



Agency: City Council Committee on Executive Matters and Legal Affairs
City and County of Honolulu
Date/Time: Tuesday October 24, 2017, 1:00 p.m.
Place: Honolulu Hale
Re: Testimony of the ACLU of Hawai'i in Opposition to Bill 88, Relating to Public Sidewalks Outside of the Waikiki Special District and Business Establishments

Dear Chair Menor, Vice Chair Fukunaga, and City Councilmembers:

The ACLU of Hawai'i Foundation ("**ACLU**") is writing to you because we understand that on Tuesday, October 24 2017, the Executive Matters and Legal Affairs Committee of the Council of the County of Honolulu will consider three bills submitted by Council Members Martin and Kobayashi concerning the homeless in Honolulu. These bills purport to criminalize certain life functions of the homeless without providing reasonable alternatives to punishment. The ACLU urges the Committee to **first** consider making sure sufficient shelter, public bathrooms, and social services exist **before** moving forward with adopting otherwise unconstitutional measures.

In January 2017, there were approximately 4,959 homeless individuals in Oahu. Of these, approximately 2,324 were unsheltered.¹ Both the overall number of homeless persons and the number of unsheltered homeless persons in Oahu has increased since 2013.² Between 2013 and 2017, the number of homeless without shelter in Oahu rose from 1,465 to 2,324 – a 58.6 percent increase, even though sit-lie was in effect during most of this period.³ Hawaii's rate of

¹ Dep't. of Human Services., State of Hawai'i, *State of Hawai'i Homeless Point-in-Time Count 2017*, at 15, available at <http://humanservices.hawaii.gov/blog/bridging-the-gap-partners-in-care-announce-2017-point-in-time-results/>

² *Id.*

³ *Id.*

homelessness in 2015 was by far the highest in the nation, over three times higher than the national rate.⁴

Hawai'i has the highest cost of living in the country. Comparisons of Hawaii's elevated cost of living range from 17 percent to 60 percent higher than the national average.⁵ In Hawai'i, 83 percent of impoverished individuals must spend more than half of their income on housing,⁶ and average rents increased by 45 percent between 2005 and 2012.⁷ As a result, "[m]ore and more households struggle to afford even a modest place to live in Hawai'i" and "many families do not earn enough to afford market rents."⁸ The lack of affordable housing in Hawai'i is a primary factor for the state's disproportionately large homeless population.⁹

Bill 88 would add on to a comprehensive set of ordinances, rules, and statutes affecting the local homeless population making it illegal to sit or lie on sidewalks in Downtown, Chinatown, McCully-Moiliili, Kailua, Wahiawa, Ala Moana-Sheridan, Kaneohe, Wiamanalo, Kapahulu, Kaimuki, Kahala, Aina Haina-Nui Valley, Hawaii Kai, Aala, Kapalama, Kalihi, Iwilei, and the surrounding business establishments. Under the Revised Ordinances of Honolulu (1990), park closure rules, homeless individuals cannot sleep in city parks

⁴ *Nat'l Alliance to End Homelessness, The State of Homelessness in America (2016)*, at 15, available at <http://endhomelessness.org/wp-content/uploads/2016/10/2016-soh.pdf>

⁵ Hawai'i Appleseed Center for Law and Economic Justice, *The State of Poverty in Hawai'i: How Hawai'i Residents Are Faring Post-Recovery*, at 5, available at <http://hiappleseed.org/sites/default/files/State%20of%20Poverty%20%5BFINAL%5D.pdf>

⁶ 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).

⁷ Hawai'i Appleseed Center for Law and Economic Justice, *Hawaii's Affordable Housing Crisis 3* (July 2014), available at <http://www.hiappleseed.org/sites/default/files/Hi%20Appleseed%20Housing%20Crisis%20Report.pdf>.

⁸ *Id.*

⁹ See *Homeless Property Rights*, *supra* note 5, at 223.

at night because doing so is not permitted.¹⁰ Predictably, homeless individuals have migrated to the only remaining areas where they would not receive citations for necessary life activities: sidewalks. Bill 88, however, seeks to further criminalize that shelter of last resort where the homeless can actually be without fear of harassment or a citation.

As set forth by the Department of Justice in its Statement of Interest in *Bell v. Boise*,¹¹ by the Ninth Circuit Court of Appeals in *Jones v. City of Los Angeles*,¹² and in *Pottinger v. City of Miami*,¹³ laws that criminalize poverty itself are unconstitutional. In nearly identical ways, the County has passed or is planning to pass a series of increasingly draconian measures (Bill 83 and Bill 87) that, when woven together, violate the Eighth Amendment to the United States Constitution by criminalizing the status of being homeless.¹⁴

Just as in *Pottinger* and *Jones*, there are not nearly enough shelter beds for the entire homeless population of the County of Honolulu: there are nearly 2,324 unsheltered individuals on Oahu, and there does not appear to be enough beds to accommodate that population. Thus, almost half of homeless persons (47 percent) in the County of Honolulu sleep on or alongside public streets or sidewalks because they have nowhere else to go. Homeless individuals face arrest or harassment if they sleep in parks,¹⁵ state parks,¹⁶ or

¹⁰ City and County of Honolulu, Hawai'i, Municipal Code (the "**Code**"), Chapter 10, Article 1. Sections 10-1.2(a)(12) (1990).

¹¹ See 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>.

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

¹³ 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).

¹⁴ The proposed bills and their enforcement would also raise serious Fourth Amendment and Due Process concerns. This letter does not address these and other legal and constitutional issues.

¹⁵ See *supra* note 10.

in their own car.¹⁷ With Bill 88, homeless residents of Honolulu County would also face arrest, fines, and jail if they sit, lie down, or sleep on public sidewalks.

Bill 88 further stigmatizes homeless persons as dangerous and undesirable individuals. There is no rational basis for preventing individuals from exercising their fundamental right to exist and perform daily functions, such as sitting, lying, or sleeping. This ordinance targets a specific population and has previously been found unconstitutional by the courts. Such ordinance effectively criminalizes being homeless itself in situations where people simply have nowhere else to go leaving no other option but to break the law.

Instead of wasting limited public resources enforcing constitutionally infirm bills—which would likely result in costly lawsuits—without actually reducing the number of unsheltered homeless, the ACLU strongly encourages the City and County of Honolulu to reconsider its proposed approach to homelessness. In particular, to meet its constitutional obligations, the County needs to ensure that sufficient and adequate shelter, public bathrooms, and social services exist before moving forward with the proposed bills. Doing so is not only constitutionally required, but it is also moral, cost effective, and good public policy.

Thank you in advance for your time and attention to this matter. If you have any questions or comments, please feel free to contact me at 522-5908 or mcaballero@acluhawii.org.

Sincerely,



Mateo Caballero
Legal Director
ACLU of Hawai'i

¹⁶ See HRS § 184-5 (2013); Hawai'i Administrative Rules ("HAR") § 13-146-51 (2011).

¹⁷ See HRS § 291C-112 (2013).