



Agency: City Council, City and County of Honolulu
Date/Time: Wednesday July 11, 2018, 10 a.m.
Place: Kapolei Hale
Re: Testimony of the ACLU of Hawai'i in Opposition to Bill 51, Relating to Obstruction of Public Sidewalks

Dear Chair Martin, Vice Chair Pine, and City Councilmembers:

The ACLU of Hawai'i (“*ACLU*”) writes in opposition to Bill 51, which makes it a violation punishable by \$100 fine to “create, cause or maintain an obstruction on a public sidewalk that interferes, impedes and/or prevents the full, free and unobstructed passage of pedestrians upon public sidewalks or interferes with the normal flow of pedestrian traffic upon a public sidewalk during the hours from 6:00 a.m. to 10:00 p.m.” The ACLU is concerned that this bill will further criminalize unsheltered communities and otherwise innocent behavior without a valid government interest. Additionally, the definition of “obstruction” is vague and overbroad. Finally, the bill is duplicative and unnecessary, because Hawai'i Revised Statutes (“*HRS*”) Section 711-1105 already makes it a misdemeanor to knowingly or recklessly provide “less than thirty-six inches of space for passage on any paved public sidewalk.”

In January 2018, there were approximately 4,495 homeless individuals on Oahu. Of these, approximately 2,145 were unsheltered.¹ Both the overall number of homeless persons and the number of unsheltered persons in Oahu has increased since 2013, when efforts to criminalize homelessness began.² Between 2013 and 2018, the number of individuals without shelter in Oahu rose from 1,465 to 2,145—a 46.4 percent increase, even though the strategy of “compassionate” disruption was being intentionally pursued for most of this period.³ Hawaii's rate of 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

¹ Partners in Care, *Homeless Point-In-Time Count Report January 22, 2018* at 12, available at http://www.partnersincareoahu.org/sites/default/files/2018_OAHU%20PIT_Report_FIN_AL-6.5.18.pdf.

² *Id.*

³ *Compare id. with* Partners in Care, *Homeless Point-In-Time Count Report January 22,*

³ *Compare id. with* Partners in Care, *Homeless Point-In-Time Count Report January 22, 2017* at 13, available at <http://www.partnersincareoahu.org/sites/default/files/2017%20State-wide%20PIT%20Report%20-%20Full%20Report%20-%20FINAL.pdf>.

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>

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 51 would add on to a comprehensive set of ordinances, rules, and statutes affecting, targeting, and being primarily enforced against unsheltered communities. As set forth by the Department of Justice in its Statement of Interest in *Bell v. Boise*,¹⁰ by the Ninth Circuit Court of Appeals in *Jones v. City of Los Angeles*,¹¹ and in *Pottinger v. City of Miami*,¹² laws that criminalize poverty itself are unconstitutional.¹³ In nearly identical ways, the County 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 not having permanent shelter.¹⁴

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.

¹⁰ 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>.

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

¹² 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).

¹³ See also *Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 432 (N.D. Cal. 2017) (discussing that an Eighth Amendment claim is viable when the laws criminalize involuntary conduct when shelter is unavailable).

¹⁴ The proposed bills and their enforcement would also raise serious Fourteenth Amendment concerns. See, e.g., *Jeremiah v. Sutter County*, No. 2:18-cv-00522-TLN-KJN, 2018 WL 1367541, at *5 (E.D. Cal. Mar. 16, 2018) (stating that officials violate the Fourteenth Amendment when they are deliberately indifferent to the additional dangers caused to individuals who cannot afford adequate housing in closing homeless lodging situations). Our testimony does not address these and other legal and constitutional issues.

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 2,145 unsheltered individuals on Oahu, and there does not appear to be enough beds to accommodate more than a fraction of those unsheltered. Homeless individuals already face arrest or harassment if they sleep in parks,¹⁵ state parks,¹⁶ or in their own car.¹⁷ Thus, almost half of homeless persons (47.7 percent) in the City and County of Honolulu sleep and live on or alongside public streets or sidewalks because they have nowhere else to go.

The definition of “obstruction” in Bill 51 is also vague and overbroad. The bill defines obstruction as “the act or condition of being obstructed; or a condition of being clogged or blocked.” In turn, “obstruct” means “to block up, stop up or close up, or placing an obstacle in or fill with obstacles, or impediments that interfere with the passing or to be or come in the way of a pedestrian’s free use of the sidewalk and provides less than thirty-six inches of space for passage.” Under this definition, simply standing on the sidewalk could potentially result in a violation of the ordinance. Similarly, standing next to another person could result in a violation even if neither person individually was in violation of the ordinance. The bill does not provide adequate notice that such innocent conduct is illegal.¹⁸ This is particularly problematic because the ordinance does not contain an intent requirement so that completely innocent behavior could potentially result in a \$100 fine.

Finally, Bill 51 is duplicative, because HRS Section 711-1105 already makes it a misdemeanor to knowingly or recklessly provide “less than thirty-six inches of space for passage on any paved public sidewalk.” This raises questions about the purpose of Bill 51, which appears to be to further harass, criminalize, and stigmatize unsheltered individuals.

Instead of wasting limited public resources enforcing constitutionally infirm bills—which would likely result in costly lawsuits—without actually reducing the number of unsheltered individuals on Oahu, the ACLU strongly encourages the City and County of Honolulu to reconsider its proposed approach to our housing crisis. In particular, to meet its constitutional obligations, the County needs to and should address the root causes of our housing crisis as opposed to criminalizing its consequences. Doing so is not only constitutional, but it is also moral, cost effective, and good public policy.

¹⁵ See City and County of Honolulu, Hawai‘i, Municipal Code, Chapter 10, Article 1, § 10-1.2(a)(12) (1990).

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

¹⁷ See HRS § 291C-112 (2013).

¹⁸ The U.S. District Court for the District of Hawaii has emphasized the importance of the City announcing its intentions at every stage, as a safeguard against unconstitutional deprivations, in situations when unsheltered individuals have a strong private interest. See *James v. City of Honolulu*, 125 F. Supp. 3d 1080, 1094 (D. Haw. 2015).

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@acluhawaii.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mateo Caballero', with a stylized flourish at the end.

Mateo Caballero
Legal Director
ACLU of Hawai'i