner restriction. The Circuit Court invoked the four requirements of *United States v. O'Brien*, 391 U.S. 367 (1968), with respect to government regulations on actions that contain both speech and non-speech elements: (1) the Plaintiffs had acknowledged that

it was within the power of the City to enact Ordinances that regulated park usage; (2) the City had a substantial interest in managing park property that was plainly served by the Ordinance; (3) the City's interest in managing parks was unrelated to speech; and (4) the incidental restriction on alleged freedoms on the First Amendment was not greater than necessary to further the interest of the City.

The Circuit Court also drew extensive parallels with the Supreme Court's decision in *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1982), in which the Court also accepted that the Plaintiffs' actions (camping in a city park to draw attention to the plight of the unhoused) were expressive conduct but nevertheless upheld the

Ordinance restricting their conduct as a valid time, place, or manner restriction. The City's Ordinance did not forbid feeding of the unhoused outright and was otherwise content neutral; the Circuit Court noted, as the Court did in *Clark*, that the lower Courts had overstepped by assuming the role of the municipal authority in determining how much protection of park lands was appropriate. Sans credible evidence that the Ordinance should fall afoul of *O'Brien*, the Circuit Court the District Court should have deferred to the professed reasoning of the City.

VII. RIGHT TO PRIVACY

STATE COURT CASES

Oregon

State v. Tegland, 344 P.3d 63 (Ct. App. Or., Feb. 11, 2015)

Gregory Tegland lived in a shelter made out of a grocery cart, a wooden pallet, and multiple tarps, which extended about two feet onto the public sidewalk. Based on a city code prohibiting the erection of structures on public rights of ways, police informed Tegland that he would need to remove his structure, but he did not.

On the morning of Tegland's arrest, two Portland officers approached the structure to see if there was anyone inside the structure. Because tarps covered the structure's sides, the officers could not see anything inside the structure, except for Tegland's feet and some bedding. The officers arrested Tegland for violating the city's code against erecting a structure on a public right of way. During the arrest, the officers searched Tegland's shelter and found evidence leading to a second charge for possession of methamphetamine.

Defendant moved to suppress all evidence gathered from the search of his shelter, claiming the search violated his Fourth Amendment rights against unreasonable search and seizure. He also claimed the search violated Article I, Section 9 of the Oregon Constitution (the state Fourth Amendment equivalent).

Finding that the officers had the right to remove the structure entirely based on violation of the Ordinance prohibiting erection of structures on public rights of way, the Trial Court found that lifting the makeshift door of the shelter did not constitute an unreasonable search. Tegland was then convicted on both charges and appealed.

The Court of Appeals found that whether a living space is permanent or transient cannot conclusively determine whether or not one has a reasonable expectation of

privacy. Still, however, the Court found that the structure violated the city code prohibition against structures on public rights of way such that the police had authorization to summarily remove or abate any such obstruction. Moreover, the Court noted that police had informed Tegland of the Ordinance prior to his arrest, and ultimately affirmed the conviction.

Washington

State v. Pippin, No. 48540-1-II (Ct. App. Wash. 2017)

Vancouver Municipal Code ("VMC") barred camping on public property without permission. VMC was revised to permit camping on public land between 9:30 p.m. and 6:30 a.m. Police officers began notifying people of the new Ordinance either by making contact at each campsite or leaving a written notice on the outside of the campsite. Vancouver police officers went to William Pippin's tent on November 2 at 10:35 a.m. to make contact with him to either arrest him or warn him for violating the Ordinance. An officer rapped on the tent and announced police were present and asked if anyone was there. The officers asked Pippin to exit the tent so they could notify him of the Ordinance. After an uncertain amount of time Pippin had not exited. The officers stated they were concerned Pippin may have a weapon. One of the officers lifted up the tarp and noticed a bag of methamphetamine in the tent. Pippin was arrested and charged with possession of a controlled substance.

Pippin moved to have the evidence suppressed arguing it was obtained by an unconstitutional search under the Fourth and Fourteenth Amendments of the U.S. Constitution and article I, section 7 of the Washington Constitution. The State argued that Pippin had no privacy interest in his tent and even if he did, the officers conducted a protective sweep incident to his arrest as there was a threat to officer safety. The Trial Court granted Pippin's motion to suppress ruling he had a

constitutional privacy interest in his tent. The Trial Court found that Pippin's expectations of privacy outweighed the officers' safety concerns and the search violated the constitution and ordered to evidence suppressed. The Trial Court ultimately dismissed the case.

The State appealed. The Appeals Court held in a published portion of the opinion that Pippin's tent and its contents were entitled to constitutional protection under the State's constitution. In the published portion of the opinion, the Court noted that when presented with arguments under the state and federal constitutions, the Court starts with the state constitution. The Court cited a decision of the State Supreme Court. Accordingly, the Court analyzed Pippin's privacy interest under the state

constitution. The Court noted that Article I, section 7 focuses on whether the private affairs of an individual have been disturbed. The Court held that Pippin's tent, although on public property and not permanent, allowed him to sleep under a roof and gave him a privacy interest protected by the state Constitution. In the unpublished portion of the opinion, the Court held that the warrantless search was not justified a protective sweep, but that the Trial Court used an incorrect legal standard in deciding the search was not justified by concern for officer safety. The Court remanded to the Trial Court whether officer safety concerns justified a warrantless search.

VIII. MISCELLANEOUS

Federal Court Cases

U.S. SUPREME COURT

Hiibel v. Sixth Judicial District of Nevada, 542 U.S. 177 (2004)

Larry Hiibel was arrested and convicted under Nevada's stop and identify statute for refusing to identify himself during an investigatory stop for a reported assault. Hiibel appealed the conviction, claiming that his arrest and conviction for refusing to identify himself violated his Fourth and Fifth Amendment rights. The appellate Court and the Nevada Supreme Court affirmed his conviction. The Supreme Court granted Hiibel's petition for certiorari.

The Law Center, the National Coalition for the Homeless, and other homelessness advocacy groups filed an amicus brief supporting Hiibel in the Supreme Court. The advocacy groups contended that arresting people for failing to identify themselves violated their Fourth Amendment rights to be free from unreasonable searches and seizures, particularly in light of the difficulty unhoused persons have maintaining and obtaining identification. The advocacy groups noted that police were more likely to stop unhoused people and ask for identification, and unhoused people were more likely not to have identification. The advocacy groups pointed to restrictive state documentation requirements as one reason many unhoused persons did not have identification.

The Supreme Court ruled that Hiibel's arrest for refusing to identify himself did not violate either his Fourth or Fifth Amendment rights. However, the Court's holding merely applied to refusing to identify oneself in a situation where a police officer has reasonable suspicion to investigate, but did not reach the question whether a person could be arrested in the same circumstances for failure to produce an identification card.

SIXTH CIRCUIT

Greater Cincinnati Coalition for the Homeless, et. al. v. City of Cincinnati, 2010 WL 3448085 (S.D. Ohio August 27, 2010)

The Greater Cincinnati Coalition for the Homeless, The Mary Magdalen House, The Drop Inn Center, The Joseph House, Inc., Cincinnati Interfaith Workers' Center, and St. Francis-St. Joseph Catholic Worker House filed a § 1983 claim against the City of Cincinnati for violating their constitutionally protected rights by the adoption of City Resolution No. 41-2008. This resolution, passed in June 2008, stated that "social service agencies and programming shall not be concentrated in a single geographic area and shall not locate in an area that is deemed impacted; and further directed the City Manager to use his authority to the extent permitted by law, to carry out any actions necessary to adhere to such policy."

The Plaintiffs alleged that the resolution violated their First Amendment rights. The Plaintiffs also alleged that the resolution was an attempt to regulate land use without using the required process, which was a violation of their substantive due process rights. The Plaintiffs, which were all located in the neighborhood of Cincinnati called Over-the-Rhine, claimed that Resolution 41-2008 prohibited them from opening or expanding services and discouraged the delivery of social services in the community. The Plaintiffs also alleged that the proposed changes were being implemented in such a way that contravened the City Charter, which required zoning code changes to be reviewed by the planning commission.

The Defendants filed a motion to dismiss alleging that the Plaintiffs' claims were not yet ripe since no action had been taken that adversely affected Plaintiffs and that the Complaint otherwise failed to state a claim upon which relief can be granted. The Plaintiffs responded by filing a motion for leave to file a supplemental Complaint,

which alleged that Resolution 41-2008 had impacted a non-profit housing development corporation called Over-the-Rhine Community Housing ("OTRCH"). The Plaintiffs alleged that OTRCH did not receive needed certification of a \$145 million dollar project because the City Planning and Building Dept. interpreted Resolution 41-2008 to apply to the OTRCH project.

The Defendants renewed their motion to dismiss. After the filing of the supplemental Complaint, the City approved and funded a 25- unit permanent housing project in Over-the-Rhine for long-term unhoused individuals. The Magistrate Judge found the Plaintiffs' claims to be hypothetical and speculative, and therefore unripe based on the following reasons: (1) No social service agency had yet been deprived of a constitutionally protected right; (2) The Resolution was not an Ordinance and did not have binding legal effect. Rather it merely instructed the city manager to act in the future "as permitted by law."

SEVENTH CIRCUIT

Murphy v. Raoul, 380 F.Supp.3d 731 (N.D. Ill. March 31, 2019)

Indigent sex offenders without an adequate place to live were ineligible for supervised release and therefore, endured longer sentences than what affluent inmates would have. There were no halfway houses or transitional housing facilities in Illinois that would take sex offenders, and Illinois Department of Corrections did not allow shelters to be an offender's host site for supervised release. Therefore, sex offenders without a proper home were forced to remain incarcerated beyond their scheduled sentence.

The Northern District of Illinois concluded that the Illinois statutory scheme resulting in this scenario violated the Equal Protection Clause by depriving offenders of their liberty as a result of their inability to pay and lack of appropriate housing. It further found that application of host site requirements to offenders violated the Eighth Amendment.

See v. City of Fort Wayne, No. 1:17-CV-386-PRC (N.D. Ind. June 29, 2018)

On June 27, 2016, Keith See was in Freimann Square in Fort Wayne, Indiana and knelt at the fountain in the square to splash water on his face and chest. An officer who observed Mr. See doing this initiated an encounter with him and told him that he believed Mr. See had broken the law because bathing in the fountain was prohibited by City Ordinance. After patting down Mr. See with Mr. See's consent, the officer issued Complaint and Summons to Mr. See for "washing face and hands" in the fountain, citing a violation of Local Ordinance § 97.40. That Ordinance provided, "No person shall bathe, wade,

or swim in any pond, fountain, stream or river within any park with the exception of designated, interactive water features (i.e. spray parks)."

Mr. See brought an action alleging violations of the Fourth and Fourteenth Amendments as well as false arrest and false imprisonment in violation of Indiana state law. After a statutory interpretation analysis, the Court determined that the word "bathe" in the local Ordinance was not intended to encompass the act of making contact with the water from a location outside of the water, and determined that Mr. See did not bathe in the fountain under the Ordinance.

Turning to the Fourth Amendment claims, the Court considered whether the officer's investigatory stop of Mr. See was based on reasonable suspicion and determined that it was not. However, the officer was entitled to qualified immunity because there was no showing of actual malice. The Court dismissed Mr. See's Fourteenth Amendment claims as well. The Court remanded to state Court the allegations of state tort law violation.

Burley v. Miller, No. 1:17-CV-966 (W.D. Mich. 2018)

On November 11, 2013, Edward Burley, a prisoner in Michigan, was on his way for a program class. Because he was early, Burley alleged, the prison correction officers ordered him to leave the building and stand in the freezing rain despite being informed that Burley had asthma. Burley alleged that he was forbidden from returning to his housing unit. Burley further alleged that after he was finally allowed to enter, he was not allowed to change his clothes, and therefore had to sit in wet clothes for two hours.

Burley filed suit in the United States District Court, Eastern District of Michigan, Southern Division (the "District Court") under 42 U.S.C Section 1983, claiming that the correction officers violated his First and Eighth Amendment rights. The case was referred to a magistrate judge who ruled that the facts of the case did not support the First Amendment claims and that the Eighth Amendment rights weren't clearly established at the time of the events and therefore, the Defendants were entitled to dismissal on the basis of qualified immunity. The Plaintiff objected to the report and the case went to the District Judge for review.

At District Court, the Plaintiff objected to the qualified immunity ruling, asserting that the magistrate judge misapplied the reasonable person component. That is, qualified immunity is established when government officials who are performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known". *Harlow v. Fitzgerald*, 457 U.S. 800, 102 (1982). Based on the record of facts, the

Defendants were told on a previous occasion that Burley had asthma when they shook him down and found two inhalers on his person.

To assess qualified immunity, the District Court looked at two factors: (1) whether the facts, viewed in the light most favorable to the Plaintiff show the officers' conduct violated a constitutional right and (2) whether that right was clearly established. The District Court ruled that the Defendants were not entitled to qualified immunity because they knew that Burley had medical conditions and the two hours that he was forced to stay in his wet clothes aggravated those conditions. It is clear, the District Court indicated, that Burley had a right to be free from exposure to severe weather, considering not just the 12 minutes he stood in the freezing rain, but the two hours he stayed in his wet clothes, which aggravated his known medical conditions.

Therefore, the District Court sustained the Plaintiff's objection regarding the Eighth Amendment claim and overruled the remaining claims.

NINTH CIRCUIT

Brown v. County of Del Norte, No. 18-16689 (9th Cir. 2020)

Alice Brown ("Plaintiff") filed suit against a number of individually named National Park rangers, the County of Del Norte (California), and a number of individually named Del Norte County Sheriffs and Deputies (collectively, "Defendants"), arguing violation of her constitutional rights under the Fourth, Eighth and Fourteenth Amendments, as well as claims of excessive use of force, false arrest and a Monell claim, in each case, concerning her arrest and search of her vehicle on a National Park property.

The incidents occurred when certain of the National Park rangers found Plaintiff sleeping overnight in her van in a parking lot where overnight camping or parking was prohibited. When asked to identify herself and present her driver's license, Plaintiff declined to cooperate. The officer also asked to see inside her van because the windows were all blocked; again, Plaintiff resisted. Plaintiff was subsequently arrested for resisting and obstructing law enforcement. During the arrest, the officer grabbed Plaintiff's wrist and pushed her on the ground, causing injuries to Plaintiff. The District Court granted summary judgment in favor of Defendants on all claims.

Responding to the Fourth Amendment claim against unreasonable search of Plaintiff's van without probable cause, the Court noted that when someone is placed under arrest and taken into custody, law enforcement officers may lawfully search their person and the area within their immediate control (i.e., such area from which an arrested person may get possession of a weapon).

Because Plaintiff was arrested near her van for resisting an officer in discharging his duties, the applicable ranger was within constitutional limits in performing a sweep search of Plaintiff's van to make sure there was no one else or any weapons.

The Court further found that a subsequent inventory search was also justified, given that the officers had reasonably impounded Plaintiff's vehicle. In California, police officers were permitted to impound a vehicle when the person driving or controlling the vehicle is arrested and in custody. Such a seizure was considered reasonable if it served community caretaking functions, such as preventing a hazard to other drivers or a target for vandalism or theft.

Plaintiff alleged that the injury and discomfort the police officer inflicted on her during the arrest amounted to cruel and unusual punishment. The Eighth Amendment prohibition against cruel and unusual punishment is not applicable until after a conviction is entered and sentence is imposed. Since all allegations of cruel and unusual punishment concerned actions arising prior to any conviction or sentencing, Plaintiff's Eighth Amendment claim failed.

The Court also rejected the Fourteenth Amendment claim that the police officers deprived her equal protection of law because of her race and unhoused status. First, the Plaintiff's claim was against the park ranger, a federal employee, while the Fourteenth Amendment's commands are directed at states, not the federal government.

Second, because the facts underlying her Fourteenth Amendment were afforded explicit protection by the other more particular constitutional Amendments (e.g., the Fourth Amendment), the standards governing those Amendments, as opposed to those pertaining to substantive due process, guided the Court's analysis.

For the false arrest claim to prevail, Plaintiff must prove the conviction or sentence stemming from her allegedly false arrest has been reversed, expunged, or otherwise called into question. Because the Plaintiff's conviction for resisting, delaying or obstructing a police officer was upheld, the false arrest claim must fail.

For her excessive use of force claim, Plaintiff contended that a ranger caused her physical injury when arresting Plaintiff, and the use of any force at all was completely unnecessary and unreasonable. An excessive force claim pertaining to an arrest, evaluated under the Fourth Amendment, cannot be maintained if an officer's use of force is objectively reasonable under the circumstances. Based on the video recording evidence from Defendant ranger's body camera, the Court concluded that any intrusion into Plaintiff's Fourth Amendment interests was minimal under the circumstances when she was rummaging through the front seat area of her van and

while blocking the officer's view of her hands and of the interior of her van.

The Court also noted that, when arresting Plaintiff, the officer used a simple technique that would avoid serious bodily injury, as opposed to resorting weapons of striking Plaintiff, although the simple technique caused Plaintiff to fall on the ground. Thus, given the objective reasonableness of the force used, the Court rejected this claim.

Last, as to the Monell claim, because the Defendant officers all acted reasonably and within the constitutional limits, the Court pointed that there was no logical ground to find that these Defendants were inadequately trained or supervised. The Plaintiff also failed to allege any evidence that may support the allegation that the county had a pattern, custom, or practice of failing to intervene and disregarding Plaintiff's constitutional rights.

Garber v. Heilman, 2009 WL 409957 (C.D. Cal. Feb. 18, 2009)

The Plaintiff Robert Garber, acting pro se, filed a § 1983 Complaint alleging that certain police officers engaged in "a quasi-official pattern and practice" involving "the deliberately indifferent training of [their] officers in the execution of arrests without probable cause, filing of false reports, the ratification of officer misconduct, deficient supervision, bias and discrimination against homeless and aliens" and that most recently, this conduct led to Plaintiff's arrest and citation on June 3, 2007 for living in a vehicle on the streets in violation of Los Angeles Municipal Code § 85.02.

The Plaintiff alleged that he had been arrested five times, prosecuted four times and acquitted or had the cases dismissed all four times. He alleged that he had received multiple citations by the LAPD and Parking Enforcement, which, Plaintiff alleged were part of the Defendants' efforts to harass Plaintiff and retaliate against him because of his unhoused status. The Plaintiff, again without lawyer, attempted to allege seven separate causes of action against all Defendants for violations of the First, Fourth, Fifth, and Fourteenth Amendments, and for retaliation, harassment, obstruction of justice, malicious prosecution, and personal injury in violation of state law. The Court dismissed these pleadings for failure to state a claim for which relief can be granted and dismissed the Complaint with prejudice.

Fitzgerald v. City of Los Angeles, No. CV-03-1876 NM (C.D. Cal. 2003), 485 F. Supp. 2d 1137 (C.D. Cal. 2007)

Plaintiffs brought suit to challenge a police practice of taking unhoused people from the Skid Row area of the city into custody and detaining them after performing warrantless searches without reasonable suspicion to believe such persons' parole or probation had been

violated. The Plaintiffs alleged that the Los Angeles Police Department (LAPD) had adopted a policy and practice of harassment, intimidation and threats against the residents of the Central City East area of Los Angeles, including unhoused individuals in that area and residents of Skid Row's Single Room Occupancy (SRO) housing units. The Plaintiffs claimed that the police's stated reason for such actions – that they were looking for parole violators and absconders – was a pretext.

The Court certified the Plaintiff class for settlement purposes and issued an injunction against such police practices, based on Plaintiffs' Fourth Amendment claims as well as "Plaintiffs' rights under California Civil Code § 52.1 to be free from interference and attempts to interfere with Plaintiffs' Fourth Amendment rights by threats, intimidation, or coercion."

In December 2003, the parties settled the case, agreeing to a stipulation to a permanent injunction limiting detentions, "Terry" stops and searches without the necessary reasonable suspicion, probable cause and/or search warrants. The injunction would remain in effect for thirty-six months, and could be extended upon a showing of good cause for an additional thirty-six months.

In November 2006, Plaintiffs learned of allegations that the police were violating the injunction. The Court granted the Plaintiffs' motion to extend the injunction. The parties settled the case in December 2008 and the Court approved the settlement agreement in February 2009. The settlement agreement set forth specific rules officers must follow with respect to searches incident to arrest, searches of parolees and probationers, handcuffing and frisks and prolonged detention for the purpose of running warrants. Warrant checks may only be conducted "if the time required to complete the warrant check does not exceed the time reasonably required to complete the officer's other investigative duties." In addition, the settlement agreement requires that the LAPD develop and conduct training sessions covering these issues. All officers assigned to patrol the Skid Row area must attend the training sessions.

Currier v. Potter, 379 F.3d 716 (9th Cir. 2004), cert. denied, 125 S. Ct. 2935 (2005)

Three unhoused individuals in Seattle brought suit against the Postal Service for denying them certain types of mail service, such as no-fee postal boxes available to other classes of individuals, and general delivery service at all postal branches. The Plaintiffs alleged violations of postal service regulations, the Postal Reorganization Act, the Administrative Procedures Act, and the Constitution. The Defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim.

The lower Court dismissed the Complaint in its entirety. It held that postal service regulations as well as the

Administrative Procedure Act did not create a cause of action for the Plaintiffs in this case. While the Plaintiffs did establish the Court's jurisdiction under a provision of the Postal Reorganization Act prohibiting discrimination among users of the mail, the Court dismissed that claim *sua sponte* on the basis that the postal service regulations passed muster under an ordinary rational basis review.

The Court also dismissed Plaintiffs' constitutional claims. As to the First Amendment, the Court agreed that the right to receive mail is fundamental, but refused to apply strict scrutiny because the Postal Service was not purporting to censor the content of any mail. Under a reasonableness review, the Court found the regulations content-neutral and that they reasonably advanced "Congressionally-mandated goals of delivering mail efficiently and economically."

Turning to the equal protection claim, the Court found that the Postal Service's distinctions among persons who could and could not receive no-fee post office boxes were reasonable. "The relevant postal regulations that govern the no-fee boxes make it clear that only residents who have a physical residence or a business location at a fixed delivery point are eligible for the [no-fee boxes]." Moreover, providing general delivery service at all post office branches would increase costs and complicate investigations of illegally shipped material.

On appeal, the Ninth Circuit affirmed the District Court's ruling.

ELEVENTH CIRCUIT

Hoover v. Judd, No. 8:18-CV-03029 (M.D. Fla. 2018)

According to the Complaint, Gary Hoover brought an action against Sheriff Gary Judd, in his official capacity as Sheriff of Polk County, Florida, for violating his rights under the Fourteenth Amendment to the U.S. Constitution and banning him from all public parks in the county without providing Hoover with due process.

The county's policy provided the sheriff, who could then delegate to his deputies, the authority to issue trespass warnings to ban individuals from parks during hours normally open to the public. There were no guidelines on the duration or the geographic scope for the trespass warnings and there was no procedure for challenging such warnings.

Mr. Hoover also asserted that there was no inherent authority granted to the sheriff to issue trespass warnings. According to the Complaint, under the county trespass law, the Sheriff may issue a trespass warning for publicly-owned property only if he has been delegated trespass authority by the owner of the property. Mr. Hoover alleged that the county and the Sheriff had interpreted the county Ordinance as a delegation of legal authority to authorize

the Sheriff to issue trespass warnings for county-owned parks. The Sheriff had allegedly extended this authority to issue trespass warnings to parks located in the county, but not owned by the county.

Mr. Hoover was banned from all parks in the county, both county-owned and otherwise, under threat of arrest and afforded no way to challenge the basis of the Sheriff's authority, the geographic scope of trespass warnings or the duration of the warning. Mr. Hoover asserted that all such actions were in violation of his procedural due process rights under the Fourteenth Amendment.

The parties agreed to dismiss the case and move to mediation on March 12, 2020.

Alvey v. Sheriff Gualtieri, No. 8:15-CV-1861-T-33AEP (M.D. Fla. 2016)

Amber Alvey was admitted to a shelter, Pinellas Safe Harbor. The sleeping arrangements at the shelter consisted of bunk beds and floor mats placed in raised plastic frames (referred to as "boats"). Ms. Alvey informed the staff of the shelter that she had a disability and could not get up and down from the floor mat without assistance and requested a bed. Instead, she was assigned a "boat." While trying to get up from the "boat" for a resident headcount, Ms. Alvey fell and was taken to the hospital. As a result, the shelter staff decided that the shelter could not meet her medical needs, checked her out of the shelter for the evening and banned her from the shelter.

Ms. Alvey filed suit against the shelter claiming that it violated her rights under Title II of the Americans with Disabilities Act (the "ADA"). She alleged that 1) under the ADA, she is a qualified individual with a disability, 2) she was denied the benefits of or excluded from the services of the shelter, and 3) the exclusion or denial was because of her disability.

The DOJ filed a Statement of Interest in the case. The DOJ notes that, under the ADA, a public entity must afford a qualified individual with a disability an equal opportunity to gain the same benefit as a person without a disability.

The shelter stated that its benefit is to provide residents with a "safe shelter," but the DOJ asserted that it did not provide a safe shelter for Ms. Alvey. Instead, by rejecting her request, it put her in an unsafe situation after it failed to make reasonable modifications. The shelter stated that it had a policy of not allowing residents who cannot care for themselves without assistance and that Ms. Alvey could not care for herself. However, the DOJ asserted that the standard was whether the qualified individual meets the public entity's eligibility requirements with a reasonable modification and that the shelter did not consider whether she would have met their

eligibility requirements if a reasonable modification was provided. The DOJ also highlighted that no special words are required to indicate the request for a reasonable modification under Title II of the ADA.

Sheriff Gualtieri filed a motion to dismiss the case for lack of standing because Ms. Alvey did not establish that she suffered an injury that was causally connected to Gualtieri's actions. The Court found that Ms. Alvey lacked standing because there was not evidence that Ms. Alvey would seek emergency shelter at the shelter in the future since she had never been unhoused and had only sought shelter at the shelter once. However, Ms. Alvey's suit against Defendant for its past ADA violations survived.