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VIA EMAIL

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RE: Complaint against the City and County of Honolulu, Hawai‘i, alleging violations of rights guaranteed by the United States Constitution

Dear Principal Deputy Assistant Attorney General Gupta, Section Chief Preston, and Ms. Brett:

The American Civil Liberties Union of Hawai‘i Foundation (“ACLU”) submits this Complaint on behalf of more than 1,900 unsheltered homeless individuals in the City and County of Honolulu, Hawai‘i who are subjected to ongoing policies and practices that unlawfully

criminalize the status of being homeless and deprive homeless individuals of their right to due process in violation of the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution and our obligations under international human rights treaties. The ACLU respectfully requests that the Special Litigation Section:

1. Commence an investigation into the City and County of Honolulu (“the City”), pursuant to 42 U.S.C. § 14141, based on the City’s engagement in “a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges or immunities secured or protected by the Constitution or laws of the United States”; and
2. File a Statement of Interest, pursuant to 28 U.S.C. § 517, in the pending case of *Martin v. City and County of Honolulu*, Civ. 15-00363 HG-KSC (challenging the City’s pattern and practice of seizing and immediately destroying property belonging to homeless individuals).

Part I of this Complaint provides data regarding Hawaii’s homelessness crisis.

Part II provides an overview of the City’s recent enactment of ordinances aimed at punishing homeless individuals for being poor.¹

Part III of this Complaint demonstrates that these ordinances, as applied by the City, have resulted in (a) the criminalization of homelessness itself² in violation of the Eighth Amendment, and (b) the seizure and destruction of property belonging to homeless individuals in violation of the Fourth and Fourteenth Amendments. This Section also demonstrates how the City’s actions are undermining the McKinney-Vento Homeless Assistance Act of 1987, 42 U.S.C. § 11301 *et. seq.* (1987), by forcing homeless families to move to far-distant school districts to evade City enforcement efforts, as well as efforts to uphold our human rights treaty obligations

Part IV of this Complaint details ongoing litigation in United States District Court for the District of Hawai‘i, *Martin et al. v. City and County of Honolulu*, Civ. 15-00363 HG-KSC,

¹ Appendix E1, Honolulu Mayor Kirk Caldwell, *Together we can resolve problem of homelessness in Honolulu*, HONOLULU STAR-ADVERTISER (June 1, 2014), available at http://www.staradvertiser.com/editorialspremium/20140601_Together_we_can_resolve_problem_of_homelessness_in_Honolulu.html?id=2613669311; see also Rui Kaneya, *UH Study: City’s Recent Moves Aren’t Curbing Homelessness*, HONOLULU CIVIL BEAT (Jun. 15, 2015), available at <http://www.civilbeat.com/2015/06/uh-study-citys-recent-moves-arent-curbing-homelessness/>.

² Statement of Interest of the United States, *Bell v. City of Boise, et al.*, Civil Action No. 1:09-cv-540-REB, Doc. 276 at 3 (Aug. 6, 2015), available at <http://www.justice.gov/opa/file/643766/download>.

brought by fifteen homeless persons (as a putative class action) against the City in an effort to vindicate their constitutional rights and to prevent further violations of those rights.

Part I: Introduction

In April 2015, there were approximately 4,903 homeless individuals in the City and County of Honolulu (comprised of the island of O‘ahu). Of these, approximately 1,939 were unsheltered.³ Both the overall number of homeless persons and the number of unsheltered homeless persons on O‘ahu has increased each year.⁴ Between 2014 and 2015, for example, the number of unsheltered homeless on O‘ahu rose from 1,633 to 1,939 – an 18% increase.⁵ Hawaii’s rate of homelessness in 2014 was over 2.5 times higher than the national rate;⁶ during the 2014 fiscal year, 14,282 households reported utilizing homeless services in Hawai‘i.⁷

Hawai‘i has the highest cost of living of any state, and Honolulu is second only to New York City for the highest cost of living among U.S. cities.⁸ In Hawai‘i, 83% of impoverished individuals must spend more than half of their income on housing,⁹ and average rents increased by 45% between 2005 and 2012.¹⁰ As a result, “[m]ore and more households struggle to afford

³ Tai Dunson-Strane and Sara Soakai, *The Effects of City Sweeps and Sit-Lie Policies on Honolulu’s Houseless*, Department of Urban and Regional Planning University of Hawai‘i at Manoa 10 (June 2015), available at http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report.small_.pdf; see also Dep’t. of Community Servs., City & Cnty. of Honolulu, *City and County Homeless Point-in-Time Count 2015* (April 2015), available at <http://humanservices.hawaii.gov/bessd/files/2012/12/PIT-Oahu-2015-PIT-Report-Rev-4.18.15.pdf>.

⁴ *The Effects of City Sweeps and Sit-Lie Policies on Honolulu’s Houseless*, *supra* note 3, at 10.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*; see also Justin Sullivan, *10 most expensive cities in America*, CBS NEWS, available at <http://www.cbsnews.com/pictures/10-most-expensive-cities-in-america/> (last visited Oct. 27, 2015).

⁹ See Wayne Wagner, *Homeless Property Rights: An Analysis of Homelessness, Honolulu’s “Sidewalk Law,” and Whether Real Property is a Condition Precedent to the Full Enjoyment of Rights Under the U.S. Constitution*, 35 U. HAW. L. REV. 197, 202-03 (2013).

¹⁰ Hawai‘i Appleseed Center for Law and Economic Justice, *Hawaii’s Affordable Housing Crisis* 3 (July 2014), available at

even a modest place to live in Hawai‘i” and “many families do not earn enough to afford market rents.”¹¹ As one local news source put it, “[i]t’s an overwhelming churn of a housing crisis that no one can seem to solve.”¹² The lack of affordable housing in Hawai‘i is a primary factor for the state’s disproportionately large homeless population.¹³

The lack of affordable housing is acute on O‘ahu, where the number of unsheltered homeless individuals far exceeds the number of available beds in emergency shelters. At best, on any given night there are only (on average) 170 vacant shelter beds to house the roughly 1,900 unsheltered homeless throughout the island.¹⁴ However, the aggregate figure of available shelter beds is misleading, because only a small handful of these beds are available for families. For instance, during the week of July 11, 2015, to July 17, 2015 (the most recent week of available reporting in which all shelter facilities submitted reports), at least 55 of the 170 beds were reserved for single men.¹⁵

Hawai‘i Governor David Ige remarked in August 2015 that “there is virtually zero shelter space” on O‘ahu with available beds for women and families.¹⁶ The two emergency shelters in urban Honolulu – the Next Step shelter and the Institute for Human Services (“IHS”) – are typically full for families, and the only shelter space available to families is at the Lighthouse Outreach Center in Waipahu (an institution that is 18 miles from downtown Honolulu and which

<http://www.hiappleseed.org/sites/default/files/Hi%20Appleseed%20Housing%20Crisis%20Report.pdf>.

¹¹ *Id.*

¹² Gina Mangieri, *Is public housing being maximized in Hawaii’s homeless crisis?*, KHON2 NEWS (July 22, 2015), available at <http://khon2.com/2015/07/22/is-public-housing-being-maximized-in-hawaiis-homeless-crisis/>.

¹³ See *Homeless Property Rights*, *supra* note 9, at 223.

¹⁴ American Civil Liberties Union of Hawai‘i, Request to Access Government Records to City and County of Honolulu and Response (Aug. 17, 2015), available at <https://acluhawaii.files.wordpress.com/2012/03/shelter-vacancy-reports.pdf> (response to open records request by City and County of Honolulu Office of Housing providing weekly shelter bed availability on O‘ahu; figures based on July 2015, most recent statistics available).

¹⁵ *Id.*

¹⁶ Appendix E2, Cathy Bussewitz, *Low-income families living in Honolulu homeless encampment*, HONOLULU STAR-ADVERTISER (Aug. 17, 2015), available at http://www.staradvertiser.com/news/breaking/20150817_Lowincome_families_living_in_Honolulu_homeless_encampment.html?id=322126071.

lacks bathing facilities of any kind). Families wishing to keep their children in their home school in downtown Honolulu, as contemplated by the McKinney-Vento Homeless Assistance Act of 1987,¹⁷ must leave the shelter by 4:30 a.m. to get their children to school on time.

Even when shelter beds are available, they are not necessarily adequate for any given homeless individual. Myriad barriers exist that prevent many homeless individuals from accessing emergency shelters, including but not limited to individuals' mental disabilities (including PTSD) that prevent them from living successfully in a group setting; complaints of parasites such as bed bugs and health hazards from other residents; complaints of thefts/destruction of property by staff and/or residents; shelter rules that prohibit individuals from bringing pets and/or personal property; and shelter rules that require individuals to leave the shelter during daylight hours. The City itself is responsible for some of these barriers: for example, the City had planned to deny shelter access to domestic violence survivors and persons with disabilities at the upcoming Sand Island homeless facility in violation of federal and state law.¹⁸ In response to concerns raised by the ACLU, this policy has now been removed from the request for proposals detailing the project requirements to potential bidders.¹⁹ Similarly, in response to an ACLU complaint earlier this year, the City also modified plans for its "Housing First" program with IHS, which originally sought to deny services on the basis of residency length.²⁰ Lack of financial resources also acts as a barrier to shelter; cash-only nightly shelter fees often prevent homeless persons from using shelter services even where they are available. Although some shelters routinely waive these nightly fees, the perception remains among many homeless individuals that they must pay for shelter beds. Language difficulties between staff and non-English speaking individuals present another barrier which complicates the search for

¹⁷ 42 U.S.C. § 11301 *et. seq.* (1987).

¹⁸ Chad Blair, *Sand Island Shelter Rules Eased*, HONOLULU CIVIL BEAT (Oct. 21, 2015), available at <http://www.civilbeat.com/2015/10/sand-island-shelter-rules-eased/>.

¹⁹ *Id.*; see also Appendix G, Letter from ACLU of Hawai'i Foundation, August 21, 2015 and Response from City and County of Honolulu, September 28, 2015.

²⁰ See Appendix F, Letter from ACLU of Hawai'i Foundation, February 2, 2015 and Response from City and County of Honolulu, April 7, 2015. The IHS shelter continues to discourage new Hawai'i residents from accessing its shelter by charging new residents quadruple the rent charged to those residents who have lived in Hawai'i for longer periods of time. See also Appendix E7, Dan Nakaso, *Arrivals from mainland add to demand for local services*, HONOLULU STAR-ADVERTISER (Oct. 18, 2015), available at http://www.staradvertiser.com/homeless/20151018_arrivals_from_mainland_add_to_demand_for_local_services.html?id=333819791.

shelter. The estimated 933 Micronesian homeless individuals on O‘ahu²¹ who speak a wide array of dialects are particularly impacted by lack of language resources in local shelters.

Part II: City’s Mayor “Declare[s] a War on Homelessness”

1. Local Ordinances Affecting Homeless Persons

In response to the increasing numbers and visibility of homeless individuals in Honolulu, the City has embarked on an aggressive campaign to expel homeless persons from tourist and other high-traffic areas where their presence was deemed unsightly.²² In June 2014, Honolulu Mayor Kirk Caldwell authored an editorial, stating: “It’s time to declare a war on homelessness, which is evolving into a crisis in Honolulu. *We cannot let homelessness ruin our economy and take over our city.*”²³ In so doing, he has pushed for new laws, and enforced existing laws, in ways that have criminalized the status of homelessness.

The City has passed increasingly comprehensive and punitive ordinances affecting the local homeless population, including park closure rules, the Stored Property Ordinance, the Sidewalk Nuisance Ordinance, the Urination/Defecation ban, and a series of Sit-Lie bans.²⁴

Under the City’s park closure rules, homeless individuals cannot sleep in city parks at night because doing so is a crime.²⁵ Homeless individuals are also prohibited from having tents in city parks at *any* time.²⁶ While the City has a handful of parks available for camping with a \$10-a-day permit, these campsites (seventeen in total) are all in rural areas far outside urban Honolulu, and none is available seven days a week. Roughly half are available for up to five days, and the rest are available for only up to three days.²⁷

²¹ *Many Oahu homeless are from Micronesia, Marshall Islands*, WEST HAWAII TODAY (May 13, 2015), available at <http://www.westhawaii.com/news/state-wire/many-oahu-homeless-are-micronesia-marshall-islands>.

²² *Homeless Property Rights*, *supra* note 9, at 204.

²³ *Together we can resolve problem of homelessness in Honolulu*, *supra* note 1.

²⁴ *The Effects of City Sweeps and Sit-Lie Policies on Honolulu’s Homeless*, *supra* note 3, at 8.

²⁵ Revised Ordinances of Honolulu (“ROH”) § 10-1.1 *et seq.*

²⁶ ROH § 10-1.2(b)(9).

²⁷ *See City and Cnty. of Honolulu, Campgrounds*, available at <https://camping.honolulu.gov/parks> (last visited Oct. 27, 2015).

The City has also criminalized urinating or defecating in public, despite the fact that the City often closes and locks restrooms in parks (and/or closes the parks completely to the public) during nighttime hours, requiring homeless persons to break the law to attend to the basic life function of excretion.²⁸

“[U]tiliz[ing]” shopping carts within public parks is likewise unlawful.²⁹

Predictably, homeless individuals migrated to the only remaining areas where they would not receive criminal citations for necessary life activities: sidewalks and river banks. The first “sit-lie ban” was enacted in September 2014 in response to this migration.³⁰ The ordinance bans sitting or lying on a public sidewalk, “or on a tarp, towel, sheet, blanket, sleeping bag, bedding, planter, chair, bench, or any other object or material placed upon a public sidewalk.”³¹ Homeless persons who violate the sit-lie ban face criminal petty misdemeanor charges and penalties of up to 30 days in prison and a \$1,000 fine.³²

Although the ordinance was originally used to criminalize sitting or lying in only the Waikiki tourist district, the Honolulu City Council and Mayor Caldwell have incrementally expanded its coverage to include the vast majority of urban O‘ahu, including Honolulu (specifically, Ala Moana/Sheridan, Chinatown, McCully/Moiliili, and Kaka‘ako), Aina Haina-Niu Valley, Hawai‘i Kai, Kahala, Kailua, Kalihi, Kaneohe, Kapahulu, Wahiawa, Wai‘alae, and Waimanalo.³³ The sit-lie ban applies to the entirety of downtown Honolulu from 5:00 a.m. until 11:00 p.m. The ban also applies alongside city-owned “streams or riparian zones”; this includes the Kapalama Canal, an area to which homeless individuals had migrated after enactment of the

²⁸ See ROH § 40 - __ (Ordinances 14-27 and 14-28, available at <http://www4.honolulu.gov/docushare/dsweb/Get/Document-152426/ORD14-27.PDF> and <http://www4.honolulu.gov/docushare/dsweb/Get/Document-152427/ORD14-28.PDF>).

²⁹ ROH § 10-1.2(a)(15).

³⁰ Relating to Public Sidewalks, Bill 42, Honolulu City Council (2014), available at <http://www4.honolulu.gov/docushare/dsweb/Get/Document-150454/dspage03258996542835187127.pdf>.

³¹ ROH § 29-__ (Ordinance 14-35, available at <http://www4.honolulu.gov/docushare/dsweb/Get/Document-153805/DOC002%20%2845%29.PDF>).

³² *Id.*; see also *The Effects of City Sweeps and Sit-Lie Policies on Honolulu’s Houseless*, *supra* note 3, at 8.

³³ ROH § 29-__ (Ordinance 14-35).

earlier sit-lie bans.³⁴ The City then spent \$240,000.00 to build a fence along the canal to keep homeless people from returning.³⁵

In many of the areas covered by the sit-lie ban, however, the City reported having no awareness of individuals (homeless or otherwise) actually blocking sidewalk access,³⁶ that is, the City has no demonstrated need for this legislation other than animus towards the poor.

The City has twice extended the coverage of its sit-lie ban over Mayor Caldwell's veto, who cited constitutional concerns. In May 2015, the City Council overrode the Mayor's veto of a measure that expanded the sit-lie ban beyond several local business districts.³⁷ The measure also criminalized sitting or lying down in the areas "immediately abutting" all sidewalks in the sit-lie zones because "[p]edestrians are discouraged from using public sidewalks if persons are sitting or lying down on the unpaved public property immediately abutting the public sidewalk[.]"³⁸ Mayor Caldwell noted that "[i]f it looks like the government is trying to target the homeless just because they're homeless, that's where you open up this direct attack saying these bills are not about commerce...it's about going after homeless folks."³⁹ One city councilwoman similarly noted the ban's possible constitutional infirmities: "We just took a chance with the bill. That's why it may be declared illegal [...] Maybe it's not worth the legal trouble, but what else can we do?"⁴⁰

³⁴ ROH § 41- __ (Ordinance 15-39), *available at* <http://www4.honolulu.gov/docushare/dsweb/Get/Document-168220/ORD15-039.PDF>.

³⁵ See Allyson Blair and Ben Gutierrez, *Mayor Caldwell announces mile-long fence along Kapalama Canal to prevent homeless camps*, HAWAII NEWS NOW (Aug. 19, 2015), *available at* <http://www.hawaiinewsnow.com/story/29836475/mayor-caldwell-announces-mile-long-fence-along-kapalama-canal-to-prevent-homeless-camps>.

³⁶ See Appendix D1, Deposition of Ross Sasamura (hereinafter, "Sasamura Dep."), 174:12-175:20, *Martin v. City and County of Honolulu*, Civ. 15-00363 HG-KSC (D. Haw. 2015).

³⁷ Nick Grube, *Honolulu City Council Overrides Caldwell, Expands Sit-Lie*, HONOLULU CIVIL BEAT (June 3, 2015), *available at* <http://www.civilbeat.com/2015/06/honolulu-city-council-overrides-caldwell-expands-sit-lie/>.

³⁸ *Relating to Public Sidewalks, Bill 6*, Honolulu City Council (2015), *available at* [http://www4.honolulu.gov/docushare/dsweb/Get/Document-166012/DOC002%20\(19\).PDF](http://www4.honolulu.gov/docushare/dsweb/Get/Document-166012/DOC002%20(19).PDF).

³⁹ *Honolulu City Council Overrides Caldwell*, *supra* note 37.

⁴⁰ Rui Kaneya, *Can Honolulu's Sit-Lie Ban Pass Constitutional Muster?*, HONOLULU CIVIL BEAT (May 20, 2015), *available at* <http://www.civilbeat.com/2015/05/can-honolulus-sit-lie-ban-pass-constitutional-muster/>.

The City Council again overrode Mayor Caldwell’s veto as recently as September 3, 2015, and expanded coverage of the sit-lie ban to two Chinatown pedestrian malls, 24 hours a day, seven days a week.⁴¹ This measure also expanded the hours that the sit-lie ban would be enforced in one downtown pedestrian mall to 5:00 A.M. to 10:00 P.M. daily and extended the hours of another downtown pedestrian mall to 24 hours, seven days a week.⁴² Mayor Caldwell again noted that the expansion “unlawfully expands” the sit-lie ban and that “the legal deficiencies of [the expansion] make it more likely that the City will be subject to unnecessary legal challenges and to the payment by the City’s taxpayers of costly attorneys’ fees incurred by plaintiffs.”⁴³ On October 20, 2015, the Honolulu City Council issued a resolution to continue expanding the sit-lie ban.⁴⁴

Not only are homeless individuals precluded from sitting and lying throughout the majority of urban O‘ahu; their property is also subject to summary removal and disposal if placed on public sidewalks or parks. Passed by the Honolulu City Council in December 2011, the Stored Property Ordinance (“SPO”) allows city officials to seize and impound any property “stored” on public land after giving at least twenty-four hours’ notice to the property’s owner.⁴⁵ Notice is not required, however, when an individual’s property “remains in a park after park closure hours.”⁴⁶ As such, City officials can – and do – rouse homeless individuals in parks in the middle of the night, order those individuals to move away from their belongings, and then either impound or destroy those items.⁴⁷

⁴¹ Appendix E3, *Council trumps Mayor’s veto of expanded ‘sit-lie’ legislation*, HONOLULU STAR-ADVERTISER (Sept. 3, 2015), available at http://www.staradvertiser.com/newspremium/20150903_council_trumps_mayors_veto_of_expanded_sit-lie_legislation.html?id=324044881.

⁴² *Id.*

⁴³ Mayor Kirk Caldwell, Letter to Ernest Y. Martin, Chair and Presiding Officer and Members, Honolulu City Council (Aug. 19, 2015), available at http://www.honolulu.gov/rep/site/csd/Bill_44_Letter_8-19-15.pdf.

⁴⁴ Resolution No. 15-285, *Urging the City administration to increase its efforts to remove sidewalk nuisances from city sidewalks* (reported out for adoption on Oct. 20, 2015), available at <http://www4.honolulu.gov/docushare/dsweb/Get/Document-169250/dspage05773393471213320018.pdf>.

⁴⁵ ROH § 29-19.1 *et seq.*

⁴⁶ ROH § 29-1.1 (defining “stored personal property”); ROH § 29-19.3(a) (“All stored personal property may be impounded by the city”).

⁴⁷ Appendix C6, Declaration of K. Raina Whiting (hereinafter, “Whiting Decl.”) ¶¶ 4-11.

The City is required to impound all property (other than perishable goods) and store it for at least 30 days before discarding it.⁴⁸ Yet the SPO contains an additional clause that is particularly devastating to homeless individuals: “moving the personal property to another location on public property shall not be considered to be removing the personal property from public property[.]”⁴⁹ In other words, an individual who receives an SPO notice must find some private location to store his or her belongings; merely moving the belongings to another sidewalk or park will result in the property’s impoundment.

In April 2013, the City enacted the Sidewalk Nuisance Ordinance (“SNO”),⁵⁰ which allows the City to seize property at any time without any notice whatsoever if it is on or hanging over any sidewalk.⁵¹ The SNO, like the SPO, requires the City to impound and hold the property for a minimum of 30 days before destroying it.⁵²

The City’s process for retrieving impounded property represents an insurmountable barrier for nearly all homeless individuals. Under the SPO, the individual must pay “moving, storage, and other related fees and costs” of an indeterminable amount.⁵³ Under the SNO, the individual must pay a “removal, storage, and handling fee” of \$200.00.⁵⁴ In order to retrieve impounded property, the owner must first pay the applicable fee at City Hall in downtown Honolulu.⁵⁵ An individual wishing to obtain a fee waiver must instead travel to a city facility in Kapolei, 23 miles away from City Hall, and complete a detailed six-page application (available only in English) and wait an undetermined period of time for a ruling on the fee waiver.⁵⁶ The

⁴⁸ ROH § 19-19.5.

⁴⁹ ROH § 29-19.3(b).

⁵⁰ ROH § 29-16.1 *et seq.*

⁵¹ ROH §§ 29-16.2, 16.3(a).

⁵² ROH § 29-16.3(b).

⁵³ ROH § 29-19.5(a).

⁵⁴ ROH § 29-16.3(d).

⁵⁵ *Id.*; see also Appendix D2, Deposition of Kenneth Shimizu (hereinafter, “Shimizu Dep.”) 116:5-12, *Martin v. City and County of Honolulu*, Civ. 15-00363 HG-KSC (D. Haw. 2015).

⁵⁶ See Application to Waive Sidewalk Nuisance Fee, City and Cnty. of Honolulu, Dep’t of Facility Maintenance (Rev. April 2014), available at http://www.honolulu.gov/rep/site/dfm/spo_docs/reevisedapplicaiontowaivesidewalknuisancefee4.9.14.pdf.

applicant must also provide a mailing address to which the decision on the fee waiver may be sent.⁵⁷

After paying the fee or obtaining a fee waiver, the owner must then retrieve the property from another city facility in Halawa Valley, eight miles from downtown Honolulu (a one-hour commute by public transportation). Owners must take all of their property at once, yet are prohibited from taking large objects with them on city buses.⁵⁸ As such, if a homeless individual cannot find a friend or family member with a car willing to help them retrieve the property, they likely cannot retrieve their property at all. For many homeless individuals, then, impound is the functional equivalent of permanent destruction.⁵⁹

2. State Laws Affecting the Homeless

Several State of Hawai‘i laws add to the net of illegality facing the homeless. For example, Hawai‘i Revised Statutes (“HRS”) § 711-1105 provides for criminal penalties if an individual “obstructs” a sidewalk (anywhere in the State of Hawai‘i) by “[o]bstructing any highway or public passage” or by “provid[ing] less than thirty-six inches of space for passage on any paved public sidewalk.” Although homeless individuals face criminal punishment under both state and local law for sleeping on public sidewalks, they also violate state law if they sleep in their own cars (assuming they could afford a car in the first place).⁶⁰ Camping in state parks without a permit is likewise illegal.⁶¹ There are only four state parks on the island of O‘ahu that allow camping (with a permit, for a fee of \$12 per campsite per night). Only one of these four campgrounds – the Sand Island Recreation Area – is close to urban Honolulu; however, it only

⁵⁷ *Id.*

⁵⁸ *Rules, Regulations, and Rider Tips: Baggage Rules*, The Bus, City and Cnty. of Honolulu, available at <http://www.thebus.org/howtoride/RulesReg.asp> (last visited Oct. 27, 2015).

⁵⁹ See generally Rui Kaneya, *Here’s What Homeless People Have to Do to Get Their Property Back*, HONOLULU CIVIL BEAT (Oct. 5, 2015), available at <http://www.civilbeat.com/2015/10/heres-what-homeless-people-have-to-do-to-get-their-property-back/>.

⁶⁰ Hawai‘i Revised Statutes (“HRS”) § 291C-112.

⁶¹ See HRS § 184-5; Hawai‘i Administrative Rules (“HAR”) § 13-146-51.

allows camping on the weekend.⁶² None of the other three campgrounds is open seven days a week.⁶³

3. Enforcement of Local Ordinances and State Laws Against the Homeless

To enforce this complex array of local ordinances, city officials within the City's Department of Facility Maintenance ("DFM") have conducted "sweeps" to "harass the homeless and expel them from tourist" and other areas of Honolulu where the homeless presence is considered unsightly.⁶⁴ During these "sweeps," city officials seize and impound or destroy homeless persons' property under authority of the SNO and SPO. First, DFM officials arrive to sweep sites with police officers from the Honolulu Police Department ("HPD").⁶⁵ Next, DFM officials rope off the sweep site with red barrier tape and order individuals inside the site to "remove their life's necessities and leave the taped-off area."⁶⁶ Then, DFM officials proceed tent by tent to enforce the SNO or SPO, seizing the property that homeless residents were unable to carry away and either impounding or discarding it.⁶⁷ During sweeps, HPD officials ensure that "peace and order" are maintained;⁶⁸ HPD officials are also responsible for detaining individuals who attempt to cross the red barrier tape without authorization.⁶⁹ The ACLU has received complaints that homeless persons are only given 15 minutes (if any) to collect what belongings they can carry and that homeless individuals are often threatened with arrest if they attempt to cross the red barrier tape to reach their belongings.⁷⁰

⁶² See State of Hawai'i Dep't of Land and Natural Resources, Sand Island State Recreation Center, available at <https://camping.ehawaii.gov/camping/all/details,1682.html> (last visited Oct. 27, 2015).

⁶³ *Id.*

⁶⁴ *Homeless Property Rights*, *supra* note 9, at 204.

⁶⁵ Appendix D1, Sasamura Dep. 32:14-33:8; 160:14-17.

⁶⁶ Appendix D1, Sasamura Dep. 104:18-20.

⁶⁷ Personal property stored by the City is frequently destroyed in the process of packing it into DFM's green storage bins. For example, multiple declarants in the *Martin* litigation stated that city officials broke tents while shoving them into storage bins, rendering the tents unusable. See, e.g., Appendix C6, Whiting Decl. ¶ 8; Appendix C11, Declaration of Tabatha Martin (hereinafter, "Tabatha Martin Decl.") ¶ 10.

⁶⁸ Appendix D1, Sasamura Dep. 160:16-17.

⁶⁹ Appendix D1, Sasamura Dep. 25:9-23.

⁷⁰ See Appendix C6, Whiting Decl. ¶ 9.

In surveys conducted of Honolulu's homeless residents in the spring of 2015, homeless respondents reported that the City confiscated personal identification documents (57 percent), clothing (43 percent), tents (40 percent), household items (30 percent), food (24 percent), medicine (21 percent), and children's toys (13 percent).⁷¹ Seizure of such items creates particularly dangerous conditions for homeless persons.

Despite the harm that sweeps have on homeless individuals, the City has enforced the SNO and SPO with increasing frequency. In July 2015, one local news source reported that under Mayor Caldwell, the City "has been dispatching a crew from the Honolulu Department of Facility Maintenance five days a week to enforce the [SNO and SPO] [...] at an annual cost of about \$750,000[.]"⁷² Between May and June alone, the enforcement crew "swept" the homeless from more than 40 areas in Honolulu to carry out a total of 164 sweeps.⁷³ One city councilwoman acknowledged the limited utility of such "sweeps" in assisting the homeless, but lamented that sweeps to enforce the SNO and SPO are "the only tool the city has in responding to residents' concerns in areas outside the boundary of the city's 'sit-lie' ban."⁷⁴

Most recently, the City conducted an extensive series of sweeps to "clear out" the homeless persons living in Kaka'ako, a former industrial district just south of downtown Honolulu currently undergoing extensive development.⁷⁵ Beginning on September 8, 2015, city officials commenced a near-daily campaign of SNO and SPO enforcement in Kaka'ako, where one local news source in July 2015 counted 236 shelters and tents.⁷⁶

⁷¹ *The Effects of City Sweeps and Sit-Lie Policies on Honolulu's Homeless*, *supra* note 3, at 22.

⁷² Rui Kaneya, *Swept Away: City Keeps Rousting Homeless at a Cost of \$750,000 a Year*, HONOLULU CIVIL BEAT (July 22, 2015), available at <http://www.civilbeat.com/2015/07/swept-away-city-keeps-rousting-homeless-at-a-cost-of-750000-a-year/>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Rui Kaneya, *Honolulu Launches First Phase of Homeless Enforcement in Kakaako*, HONOLULU CIVIL BEAT (Sept. 8, 2015), available at <http://www.civilbeat.com/2015/09/honolulu-launches-first-phase-of-homeless-enforcement-in-kakaako/>.

⁷⁶ Brent Remadna, *Crime increases as homeless population grows in Kakaako*, KHON2 NEWS (July 22, 2015), available at <http://khon2.com/2015/07/22/crime-increases-as-homeless-population-grows-in-kakaako-2/>.

While city and state officials repeatedly stated that there was sufficient shelter space to house “all of those being displaced” in the Kaka‘ako sweeps,⁷⁷ their accounting of the number of homeless individuals who would be displaced was grossly inaccurate. On October 7, 2015 – the day before city officials began sweeping the densest section of the Kaka‘ako homeless encampment – the Governor of Hawaii’s coordinator on homelessness, Scott Morishige, estimated that only 100 individuals remained.⁷⁸ One local advocate, however, surveyed the same area on October 7, 2015, and counted 278 adults and 66 children for a total of 344 people, over 300 of whom were without shelter.⁷⁹ Despite the discrepancy, city officials pushed ahead with the sweeps.

During these sweeps, city officials failed to maintain compliance with the SNO and SPO ordinances themselves. Despite clear language of the SNO and SPO requiring items to be impounded,⁸⁰ city officials immediately destroyed items such as tents, tarps, bedding, clothing, toys, and at least one baby stroller.⁸¹

The Supervisor of the SPO/SNO Enforcement team, Kenneth Shimizu (“Mr. Shimizu”), testified that he only disposes of those items which he receives consent to dispose of or which are hazardous or contaminated. However, the ACLU has received eyewitness testimony that city officials enforcing the SNO and SPO often seize and discard unattended items where no apparent hazard or health risk exists.⁸² Further, Mr. Shimizu’s interpretation of what constitutes “consent”

⁷⁷ Rui Kaneya, *Many of Kakaako’s Homeless Are Not Shelter Bound*, HONOLULU CIVIL BEAT (Oct. 9, 2015), available at <http://www.civilbeat.com/2015/10/many-of-kakaakos-homeless-are-not-shelter-bound/>.

⁷⁸ *Id.*

⁷⁹ Appendix C8, Declaration of Beatriz Cantelmo (hereinafter, “Cantelmo Decl.”) ¶ 4.

⁸⁰ See ROH § 29-19.3 (relating to impoundment under SPO); ROH § 29-16.3(b)(1) (relating to impoundment under SNO).

⁸¹ See, e.g., Appendix C4, Declaration of Amber Coiley (hereinafter, “Coiley Decl.”) ¶¶ 2-4 (describing summary seizure and disposal of a tent, bedding, and clean clothes during October 2015 Kaka‘ako sweeps). Additionally, Plaintiffs’ Motion for Preliminary Injunction in *Martin v. City and County of Honolulu*, Civ. 15-00363 HG-KSC, includes declarations and large numbers of photographs and videos demonstrating that the City destroyed large quantities of property during its most recent sweeps, including but not limited to tents, bedding, clothing, tables, chairs, coolers, and children’s toys. See Appendix B, Motion for Preliminary Injunction and Memorandum in Support of Motion, *Martin et al. v. City and County of Honolulu*, Civ. 15-00363 HG-KSC, at 19-20, 22-23 (D. Haw. Sept 16, 2015). Those declarations and exhibits can be provided to the Department of Justice upon request.

⁸² See, e.g., Appendix C4, Coiley Decl. ¶¶ 2-4; Appendix C6, Whiting Decl. ¶¶ 11, 12, 16.

and what constitutes “hazardous” leads to consistent and pervasive due process violations, including the following:⁸³

- To obtain consent from individuals who cannot speak English, for example, the SNO and SPO enforcement team members “speak pidgin” and use “hand signals”⁸⁴ (despite Hawaii’s Language Access Law, HRS chapter 321C).
- When obtaining consent generally, city officials do not explain to homeless individuals the options they have for storage, impound, and reclamation.
- When conducting sweeps, City officials generally do not inform homeless individuals of the availability of a fee waiver of the storage costs,⁸⁵ such that many homeless individuals remain under the impression that they must pay \$200.00 to retrieve any property.
- When asked how they determine which items are hazardous or contaminated, City officials testified that they would throw away many kinds of property, including food,⁸⁶ things that were wet or soiled,⁸⁷ and things that had sharp corners.⁸⁸
- Mr. Shimizu further stated that the DFM has no written policy listing these criteria (or any others), but that the enforcement team uses the “smell” to assist them in determining what is and is not hazardous.⁸⁹

Despite the unlawful and ad hoc nature of the Kaka‘ako sweeps, Governor Ige commended the DFM and announced his “plan to replicate the Kakaako model” against the

⁸³ See Appendix D2, Shimizu Dep. 69:3-6.

⁸⁴ *Id.* at 145:25-147:4.

⁸⁵ See Appendix C6, Whiting Decl. ¶ 14.

⁸⁶ Appendix D2, Shimizu Dep. 67:13-68:5.

⁸⁷ Appendix D3, Deposition of Leslieann Ponte (hereinafter, “Ponte Dep.”), 53:7-12; *Martin v. City and County of Honolulu*, Civ. 15-00363 HG-KSC (D. Haw. 2015); Shimizu Dep. at 134:6-9.

⁸⁸ Appendix D2, Shimizu Dep. 94:2-4.

⁸⁹ *Id.* at 76:22.

homeless across the state.⁹⁰ On October 20, 2015, the Honolulu City Council expressed its approval of the Kaka‘ako sweeps and reported out for adoption a resolution to “step up enforcement” of the SNO and SPO and “suggest[] areas of expansion for the sit-lie boundaries.”⁹¹ In response, officials announced plans to conduct further SNO and SPO enforcement plans in Kaka‘ako Waterfront Park and Kewalo Basin (where many homeless individuals relocated following the Kakaako sweeps) “as early as November 12[, 2015].”⁹²

During and after the City’s sweeps of Kaka‘ako, both city and state governments pledged to construct more shelters for homeless persons in Hawai‘i.⁹³ The City continued work on the Sand Island shelter facility, which will consist of retrofitted shipping containers designed to provide temporary shelter to 87 people.⁹⁴ On October 16, 2015, Governor Ige signed an emergency proclamation to address homelessness in Hawai‘i generally.⁹⁵ This proclamation allows Governor Ige to tap into a \$1.3 million fund to provide homeless services and to help finance additional shelter space.⁹⁶ In comparison, the Los Angeles City Council recently declared a state of emergency on homelessness and dedicated over \$100 million to address the crisis.⁹⁷ Although the City and State’s efforts to create more shelter space are commendable, the

⁹⁰ Governor’s Office News Release, *Governor Ige signs emergency proclamation to address homelessness statewide* (Oct. 16, 2015), available at <http://governor.hawaii.gov/newsroom/governors-office-news-release-governor-ige-signs-emergency-proclamation-to-address-homelessness-statewide/>.

⁹¹ Resolution No. 15-285, *supra* note 44.

⁹² Lorin Eleni Gill, *State to start Kakaako homeless sweeps in November*, PACIFIC BUSINESS NEWS (Oct. 26, 2015), available at <http://www.bizjournals.com/pacific/news/2015/10/26/hawaii-state-city-providers-and-public-safety-to.html>.

⁹³ Appendix E4, Dan Nakaso, *Next step for isle’s homeless*, HONOLULU STAR-ADVERTISER (Oct. 17, 2015), available at http://www.staradvertiser.com/newspremium/20151017_next_step_for_isles_homeless.html?id=333527591&c=n.

⁹⁴ Ashley Moser, *First look at Sand Island containers for homeless*, KITV HONOLULU (Oct. 28, 2015), available at <http://www.kitv.com/story/30373558/first-look-at-sand-island-containers-for-homeless>.

⁹⁵ Greg Botelho, *Homeless emergency declared in Hawaii*, CNN NEWS (Oct. 17, 2015), available at <http://www.cnn.com/2015/10/17/us/hawaii-homeless-emergency/>.

⁹⁶ *Id.*

⁹⁷ *Id.*

fact remains: there are only, at best, 170 vacant available shelter beds to accommodate the roughly 1,900 unsheltered homeless persons on O‘ahu, and none of the government projects or funding have yet provided additional shelters.

Part III: The City’s Pattern or Practice of Violating the United States Constitution

The City has a pattern or practice of criminalizing homelessness in violation of the Eighth Amendment; seizing and destroying property in violation of the Fourth Amendment; and violating both procedural and substantive due process rights of homeless individuals in violation of the Fourteenth Amendment.

A. Violations of the Eighth Amendment

As set forth by the Department of Justice in its Statement of Interest in *Bell v. Boise*,⁹⁸ by the Ninth Circuit Court of Appeals in *Jones v. City of Los Angeles*,⁹⁹ and in *Pottinger v. City of Miami*,¹⁰⁰ laws that criminalize poverty itself are unconstitutional. In nearly identical ways, the City has passed a series of increasingly draconian measures that, when woven together, violate the Eighth Amendment to the United States Constitution by criminalizing the status of being homeless.

Just as in *Pottinger* and *Jones*, there are not nearly enough shelter beds for the entire homeless population of O‘ahu: there are nearly 1,900 unsheltered individuals on O‘ahu,¹⁰¹ and as of July 2015, there are not even enough beds to accommodate 10% of that population.¹⁰² Thus, the vast majority of homeless persons in Honolulu sleep on or alongside public streets or sidewalks because they have nowhere else to go. Should they attempt to sleep on private property, they risk criminal penalties for trespassing. Homeless individuals face arrest if they

⁹⁸ See Statement of Interest of the United States, *supra* note 2.

⁹⁹ 444 F.3d 1118 (9th Cir. 2006) *vacated pursuant to settlement agreement*, 505 F.3d 1006 (9th Cir. 2007).

¹⁰⁰ See, e.g., *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1578 (S.D. Fla. 1992) *remanded for limited purposes*, 40 F.3d 1155 (11th Cir. 1994).

¹⁰¹ *The Effects of City Sweeps and Sit-Lie Policies on Honolulu’s Homeless*, *supra* note 3, at 10.

¹⁰² ACLU of Hawai‘i, Open Records Request to City and County of Honolulu and Response, *supra* note 14.

sleep in city parks,¹⁰³ state parks,¹⁰⁴ or in their own car.¹⁰⁵ Homeless residents of O‘ahu face arrest, fines, and jail if they sit, lie down, or sleep on public sidewalks in huge sections of the island, including the entirety of downtown Honolulu.¹⁰⁶ They also face arrest if they sit, lie down, or sleep in areas “immediately abutting”¹⁰⁷ all sidewalks in the sit-lie zones.

The City has also criminalized the basic life function of excretion,¹⁰⁸ even though the City closes and locks most, if not all, public restrooms at night (including those restrooms near areas where homeless individuals have congregated, as in Kaka‘ako) – such that homeless individuals have nowhere that they may legally perform these basic life functions. The ACLU of Hawai‘i has also reviewed reports that children have received bladder and kidney infections from having to hold their urine overnight because their parents cannot risk receiving a ticket for \$100.00 for urinating in public.

In response to each new law criminalizing the status of homelessness in an area, homeless individuals and families move to new areas to avoid prosecution. As they move – for example, when homeless individuals moved to the Kapalama Canal to avoid prosecution for sleeping in City parks – the City takes steps to criminalize the new behavior (by prohibiting sitting or lying down alongside the Kapalama Canal, and by building a quarter-million-dollar fence along the canal).¹⁰⁹ In so doing, the City has engaged in a pattern or practice of violating the homeless persons’ Eighth Amendment rights by criminalizing their very existence.

¹⁰³ The possibility that some individuals could sleep in city parks during daytime hours is of little solace for homeless individuals, particularly for the many homeless persons who work full-time or for school-aged children who are required by law to attend school during the day.

¹⁰⁴ *See supra* note 61.

¹⁰⁵ *See supra* note 60.

¹⁰⁶ *See supra* note 33.

¹⁰⁷ There is no indication of what “immediately abutting” means, such that individuals have no guidance as to how to comply with this measure. The result is that the homeless are forced to avoid large and vaguely defined areas of O‘ahu to avoid criminal penalties.

¹⁰⁸ *See supra* note 28.

¹⁰⁹ *See* Allyson Blair and Ben Gutierrez, *Mayor Caldwell announces mile-long fence along Kapalama Canal to prevent homeless camps*, HAWAII NEWS NOW (Aug. 19, 2015), available at <http://www.hawaiinewsnow.com/story/29836475/mayor-caldwell-announces-mile-long-fence-along-kapalama-canal-to-prevent-homeless-camps>.

B. Violations of the Fourth Amendment

The City has also enforced its Stored Property Ordinance (“SPO”) and Sidewalk Nuisance Ordinance (“SNO”) to summarily seize and destroy unabandoned property of homeless individuals in violation of the Fourth Amendment to the United States Constitution.¹¹⁰

The Fourth Amendment to the United States Constitution provides for the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures [...]”). A “seizure” of property occurs when “there is some meaningful interference with an individual’s possessory interests in that property.”¹¹¹ Seizures of property are unlawful if they are “unreasonable.”¹¹² Reasonableness is assessed by balancing “the nature and quality of the intrusion on the individual’s [Fourth Amendment] interests against the importance of the governmental interests alleged to justify the intrusion.”¹¹³

a. Homeless Individuals Did Not “Abandon” Their Property

Homeless individuals who leave their property on a public sidewalk – whether to go to work or to go to the restroom – do not abandon their property. “The touchstone of abandonment is a question of intent,” and courts will “conduct a totality of the circumstances inquiry that focuses on whether, through words, acts, or other objective indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the [seizure].”¹¹⁴ Generally, a property owner must perform some affirmative act demonstrating his or her intent to justify a finding of abandonment.¹¹⁵ Specifically, property of homeless persons has not been

¹¹⁰ The City’s enforcement of the SNO and SPO also violates the Fourteenth Amendment to the United States Constitution, as discussed more fully *infra* at Part III(C).

¹¹¹ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

¹¹² *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1029 (9th Cir. 2012).

¹¹³ *Jacobsen*, 466 U.S. at 125; *see also Lavan*, 693 F.3d at 1029-30 (describing the requirement that courts “balance[] the invasion of [the parties’] possessory interests in their personal belongings against the [the government’s] reasons for taking the property”).

¹¹⁴ *United States. v. Lopez-Cruz*, 730 F.3d 803, 808 (9th Cir. 2013) (*citing United States v. Nordling*, 804 F.2d 1466, 1469 (9th Cir. 1986)).

¹¹⁵ *See, e.g., Nordling*, 804 F.2d at 1469 (abandonment occurred where defendant intentionally left suitcase on plane and twice denied having any luggage on the flight); *see also Lopez-Cruz*, 730 F.3d at 809 (abandonment did not occur where suspect allowed border patrol agent to look through cellphone but where phone was located in suspect’s car); *United States v. Decoud*, 456

“abandoned” where the owner has not affirmatively disclaimed ownership or where the surrounding circumstances fail to show intent to abandon:

Typical possessions of homeless individuals include bedrolls, blankets, clothing, toiletry items, food and identification, and are usually contained in a plastic bag, cardboard box, suitcase or some other type of container. In addition, homeless individuals often arrange their property in a manner that suggests ownership, for example, by placing their belongings against a tree or other object or by covering them with a pillow or blanket. *Such characteristics make the property of homeless persons reasonably distinguishable from truly abandoned property, such as paper refuse or other items scattered throughout areas where plaintiffs reside.*¹¹⁶

To justify an otherwise unlawful seizure, a belief that property has been “abandoned” must be reasonable and held in good faith.¹¹⁷

As a general matter, the City does not dispute that it confiscates items formerly in the possession of homeless persons, thus, seizing them. However, the City has summarily seized and/or destroyed unabandoned, non-trash property of homeless persons in the past, and it continues to do so in its most recent sweeps.¹¹⁸

Most homeless individuals affected by the City’s sweeps did not at any time voluntarily “abandon” their basic necessities. Many such individuals relied on these items for survival, storing them in “a plastic bag, cardboard box, suitcase or some other type of container.”¹¹⁹ Homeless residents of Honolulu, like the homeless plaintiffs in *Pottinger*, “often arrange their

F.3d 996, 1001 (9th Cir. 2006) (abandonment occurred where defendant disclaimed ownership of briefcase and denied knowing how to open lock on said briefcase).

¹¹⁶ *Pottinger*, 810 F. Supp. at 1571 (emphasis added).

¹¹⁷ *See Lavan v. City of Los Angeles*, 797 F. Supp.2d 1005, 1014-15 (C.D. Cal. 2011) (finding that city officials likely seized and destroyed property of the homeless that was not “abandoned” because officials had reason to know that at least some of the property was not, in fact, abandoned), *aff’d*, 693 F.3d 1022 (9th Cir. 2012); *Lopez-Cruz*, 730 F.3d at 808-09 (no abandonment where, among other factors, fact that agent sought suspect’s permission before searching phone suggested that agent did not believe suspect had abandoned phone).

¹¹⁸ *See supra* Part II.

¹¹⁹ *Pottinger*, 810 F. Supp. at 1571 (emphasis added).

property in a manner that suggests ownership”¹²⁰ by placing their belongings in make-shift shelters located within well-populated, active homeless encampments such as Kaka‘ako¹²¹ and the Kapalama Canal.¹²² Many of the homeless individuals affected did not perform any “affirmative act” demonstrating intent to abandon their property.¹²³ Rather than disclaim ownership, many homeless individuals pleaded with city officials to save their meager possessions from summary removal, storage, or destruction.¹²⁴ Given these circumstances, the City’s insistence that the seized and destroyed property of homeless individuals was truly “abandoned” or trash was neither reasonable nor held in good faith.¹²⁵

b. The City’s Practice of Seizing and Destroying Homeless Persons’ Property Is Unreasonable and Unconstitutional

The City argues that such seizure is reasonably necessary to protect the health and safety of residents and tourists,¹²⁶ yet the City could easily meet its stated health and safety goals without violating the constitutional rights of homeless residents.

Generally, a seizure is “unreasonable” where the individual’s possessory interests outweigh the governmental interests offered to justify the intrusion.¹²⁷ However, the government

¹²⁰ *Id.*

¹²¹ See Ramsay Wharton, *Kakaako encampment nearly doubles in size*, HAWAII NEWS NOW (May 5, 2015), available at <http://www.hawaiinewsnow.com/story/28985677/kakaako-homeless-encampment-nearly-doubles-in-size>.

¹²² See Ramsay Wharton, *Homeless encampment along Kapalama Canal raise environmental concerns*, HAWAII NEWS NOW (Apr. 14, 2015), available at <http://www.hawaiinewsnow.com/story/28798311/homeless-encampments-along-kapalama-canal-raise-environmental-concerns>.

¹²³ See *Lavan*, 797 F. Supp. 2d at 1014-15.

¹²⁴ See generally Appendix C, Declarations of homeless individuals and witnesses describing City’s sweeps, filed in *Martin et al. v. City and County of Honolulu*, Civ. 15-00363 HG-KSC (D. Haw. Sept. 16, 2015).

¹²⁵ See *Lavan*, 797 F. Supp. 2d at 1014-15; *Lopez-Cruz*, 730 F.3d at 808-09.

¹²⁶ See Appendix E5, *Advocates Decry Homeless Sweeps*, HONOLULU STAR-ADVERTISER (June 13, 2015), available at http://www.staradvertiser.com/news/20150613_Advocates_decry_homeless_sweeps.html?id=307250311.

¹²⁷ *Jacobsen*, 466 U.S. at 125.

bears a heavy burden when it seizes personal property; generally, such seizure is *per se* unreasonable.¹²⁸ Where the government has seized personal property of homeless individuals, courts conducting the Fourth Amendment reasonableness balancing test give special consideration to the fact that homeless persons may rely on confiscated property for their very survival. In *Lavan v. City of Los Angeles*, for example, the district court held unreasonable the City of Los Angeles' seizure of unabandoned property on Skid Row because of its unique importance to its homeless owners.¹²⁹ To justify seizing the personal property of the homeless, the City of Los Angeles repeatedly cited "the need to keep its streets clean in order to avert a severe impact to the public interest in health, safety, and economic vitality" of the area.¹³⁰ The court, however, was not persuaded that this interest outweighed the homeless' need to keep their property in order to survive on the street:

[City officials] may be slowed in their efforts to keep the City, and especially the downtown area, clean and safe. [An] injunction may disturb their new initiative to revitalize and uplift communities, to improve the streets and sidewalks, and to diminish the crime rate Plaintiffs, however, risk a greater harm if the injunction is not granted[.]¹³¹

The court considered, for instance, that government confiscation of homeless persons' basic necessities "threaten[ed] the already precarious existence of homeless individuals by posing health and safety hazards" to the homeless individuals affected.¹³² Although the court was "not blind to the concerns of the City [of Los Angeles]" and to its "inherent interest in keeping public areas clean and prosperous," the disproportionately negative impact of the seizure on a homeless person's ability to survive outweighed the government's interest in clutter-free sidewalks.¹³³ As such, the City of Los Angeles' seizure of unabandoned homeless property on Skid Row was held

¹²⁸ *United States v. Place*, 462 U.S. 696, 701 (1983) (remarking that "[i]n the ordinary case, the [United States Supreme Court] has viewed a seizure of personal property as *per se* unreasonable [...] unless it is accomplished pursuant to a general warrant issued upon probable cause and particularly describing the items to be seized." (emphasis in original)).

¹²⁹ *See Lavan*, 797 F. Supp. 2d at 1015.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* (citing *Pottinger*, 810 F. Supp. at 1573).

¹³³ *Id.*

to be an unreasonable seizure in violation of the Fourth Amendment.¹³⁴ In factually analogous scenarios involving government confiscation, storage, and destruction of homeless persons' property, similar Fourth Amendment concerns have been raised.¹³⁵

The interests of Honolulu's homeless residents in retaining their sole means of survival greatly outweigh the City's interests in keeping goods off of public property. As discussed above, homeless individuals in Honolulu have reported government seizure of personal identification documents, clothing, tents, household items, food, medicine, and children's toys.¹³⁶ "Sweeping" homeless individuals and seizing these possessions can result in life-or-death situations. For instance, one homeless client represented by the ACLU reported that his heart medication was seized and destroyed and described the difficulties in getting replacement medication.¹³⁷ Additionally, government seizure of plywood structures, tarps, and expensive camping tents has been particularly prevalent in Honolulu, where protection from the harsh sun and heat during the summer months is essential.¹³⁸

¹³⁴ *Id.*

¹³⁵ See, e.g., *Pottinger*, 810 F. Supp. at 1573 ("The court recognizes the City's interest in keeping its parks and public areas clear of unsightly and unsafe items. However, the City's interest in having clean parks is outweighed by the more immediate interest of the plaintiffs in not having their personal belongings destroyed. As this court previously found, the loss of such items such as clothes and medicine threatens the already precarious existence of homeless individuals by posing health and safety hazards."); *Kincaid v. City of Fresno*, No. 106CV-1445 OWW SMS at *35-36 (E.D. Cal. Dec. 8, 2006) ("The City's purported desire for clean and safe streets does not make its conduct lawful. Protection of the public does not require the wholesale seizure and immediate destruction of all Plaintiffs' possessions and in any event 'is outweighed by the more immediate interests of the plaintiffs in not having their personal belongings destroyed.'" (citing *Pottinger*, 810 F. Supp. at 1573)).

¹³⁶ *The Effects of City Sweeps and Sit-Lie Policies on Honolulu's Homeless*, *supra* note 3, at 22.

¹³⁷ See Appendix A, Complaint for Declaratory and Injunctive Relief and Damages, *Martin et al. v. City and County of Honolulu*, Civ. 15-00363 HG-KSC (D. Haw. Sept 16, 2015); see also Appendix C6, Whiting Decl. ¶ 6 (eyewitness testimony describing that city officials seized – without consent – an elderly homeless man's heart medication during a sweep in 2014).

¹³⁸ See Rui Kaneya, *Is the City Violating the Law in Destroying Homeless People's Property?*, HONOLULU CIVIL BEAT (Sept. 28, 2015), available at <http://www.civilbeat.com/2015/09/is-the-city-violating-the-law-in-destroying-homeless-peoples-property/>; Appendix E6, *Tents of homeless removed from Kapalama Canal bank*, HONOLULU STAR-ADVERTISER (June 10, 2015), available at http://www.staradvertiser.com/news/20150610_Tents_of_homeless_removed_from_Kapalama_Canal_bank.html?id=306749101.

While the City justifies its sweeps as necessary to keep public thoroughfares clear and to maintain public health and safety in Honolulu,¹³⁹ its practice of seizing and destroying property, including things like bedding, tents, identity documents, backpacks, and water, is clearly not *necessary* for maintaining safe sidewalks and parks; the City could meet its stated goals by providing regular garbage services for *all* residents, including homeless individuals (as it is required to do by the City Charter¹⁴⁰). As such, the City’s actions in confiscating unabandoned personal property is unreasonable and in violation of the Fourth Amendment.

C. Violations of the Fourteenth Amendment

In enforcing the SNO, SPO, sit-lie ban, and various other state and local ordinances criminalizing homelessness, the City has also violated homeless individuals’ rights to due process of law under the Fourteenth Amendment to the United States Constitution. Specifically, the City has violated (and continues to violate) homeless persons’ rights to substantive due process by exposing them to state-created dangers and by infringing upon their freedom of movement and travel. Further, the City has violated (and continues to violate) homeless persons’ rights to procedural due process by seizing, confiscating, and often destroying their possessions with little to no procedural safeguards.

a. Procedural Due Process Violations

The City has violated, and continues to violate, homeless individuals’ due process rights by summarily seizing and destroying property in contravention to the SNO and SPO themselves.

In addition to guaranteeing substantive due process, the Fourteenth Amendment to the United States Constitution also ensures that individuals are afforded procedural due process.¹⁴¹ A “procedural due process” claim “hinges on proof of two elements: (1) a protectable liberty or property interest; and (2) a denial of adequate procedural protections.”¹⁴² Before the state may meaningfully interfere with an individual’s property interest, it must provide notice and an “opportunity to be heard at a meaningful time and in a meaningful manner.”¹⁴³ To determine whether the basic procedural due process requirements have been met, a court must balance three factors:

¹³⁹ See ROH §§ 29-16.1, 19.1; *Advocates Decry Homeless Sweeps*, *supra* note 126.

¹⁴⁰ Revised Charter of the City and County of Honolulu (“RCCCH”) § 6-803(e) (2001).

¹⁴¹ U.S. Const. amend. XIV, § 1.

¹⁴² *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005).

¹⁴³ *Mathews v. Eldridge*, 424 U.S. 319, 339–43 (1976).

- (1) The private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail. ^[144]

Additionally, “[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”¹⁴⁵ For instance, in *Goldberg v. Kelly*, the United States Supreme Court considered that due process required an oral (rather than paper) hearing before terminating welfare benefits because of the unique characteristics of the affected population. In reaching this conclusion, the Court considered that “written submissions are an unrealistic option for most [welfare] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance.”¹⁴⁶ Likewise in *Gray Panthers v. Schweiker*, written notices to elderly beneficiaries resolving benefits claims were held constitutionality deficient because of the affected population’s unfamiliarity with legal notices and processes.¹⁴⁷ The court based its due process analysis on the “unique characteristics of the group involved” and considered that “the elderly, as a group, are less able than the general populace to deal effectively with legal notices and written registration requirements...”¹⁴⁸ Reasons for claims denials stated in the provided notices were “so unclear that it [was] virtually impossible for the average beneficiary to present a well-reasoned argument” in opposition.¹⁴⁹ Because the elderly plaintiffs’ ages and disabilities “accentuate[d] the need for adequate notice,” the court suggested that on remand, “[o]ppportunity for an oral interview or consultation could alleviate some of the problems caused by inadequate notice.”¹⁵⁰ Relevant to the homeless plaintiffs represented by the ACLU, the United States Court of Appeals for the Ninth Circuit in *Lavan* similarly considered the unique circumstances of the homeless in affirming the issuance

¹⁴⁴ *Mathews*, 424 U.S. at 321.

¹⁴⁵ *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970); see also *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 652-53 (2d Cir. 1999) (“[P]articularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence”).

¹⁴⁶ *Id.*

¹⁴⁷ 652 F.2d 146, 165-66 (D.C. Cir. 1980).

¹⁴⁸ *Id.* at 169.

¹⁴⁹ *Id.* at 167.

¹⁵⁰ *Id.*

of a preliminary injunction against the City of Los Angeles.¹⁵¹ In affirming the injunction prohibiting the summary seizure and destruction of the homeless' unabandoned property, the court noted that the homeless plaintiffs were likely to succeed on their procedural due process claim because, in part, the absence of process provided by the City was "especially troubling" in light of the "vulnerability of Skid Row's homeless residents."¹⁵²

The City's ordinances, and its enforcement thereof, fail to comport with due process. The City uses the SNO and SPO¹⁵³ to seize, impound, and destroy the homeless individuals' personal property. Under the *Mathews* three-part balancing test, neither the application of the SNO nor the SPO pass constitutional muster.

First, the private interest is weighty: as discussed above, the seizure and destruction of such items as food, water, shelter, medicine, clothing, and identification documents place the already at-risk homeless population into precarious, life-or-death situations.¹⁵⁴

Second, the value of additional procedural safeguards to ensure that homeless individuals are not unnecessarily deprived of their necessities would be great, particularly because current SNO and SPO enforcement violates the ordinances themselves. For example, while the SPO and SNO require impoundment¹⁵⁵ and explicitly prohibit the City from summarily destroying anything (though the SPO permits disposal of perishable goods¹⁵⁶), the City's practice has been to seize and immediately destroy homeless individuals' property.¹⁵⁷ During one sweep in

¹⁵¹ *Lavan*, 693 F.3d at 1032-33.

¹⁵² *Id.*

¹⁵³ *See supra* at Part II; ROH § 29-19 (Stored Property Ordinance); ROH § 29-16 (Sidewalk Nuisance Ordinance).

¹⁵⁴ Tristia Bauman, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* at 26 ("[T]he loss of medicine or medical equipment can become a matter of life and death."); *see supra* at Part II (Enforcement of Local Ordinances and State Laws Against the Homeless).

¹⁵⁵ *See* ROH § 29-19.5(a) ("Impounded personal property shall be moved to a place of storage"); ROH § 29-16.3(b)(1) ("The director shall store or cause to be stored any sidewalk-nuisance removed pursuant to this subsection").

¹⁵⁶ *See* ROH § 29-19.5(e). The ACLU believes that immediate destruction of perishable food is unconstitutional, as well as particularly harsh on homeless individuals who rely on their meager food stores for survival.

¹⁵⁷ *See* Appendix A.

November 2014, the City seized and immediately destroyed at least 3.4 tons of possessions;¹⁵⁸ during the most recent sweeps, the City destroyed over 50 tons of material.¹⁵⁹ Additionally, although the SNO and SPO require storage of property for 30 days¹⁶⁰ (assuming the property has, in fact, been properly stored), the impound reclamation procedures (as described in more detail above) used by city officials often make it impossible for homeless individuals to reclaim their property at all. Additional procedural safeguards to ensure that homeless persons are not effectively “priced out” of retrieving their property would be extremely valuable.

Third, although interests in the health and safety of its residents and efficient administration of the SNO and SPO are not insignificant, the City has overlooked the health and safety of the homeless individuals that its policies harm. Further, it is likely that changes in the City’s enforcement of the SNO and SPO would actually *promote* government efficiency: for example, rather than a six-step process for reclaiming stored property which involves multiple government offices, the City could simplify the procedures both for its own sake and for the homeless residents whose property the City seizes.

Fourth, the SNO and SPO also fail to take into account “the capacities and circumstances of [the homeless individuals] who are to be heard.”¹⁶¹ The homeless population in Honolulu is made up of individuals with diverse backgrounds: age, education level, language ability, mental health status, and other life circumstances vary widely.¹⁶² What most homeless individuals in Honolulu have in common, however, is poverty and lack of resources. The City’s enforcement of the SNO and SPO largely overlook this fact. For example, multiple car rides to government offices to proceed through a complex fee waiver process render it virtually impossible for most homeless persons to retrieve their property. Like the welfare recipients in *Goldberg*, this six-step process is an “unrealistic option” for homeless individuals, who often “lack the educational attainment necessary to write effectively and who cannot obtain professional assistance” in applying for a fee waiver.¹⁶³ Homeless residents of Honolulu are also similar to the elderly beneficiaries in *Gray Panthers*, in that “[homeless persons], as a group, are less able than the

¹⁵⁸ *See id.*

¹⁵⁹ *See* Ashley Moser, *City Crews Resume Kaka‘ako Sweep, Final Phase*, KITV HONOLULU (Oct. 28, 2015), available at <http://www.kitv.com/story/30373476/city-crews-resume-kakaako-sweep-final-phase>.

¹⁶⁰ ROH §§ 29-19.5, 16.3(b)(1).

¹⁶¹ *Goldberg*, 397 U.S. at 268-69.

¹⁶² *The Effects of City Sweeps and Sit-Lie Policies on Honolulu’s Houseless*, *supra* note 3, at 16.

¹⁶³ *Goldberg*, 397 U.S. at 268-69.

general populace to deal effectively with legal notices and written” fee waiver requirements.¹⁶⁴ The process for retrieving impounded property is so byzantine that it is “virtually impossible for the average” homeless individual to figure out.¹⁶⁵ The “unique characteristics”¹⁶⁶ of homeless persons accentuate the need for clearer, simpler procedures for seizure, impound, and retrieval of impounded property.

Given that the three-part balancing test weighs in favor of homeless persons, and because local enforcement fails to take into account their unique capabilities and circumstances, the SNO and SPO as enforced violate the right to procedural due process of law as guaranteed by the Fourteenth Amendment.

b. Substantive Due Process Violations

i. The City Has Placed Homeless Persons in State-Created Danger

The City has violated, and continues to violate, due process rights of homeless persons when it seizes their food, water, and shelter, thus depriving Honolulu’s homeless of their sole protection from the natural elements and exposing them to dangers which they would not have otherwise faced.

The Fourteenth Amendment to the United States Constitution prevents state and local officials from depriving “any person of life, liberty, or property, without due process of law[.]”¹⁶⁷ The right to due process of law “provides heightened protection against government interference with certain fundamental rights and liberty interests”¹⁶⁸ and vindicates the individual’s interest in his or her own bodily security.¹⁶⁹ The due process “state-created danger” doctrine works to protect these liberty interests by finding a constitutional violation where state action exposes an individual to a danger which he or she would not have otherwise faced.¹⁷⁰

¹⁶⁴ *Gray Panthers*, 652 F.2d at 169.

¹⁶⁵ *Id.* at 167.

¹⁶⁶ *Id.* at 169.

¹⁶⁷ U.S. Const. amend. XIV, § 1.

¹⁶⁸ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

¹⁶⁹ *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977).

¹⁷⁰ *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1066 (9th Cir. 2006); *see also Sanchez v. City of Fresno*, 914 F. Supp.2d 1079, 1099-101 (E.D. Cal. 2012).

A governmental entity violates the right to due process of law under the state-created danger doctrine where official state action (1) affirmatively places an individual in danger and (2) demonstrates deliberate indifference to that danger.¹⁷¹ Government officials affirmatively place an individual in danger when they place him or her “in a situation that [is] more dangerous than the one in which they found [him or her].”¹⁷² Although the individual may have options to abate or reduce such danger, this is not dispositive for purposes of a state-created danger due process claim:

In examining whether an officer affirmatively places an individual in danger, we do not look solely to the agency of the individual, nor do we rest our opinion on what options may or may not have been available to the individual. Instead, we examine whether the officer[] left the person in a situation *that was more dangerous than the one in which they found him*.¹⁷³

The state-created danger doctrine has been held to apply to homeless individuals whose temporary shelters were seized and destroyed by government officials.¹⁷⁴ In *Sanchez v. City of Fresno*, officials from the City of Fresno launched a campaign to eradicate a local area of makeshift homeless encampments.¹⁷⁵ In furtherance of this campaign, city officials demolished several shelters belonging to the encampment’s homeless inhabitants, “even though [officials] were advised that the demolition involved the destruction of valuable personal property and the demolition of entire tents and shelters.”¹⁷⁶ For many of those affected, these shelters constituted the sole means of protection from the natural elements and “extreme weather conditions.”¹⁷⁷ In concluding that the homeless plaintiffs stated a viable claim under the state-created danger doctrine, the court took particular care to note that city officials were on notice from previous litigation that its demolition campaign was destroying personal property, tents, and shelters.¹⁷⁸ Because city officials “[knew] or should reasonably [have known] that their conduct threatened

¹⁷¹ *Kennedy*, 439 F.3d at 1066.

¹⁷² *Munger v. City of Glasgow Police Dep’t*, 227 F.3d 1082, 1086 (9th Cir. 2000).

¹⁷³ *Kennedy*, 439 F.3d at 1062 (emphasis added) (*citing Munger*, 227 F.3d at 1086).

¹⁷⁴ *Sanchez*, 914 F. Supp.2d at 1102.

¹⁷⁵ *Id.* at 1093.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1093, 1102.

[their] continued survival,” the homeless plaintiffs stated a viable claim that they were placed in danger by state action in violation of their rights to due process of law.¹⁷⁹

The City’s actions in “sweeping” the streets of homeless residents exacerbate their already-precarious living situation and place many homeless individuals “in a situation that was more dangerous than the one in which they found [them].”¹⁸⁰ Because of city sweeps, Honolulu’s homeless residents are dispossessed of their sole protection from the elements and have been exposed to scorching summer temperatures and frequent rain.¹⁸¹ Among innumerable other negative consequences of city sweeps, the seizure of homeless property has also caused homeless persons to be fired from their jobs, go hungry, and lose their sole means of accessing much-needed government benefits.¹⁸²

The City has also acted with “deliberate indifference”¹⁸³ to the consequences of its actions. Like the City of Fresno in *Sanchez*, City officials have been advised by the ACLU through both informal and formal means that “the demolition [of homeless encampments like Kaka‘ako] involved the destruction of valuable personal property and the demolition of entire tents and shelters.”¹⁸⁴ Nevertheless, the City has continued to seize property and shelters from homeless persons¹⁸⁵ despite knowing that the City’s “conduct threatens [their] continued survival.”¹⁸⁶ As such, the City has placed, and continues to place, Honolulu’s homeless residents in danger in violation of the Fourteenth Amendment.¹⁸⁷

¹⁷⁹ *Id.* at 1102.

¹⁸⁰ *Kennedy*, 439 F.3d at 1062 (emphasis added) (citing *Munger*, 227 F.3d at 1086).

¹⁸¹ Cathy Bussewitz, *With No ACs and Record High Temps, Hawaii Schools Consider “Heat Days,”* HUFFINGTON POST (Aug. 12, 2015), available at http://www.huffingtonpost.com/entry/hawaii-public-schools-heat-days_55cbb9b4e4b0898c48867196.

¹⁸² See Appendix, B; *The Effects of City Sweeps and Sit-Lie Policies on Honolulu’s Houseless*, *supra* note 3, at 18-26.

¹⁸³ *Kennedy*, 439 F.3d at 1066.

¹⁸⁴ *Sanchez*, 914 F. Supp. 2d at 1093.

¹⁸⁵ Rui Kaneya, *Kakaako Encampment Braces for the Final Sweeps*, HONOLULU CIVIL BEAT (Oct. 7, 2015), available at <http://www.civilbeat.com/2015/10/kakaako-encampment-braces-for-the-final-sweeps/>.

¹⁸⁶ *Sanchez*, 914 F. Supp. 2d at 1102.

¹⁸⁷ *Id.*

ii. The City has Infringed upon the Fundamental Right to Travel

By using the myriad of laws and ordinances to effectively drive homeless persons from the more populated tourism and business areas of O‘ahu, the City has violated homeless individuals’ fundamental right to travel as guaranteed by the Fourteenth Amendment.

The right to travel is a basic constitutional right arising from the Fourteenth Amendment’s due process clause.¹⁸⁸ In exercising this right, individuals have the freedom to move from one place to another as they wish and to “loiter for innocent purposes.”¹⁸⁹ Although the United States Supreme Court has not directly addressed whether the right to travel includes the right to intrastate travel,¹⁹⁰ many circuits have answered in the affirmative.¹⁹¹ Generally, a state law implicates the constitutional right to travel when it actually deters travel, when prohibiting or impeding travel is its primary objective, or when it uses a classification to penalize travel.¹⁹² Where it burdens the fundamental right to travel, state action must be “precisely tailored to serve a compelling governmental interest.”¹⁹³

Taken together, the SNO, SPO, sit-lie ban, and various other ordinances significantly burden homeless persons’ freedom of intrastate travel. The sit-lie ban was enacted for the express purpose of driving homeless individuals away from business and tourism districts and

¹⁸⁸ See *Memorial Hospital v. Maricopa Ctny.*, 415 U.S. 250, 254 (1974).

¹⁸⁹ *Johnson v. Bd. of Police Cm’rs.*, 351 F. Supp. 2d 929, 949 (E.D. Mo. 2004) (citing *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999)).

¹⁹⁰ The Supreme Court has, however, held that arresting individuals for loitering on public streets without identification “implicates consideration of the constitutional right to freedom of movement.” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

¹⁹¹ See, e.g., *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003) (“The right to intrastate travel, or what we sometimes will refer to as the right to free movement, has been recognized in this Circuit”); *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002) (“In view of the historical endorsement of a right to intrastate travel and the practical necessity of such a right, we hold that the Constitution protects a right to travel locally through public spaces and roadways”); *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) (recognizing right to intrastate travel as derived from principles of substantive due process); *King v. New Rochelle Municipal Housing Auth.*, 442 F.2d 646, 648-49 (2d Cir. 1971) (“It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state”).

¹⁹² *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986).

¹⁹³ *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

preventing future homeless persons from traveling to those districts.¹⁹⁴ It has the effect of driving homeless residents from downtown areas and of forcing them into small, dense encampments that are then demolished.¹⁹⁵ The sit-lie ban also has the effect of significantly burdening homeless persons' freedom of movement and travel on the island of O'ahu. For example, a homeless person who is forced to sleep in public must keep moving within the City to avoid being arrested in a sit-lie zone. His only other option is to seek space outside the sit-lie zones; then, however, he faces the myriad of other state and local laws which allow city officials to seize, impound, and destroy his property or levy criminal penalties for sleeping in a park. Because "impeding [homeless persons'] travel" into business and tourism districts is the City's "primary objective" and actual effect,¹⁹⁶ the City has infringed upon Honolulu's homeless residents' constitutional right to intrastate travel.

D. Subversion of the McKinney-Vento Homeless Assistance Act

The City's policies directly undermine the federal government's efforts to stabilize homeless children's educational progress through the McKinney-Vento Homeless Assistance Act, because the City forces homeless families into any available shelter in any geographic location on O'ahu, no matter how far away or how unsuitable it may be. For example, one family in Kaka'ako – having had all their possessions, identification documents, medicines, and other necessities destroyed by the City in a 2014 sweep – agreed to go to the Lighthouse Outreach shelter in Waipahu so they would not be arrested (or have their things destroyed) during the September and October 2015 sweeps. They attempted to keep their child in the child's home school in Honolulu, which required leaving the shelter at 4:30 a.m. to travel by public bus to the child's home school in downtown Honolulu. After a few weeks, the strain of this travel became too great, and they reluctantly transferred the child to a school closer to the new shelter – the exact scenario the McKinney-Vento Act attempts to avoid. (The ACLU of Hawaii is currently attempting to secure shelter for this family near downtown Honolulu, so that the child may return to the child's home school.) As such, the City's policies are not only

¹⁹⁴ Sophie Cocke, *Will Honolulu's Sit-Lie Ban Expand Again to Target the Homeless Outside Malls?*, HONOLULU CIVIL BEAT (Dec. 11, 2014), available at <http://www.civilbeat.com/2014/12/will-honolulu-sit-lie-ban-expand-again-to-target-the-homeless-outside-malls/>; Alan Yuhas, *Honolulu upholds ban: don't sit or lie down where a tourist might see you*, THE GUARDIAN (June 4, 2015), available at <http://www.theguardian.com/us-news/2015/jun/04/honolulu-upholds-ban-dont-sit-or-lay-down-where-a-tourist-might-see-you>.

¹⁹⁵ See generally *The Effects of City Sweeps and Sit-Lie Policies on Honolulu's Homeless*, *supra* note 3, at 18-26.

¹⁹⁶ *Soto-Lopez*, 476 U.S. at 903.

unconstitutional, they directly undermine federal policies designed to stabilize impoverished families and youths.

E. Violation of International Human Rights Obligations

In 2012, the Department of Justice and U.S. Interagency Council on Homelessness issued *Searching Out Solutions: Constructive Alternatives to the Criminalization of Homelessness*, recognizing that “[i]n addition to violating domestic law, criminalization measures may also violate international human rights law, specifically the Convention Against Torture and the International Covenant on Civil and Political Rights.”¹⁹⁷ Over the past two years, the three treaty bodies that review compliance with the human rights treaties we have ratified each inquired about criminalization of homelessness in the United States and made strong recommendations for federal agencies to “engage with state and local authorities to abolish” the practice, calling it “cruel, inhuman, and degrading treatment.”¹⁹⁸ The treaty bodies further recommended “close cooperation between all relevant stakeholders including social, health, law enforcement and justice professionals at all levels to intensify efforts to find solutions for the homeless in accordance with human rights standards.”¹⁹⁹ In 2015, the United States also supported a recommendation from the Human Rights Council’s second Universal Periodic Review to “[a]mend laws that criminalize homelessness and which are not in conformity with international human rights instruments.”²⁰⁰ Intervening in our litigation against the city would be consistent with the commitments we have made to uphold the human rights of all Americans, including those who are homeless.

¹⁹⁷ United States Interagency Council on Homelessness, *Searching out Solutions: Constructive Alternatives to the Criminalization of Homelessness* 8 (2012).

¹⁹⁸ Human Rights Committee, Concluding Observations, CCPR/C/USA/CO/4, para. 19, Apr. 23, 2014; Committee on the Elimination of Racial Discrimination, Concluding Observations, CERD/C/USA/CO/7-9, para. 12, Aug. 29, 2014; Committee Against Torture, *Committee Against Torture considers report of the United States*, Nov. 13, 2014. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15290&LangID=E>.

¹⁹⁹ Human Rights Committee, *supra* note 198.

²⁰⁰ Report of the Working Group on the Universal Periodic Review, United States of America, A/HRC/30/12, ¶ 176.310 (July 20, 2015).

Part IV: Ongoing Litigation to Stop the City from Violating Homeless Persons' Constitutional Rights

To prevent and redress these violations and others, on September 16, 2015, the ACLU of Hawai'i Foundation and the law firm of Alston Hunt Floyd & Ing filed a putative class action lawsuit on behalf of fifteen homeless or previously homeless individuals against the City in the United States District Court for the District of Hawai'i.²⁰¹ The lawsuit alleges that the City violated the Fourth and Fourteenth Amendments to the United States Constitution when it destroyed personal property of Honolulu's homeless residents without due process of law. The lawsuit seeks to stop the City from continuing to violate the constitutional rights of homeless individuals through summary destruction of property; it also seeks damages on behalf of the homeless individuals whose personal property was destroyed in the past. On September 22, 2015, the Plaintiffs' request for a temporary restraining order prohibiting future sweeps was denied, after which the City continued to seize and dispose of homeless individuals' property.²⁰²

The District Court denied the Plaintiffs' request for a temporary restraining order based on the expedited record before it. Consequently, the Plaintiffs filed a Motion for Preliminary Injunction on November 3, 2015, providing the Court with extensive documentation of the City's unlawful actions (including photographs, videos, declarations, and deposition testimony from City officials). The Court has not yet set a hearing date for that Motion.

Plaintiffs respectfully request that the Department of Justice file a Statement of Interest with the Court regarding the matters set forth herein.

²⁰¹ See Appendix A.

²⁰² Rui Kaneya, *Federal Judge Refuses to Immediately Halt Honolulu Homeless Sweeps*, HONOLULU CIVIL BEAT (Sept. 22, 2015), available at <http://www.civilbeat.com/2015/09/federal-judge-refuses-to-immediately-halt-honolulu-homeless-sweeps/>.

Conclusion

The ACLU of Hawai‘i seeks to end the City’s practice of violating the constitutional rights of Honolulu’s homeless residents. The ACLU is aware that the Department of Justice has a keen, present interest in preventing “unconstitutional and abusive policing”; ensuring that “justice is applied fairly regardless of wealth or status”; “breaking the cycle of poverty”; and preventing the “criminalization of homelessness.”²⁰³ The ACLU acknowledges and appreciates that the Department of Justice has recently intervened in at least one analogous scenario in which local government effectively criminalized homelessness in violation of the Eighth Amendment.²⁰⁴ The ACLU respectfully requests that the Department of Justice investigate the claims of Honolulu’s homeless residents and order the City and County of Honolulu to cease its unconstitutional policies and practices. In addition, the ACLU respectfully requests that the Department of Justice file a Statement of Interest in the pending case of *Martin v. City and County of Honolulu*,²⁰⁵ filed by the ACLU in the District of Hawai‘i on September 16, 2015.

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²⁰³ Statement of Interest of the United States, *supra* note 2, at 4-6.

²⁰⁴ *See id.*

²⁰⁵ Civ. 15-00363 HG-KSC (D. Haw. 2015).

APPENDICES

- A** Complaint for Declaratory and Injunctive Relief and Damages, *Martin et al. v. City and County of Honolulu*, Civ. 15-00363 HG-KSC (D. Haw. Sept 16, 2015).
- B** Motion for Preliminary Injunction and Memorandum in Support of Motion, *Martin et al. v. City and County of Honolulu*, Civ. 15-00363 HG-KSC (D. Haw. Sept 16, 2015).
- C** Declarations of homeless individuals and witnesses describing City's sweeps, filed in *Martin et al. v. City and County of Honolulu*, Civ. 15-00363 HG-KSC (D. Haw. Sept. 16, 2015).
1. Declaration of Jonathan Cortez, ECF No. 12-9.
 2. Declaration of V.T., ECF No. 12-14.
 3. Declaration of Corilynn Wallace, ECF No. 12-15.
 4. Declaration of Amber Coiley, ECF No. 36-48.
 5. Declaration of Anthony Garo, Jr., ECF No. 36-49.
 6. Declaration of K. Raina Whiting, ECF No. 36-50.
 7. Declaration of Jennifer Darrah-Okike, ECF No. 36-51.
“Exhibit 1,” referenced in the declaration of Jennifer Darrah-Okike, can be found at: <http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report.small.pdf>
 8. Declaration of Beatriz Cantelmo, ECF No. 36-53.
 9. Declaration of Jon Josephson, ECF No. 36-54
 10. Supplemental Declaration of Jon Josephson, ECF No. 36-55.
 11. Declaration of Tabatha Martin, ECF No. 36-56.
 12. Declaration of Tracy Martin, ECF No. 36-57.
 13. Supplemental Declaration of Tracy Martin, ECF No. 36-58.
 14. Declaration of Gabriel Yug, ECF No. 36-59.
 15. Supplemental Declaration of Gabriel Yug, ECF No. 36-60.
 16. Declaration of Tanako Yug, ECF No. 36-61.
 17. Supplemental Declaration of Tanako Yug, ECF No. 36-62.

- D** Transcripts of depositions of officials and current and former employees of the City and County of Honolulu.
1. Deposition of Ross Sasamura, *Martin v. City and County of Honolulu*, Civ. 15-00363 HG-KSC (D. Haw. 2015).
 2. Deposition of Kenneth Shimizu, *Martin v. City and County of Honolulu*, Civ. 15-00363 HG-KSC (D. Haw. 2015).
 3. Deposition of Leslieann Ponte, *Martin v. City and County of Honolulu*, Civ. 15-00363 HG-KSC (D. Haw. 2015).
- E** News articles from the *Honolulu Star-Advertiser*.
1. Honolulu Mayor Kirk Caldwell, *Together we can resolve problem of homelessness in Honolulu* (June 1, 2014).
 2. Cathy Bussewitz, *Low-income families living in Honolulu homeless encampment* (Aug. 17, 2015).
 3. *Council trumps Mayor's veto of expanded 'sit-lie' legislation* (Sept. 3, 2015).
 4. Dan Nakaso, *Next step for isle's homeless* (Oct. 17, 2015).
 5. *Advocates Decry Homeless Sweeps* (June 13, 2015).
 6. *Tents of homeless removed from Kapalama Canal bank* (June 10, 2015).
 7. Dan Nakaso, *Arrivals from mainland add to demand for local services* (Oct. 18, 2015).
- F** Letter from ACLU of Hawai'i Foundation, February 2, 2015.
Response from City and County of Honolulu, April 7, 2015.
- G** Letter from ACLU of Hawai'i Foundation, August 21, 2015.
Response from City and County of Honolulu, September 28, 2015.