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Via email

Dear Parish Attorney Anderson O. Dotson III and Baton Rouge Metropolitan Councilmembers:

We write on behalf of the National Homelessness Law Center (“NHLC”), the Southern Poverty Law Center (“SPLC”) and SPLC Action, the Roderick & Solange MacArthur Justice Center (“MacArthur”), the American Civil Liberties Union of Louisiana (“ACLU”), and Youth Oasis to urge you to withdraw or vote down proposed ordinance 22-00761 criminalizing camping in the City-Parish.

Recently, Councilmembers introduced an amendment to Title 13, Section 107 of Baton Rouge’s Code of Ordinances that would prohibit camping in public areas, including all public streets, sidewalks, parks, areas under highway overpasses, boulevards, alleys, public ways, public squares, and all public grounds and buildings. The proposed amendment allows for a \$200 fine and up to 15 days of imprisonment for Baton Rouge residents in violation of the camping ban. As described in more detail below, the proposed ordinance likely violates the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, and if passed, risks being enjoined in federal court. Rather than criminalizing homelessness, we urge to invest in emergency and long-term housing solutions that will end homelessness in Baton Rouge.

## I. BACKGROUND ABOUT OUR ORGANIZATIONS

NHLC is a national legal advocacy organization dedicated solely to ending and preventing homelessness. NHLC has over 30 years of experience in policy advocacy, public education, and

impact litigation. Since 2006, NHLC has tracked laws criminalizing homelessness in 187 cities across the country, and documented the failures and costs of those policies in numerous national reports, including [\*Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities\*](#) (2019) and [\*Housing Not Handcuffs 2021: State Law Supplement\*](#) (2021). NHLC has also published best practices, model policies, and case studies from across the country on how to constructively address homeless encampments. See [\*Tent City, USA: The Growth of America's Homeless Encampments and How Communities are Responding\*](#) (2017).

NHLC also litigates in federal courts to challenge policies that punish unhoused people for living in public space when they lack adequate indoor options. One of NHLC's cases, [\*Martin v. City of Boise\*](#), resulted in an order from the U.S. Court of Appeals for the Ninth Circuit which held that the Eighth Amendment to the U.S. Constitution prohibits enforcement of laws criminalizing sleeping, sitting, and lying down outside against people with no access to indoor shelter. 920 F.3d 584, 616-17 (9th Cir. 2019).

The SPLC and SPLC Action are catalysts for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. The Economic Justice Project at the SPLC works creatively alongside, and under the leadership of, directly impacted community members to provide legal advocacy, support, and education to dismantle exploitative systems that deprive people of wealth on account of their race and economic status and to support equitable systems of self-determination and economic reinvestment, particularly in historically marginalized Black and Brown communities. Alongside the NHLC and the ACLU of Alabama, the SPLC recently obtained a preliminary injunction against the Montgomery County, Alabama Sheriff and Alabama Law Enforcement Agency prohibiting them from enforcing two state statutes that criminalize charitable solicitation (i.e., panhandling).

MacArthur uses the legal system to work with and for communities affected by institutional racism and oppression. Along with MacArthur's work to advocate for the rights of incarcerated individuals and to enforce police and prosecutorial accountability, MacArthur is also dedicated to and focused on ending the punishment of poverty by representing those directly harmed by discriminatory practices that keep people trapped in cycles of poverty and marginalization. MacArthur's Louisiana office has litigated numerous cases, including a challenge to the 19th Judicial District Court's bail practices<sup>1</sup>, and multiple cases pending in federal court to vindicate the rights of Baton Rouge residents who were arrested during the protests following the killing of Alton Sterling by BRPD officers.<sup>2</sup> A lawsuit MacArthur recently filed against the City of Lafayette challenging its unconstitutional panhandling ban<sup>3</sup> also resulted in the repeal of the challenged law by Lafayette City Council.

ACLU is a nationwide, non-profit, non-partisan organization with approximately 1.7 million members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. For more than 60 years, the ACLU Foundation of Louisiana ("ACLU

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<sup>1</sup> *Ryan v. Smith*, 20-CV-843, ECF No. 137 (M.D. La. Apr. 27, 2022) (approving consent judgment).

<sup>2</sup> See, e.g., *Tennart v. City of Baton Rouge*, 17-CV-179 (M.D. La.); *Smith v. City of Baton Rouge*, 17-CV-436 (M.D. La.). Both cases are set for trial in August 2022. The City-Parish has settled claims in three other cases arising from protester-arrest cases litigated by MacArthur.

<sup>3</sup> *Hengan v. Lafayette City-Parish Consolidated Government*, 22-CV-3946 (W.D. La).

of Louisiana”) has fought to defend all people, including those facing homelessness. The ACLU of Louisiana serves as counsel in numerous civil rights actions, including those brought on behalf of unhoused people unlawfully targeted by police. In particular, *Thomas v. Tewis et al.* is currently pending in the United States District Court for the Eastern District of Louisiana. 2:21-CV-00698-GGG-DMD.

## II. DISCUSSION

According to The Advocate, members of the Baton Rouge Metropolitan Council recently introduced a proposed amendment to the City’s Code of Ordinances that would prohibit camping in any publicly owned area.<sup>4</sup> Residents could be fined as much as \$200 and jailed for up to 15 days if they attempt to set up temporary shelter for more than 12 hours in a public space.

As recently as 2019, the City of Baton Rouge reported a 40% increase in people seeking services provided by the Capital Area Alliance for the Homeless compared to prior months.<sup>5</sup> Between April and August of 2019 alone, the Capital Area Alliance for the Homeless tracked 400 different people signing up for services in Baton Rouge each month. The United States Interagency Council on Homelessness reported in January 2020 that Louisiana had an estimated 3,173 people experiencing homelessness on any given day.<sup>6</sup> Because this number is based on the Point-in-Time count, it represents a significant undercount of the actual number of people experiencing homelessness in Louisiana.<sup>7</sup> The available information suggests that upwards of hundreds of people are experiencing unsheltered homelessness in Baton Rouge, and there have been periods recently during which available shelter facilities in Baton Rouge were completely full.<sup>8</sup> The proposed ordinance attempts to connect individuals experiencing unsheltered homelessness with shelter options before arrest. Specifically, it notes law enforcement should make a reasonable effort to:

- (1) advise the person of a lawful alternative place to camp;
- (2) advise the person, to the best of the police officer’s knowledge, of available shelter or housing; and
- (3) contact, if reasonable and appropriate, a city designee who has the authority to offer to transport the person or provide the person with services

However, this language falls far short of ensuring that unhoused residents will receive these

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<sup>4</sup> Terry L. Jones, “Some fear a proposed ban on homeless tent cities in Baton Rouge could raise other problems,” THE ADVOCATE, Jun. 13, 2022, available at [Some fear a proposed ban on homeless tent cities in Baton Rouge could raise other problems | News | theadvocate.com](#)

<sup>5</sup> Chris Nakamoto, “Baton Rouge tracking 40-percent increase in people seeking homeless services,” WBRZ 2, Oct. 1, 2019, available at [Baton Rouge tracking 40-percent increase in people seeking homeless services \(wbrz.com\)](#)

<sup>6</sup> United States Interagency Council on Homelessness, “Louisiana Homelessness Statistics,” available at [www.usich.gov/homelessness-statistics/la/](#)

<sup>7</sup> National Law Center on Homelessness & Poverty, “Don’t Count on it: How the HUD Point-in-Time Count Underestimates the Homelessness Crisis in America” (2017), available at <https://homelesslaw.org/wp-content/uploads/2018/10/HUD-PIT-report2017.pdf>

<sup>8</sup> WAFB Staff, “Baton Rouge shelters full, emergency info confusing,” WAFB, Feb. 16, 2021, available at [Baton Rouge shelters full, emergency info confusing \(wafb.com\)](#)

services because it does not *require* that alternative housing, shelter, or camping, are actually available for that individual before he or she is arrested or cited. Instead, any officer is only required to make “reasonable efforts” to inform the individual of these options “to the best of the officer’s knowledge” and leaves it to the discretion of the officer to cite or arrest an individual even if those alternatives are practically unavailable. Leaving to an officer to advise a person about alternatives that may not, in reality, be practically unavailable cannot stand in for a practicable, housing-first plan to provide long-term solutions to unhoused Baton Rouge residents.

Indeed, the proposed ordinance does nothing to address rising homelessness and the need for additional housing; rather, it exacerbates the problem by further criminalizing homelessness. Criminalizing people who sleep or shelter in public places threatens their health and their lives. Displacing encampment residents and tearing down their “makeshift housing”<sup>9</sup> threatens the life and health of encampment residents. People experiencing homelessness are especially vulnerable from the loss of even temporary shelter because they have heightened risks of serious illness, hospitalization, and early morbidity compared with the general population.<sup>10</sup>

“Makeshift housing,” like tents, offer protection, however rudimentary, from outdoor elements. The destruction of their tents and other temporary structures deprives homeless people of this protection, thus exposing already vulnerable individuals to increased risk of serious physical harm. See *Jeremiah v. Sutter Cty.*, Case No. 2:18–cv–00522, 2018 WL 1367541, at \*5 (E.D. Cal. Mar. 16, 2018) (“[T]he Court finds that Sutter County would knowingly place the homeless at increased risk of harm if it confiscates and seizes Plaintiffs’ shelters and possessions.”).

Additionally, the ordinance runs counter to guidance disseminated by federal agencies, including guidance released on June 7, 2021, by the CDC.<sup>11</sup> The CDC guidelines state in part, “[i]f individual housing options are not available, **allow people who are living unsheltered or in encampments to remain where they are.** Clearing encampments, even if just for certain hours, can cause people to disperse throughout the community and break connections with service providers. This increases the potential for infectious disease spread.”<sup>12</sup> As such, the CDC advises that communities should not clear any encampments unless they can provide individual housing units for those displaced. Specifically, the CDC states that “[e]ncampment disbursement should **only be conducted as part of a plan to rehouse people living in encampments,** developed in coordination with local homeless service providers and public health partners.”<sup>13</sup> Otherwise, the

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<sup>9</sup> When people lose their housing, “their decisions about where to stay represent pragmatic choices among the best available alternatives, based on individual circumstances at a particular moment in time. Encampments form in response to the absence of other, desirable options for shelter.” Rebecca Cohen, et al., HUD Office of Policy Development and Research, *Understanding Encampments of People Experiencing Homelessness and Community Responses* 4 (2019).

<sup>10</sup> Nat’l Health Care for the Homeless Council, “Homelessness & Health: What’s the Connection?” (2019), available at <https://nhchc.org/wp-content/uploads/2019/08/homelessness-and-health.pdf>.

<sup>11</sup> See Interim Guidance on People Experiencing Unsheltered Homelessness, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html> (last updated Feb. 10, 2022).

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.* (emphasis added).

CDC recommends that encampment residents be allowed to remain where they are and be provided with necessary sanitation facilities.

The U.S. Interagency Council on Homelessness (“USICH”) also released guidance on June 15, 2022 that includes principles for addressing unsheltered homelessness.<sup>14</sup> The guidance specifically notes that approaches that use law enforcement to criminalize homelessness “result in adverse health outcomes, exacerbate racial disparities, and create stress, loss of identification and belongings, and disconnection from much-needed services. While these efforts may have the short-term effect of clearing an encampment from public view, without connection to adequate shelter, housing, and supportive services, **they will not succeed.**”<sup>15</sup> Among other principles and suggestions, the guidance urges communities to engage encampment residents to develop solutions, conduct comprehensive and coordinated outreach, address basic needs of unhoused people and provide storage for personal belongings, ensure access to shelter, develop pathways to permanent housing and supports, and create a plan for what will happen to encampment sites after residents are evicted and displaced. Given the numbers of unhoused people in Baton Rouge, the Metropolitan Council has not yet efficiently engaged in these USICH suggestions.

### III. THE PROPOSED ORDINANCE VIOLATES THE U.S. CONSTITUTION

For the four reasons discussed below, the proposed ordinance likely violates the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution and a federal court would likely enjoin its enforcement. We therefore urge you to reject the ordinance and instead invest in solutions that will meaningfully end – rather than further criminalize – homelessness.

*First*, federal courts have found that anti-camping ordinances – like the amendment being considered here – violate the Eighth Amendment when there is inadequate shelter for unhoused individuals. In *Martin v. City of Boise*, for instance, the Ninth Circuit held that “the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.” 920 F.3d 584, 616 (9th Cir. 2019). “That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.” *Id.* at 617. Nor is it “enough under the Eighth Amendment to simply allow sleeping in public spaces; the Eighth Amendment also prohibits a City from punishing homeless people for taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.” *Blake v. City of Grants Pass*, No. 1:18-CV-01823, 2020 WL 4209227, at \*6 (D. Or. July 22, 2020).

The Eighth Amendment is a fact-intensive inquiry. In *McArdle v. City of Ocala*, a district court enjoined an anti-camping ordinance in the City of Ocala, Florida, after finding that it likely violated the Eighth Amendment. 519 F. Supp. 3d 1045, 1052 (M.D. Fla. 2021). The *McArdle* court found that—like *Martin*—the City of Ocala’s ordinance punished unhoused people for sitting, lying, or sleeping in public in violation of the Eighth Amendment because the City

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<sup>14</sup> USICH, “7 Principles for Addressing Encampments,” June 2022, available at [Principles for Addressing Encampments.pdf \(usich.gov\)](https://www.usich.gov/principles-for-addressing-encampments.pdf)

<sup>15</sup> *Id.* (emphasis added).

enforced the ordinance without first inquiring whether alternative shelter was meaningfully available at the time the Plaintiffs were arrested. *Id.*

As noted above, shelter beds in Baton Rouge have recently been full and are inadequate to meet the needs of unhoused Baton Rouge residents. To the extent that alternative shelter is inadequate and unavailable, it would violate the Eighth Amendment for Baton Rouge to criminalize camping or sleeping in public spaces. Additionally, as discussed above, the proposed ordinance's requirement that a police officer "make a reasonable effort" to advise a person of available shelter "to the best of the police officer's knowledge" falls far short of providing a person with actual shelter. "[T]he failure to inquire about shelter availability is significant to the issue of whether [a] City's enforcement of [an] ordinance violates the Eighth Amendment." *Id.* at 1052. Talismanic language cannot stand in for real beds.

*Second*, the proposed ordinance may violate the Fourth and Fourteenth Amendments to the extent it results in the unlawful seizure and destruction of an unhoused person's property. An unreasonable deprivation of an unhoused person's property is unconstitutional under the Fourth Amendment. *See Lavan v. City of Los Angeles*, 693 F.3d 1022, 1027–30 (9th Cir. 2012). And the Supreme Court has held that merely providing some advance notice, without any meaningful opportunity to dispute the seizure and destruction of a person's home, does not satisfy the requirements of due process under the Fourteenth Amendment. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (pre-deprivation hearing and notice is required except in the "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event") (quotation marks and citation omitted).

The proposed amendment makes it unlawful for any person to camp in a public area that is not designated as a camping area by the city-parish, and specifically makes it unlawful to store personal belongings or use a tent, shelter, or other structure for living accommodation. But the proposed amendment does not state what law enforcement should do with that property in the event that officers enforce the anti-camping ordinance against unhoused individuals. Other courts have found that it violates the Fourth Amendment to seize and/or destroy unhoused people's unabandoned property after balancing a municipality's interest in taking the property against an unhoused person's interests in their personal belongings. *See Lavan*, 693 F. 3d at 1030 (upholding a preliminary injunction against city for confiscating and destroying unhoused individuals' personal possessions). Importantly, in conducting that balancing test, courts have emphasized that "the property of homeless individuals is due no less protection under the Fourth Amendment than that of the rest of society." *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1573 (S.D. Fla. 1992) (holding that the city's seizure of an unhoused person's personal belongings in public areas violated the Fourth Amendment).

*Third*, the proposed ordinance may violate the Fourteenth Amendment's Equal Protection Clause. The proposed ordinance discriminates against persons experiencing homelessness, who are the only people who have no choice but to sleep or camp outside and have personal belongings with them in the public places where they live. *See McArdle*, 519 F. Supp. 3d at 1055 (denying City's motion for summary judgment and concluding that it would violate equal protection "if no inquiry of the availability of shelter space is made prior to an individual's arrest" for camping on public property).

*Fourth*, the proposed camping ordinance likely violates the Fourteenth Amendment’s Due Process Clause. Substantive due process protects a person from arbitrary, wrongful government action regardless of the fairness of the procedures used to implement them. Courts have suggested that it may violate substantive due process to outlaw sleeping in public where—as is likely here—there are insufficient alternatives. *See, e.g., McArdle v. City of Ocala*, 418 F. Supp. 3d 1004, 1008 (M.D. Fla. 2019) (denying City’s motion to dismiss plaintiffs’ substantive due process claim that the City was using the ordinance to arrest and incarcerate unhoused people for sleeping or resting while awake because they were homeless). Baton Rouge’s proposed ordinance likely violates substantive due process because, as has been recently reported, Baton Rouge’s shelter beds have been full.

#### IV. CONCLUSION

We all want to end homelessness in our communities. The most effective way to achieve that goal is not to criminalize homelessness but to provide access to adequate housing. Criminalizing unhoused people who sleep in tents, sleeping bags, or bedding on public property without providing additional housing units just displaces people experiencing homelessness, risks the destruction of property, and inevitably leads to subsequent encampments.<sup>16</sup> We urge you to follow CDC guidance, controlling federal precedent, and the U.S. Constitution to vote down and/or permanently withdraw consideration of the proposed amendment to Title 13, Section 107 of the Baton Rouge Code of Ordinances.

We are happy to discuss this matter with you further and we are eager to work with the City-Parish to establish policies and practices that meaningfully, substantively, humanely, and constitutionally address homelessness in your community.

Sincerely,

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<sup>16</sup> *See* Sara K. Rankin, “Punishing Homelessness,” 22 NEW CRIM. L. REV. 99, 114 (2019).

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