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October 6, 2017

Miro Weinberger, Mayor
149 Church Street
Burlington, Vermont, 05401

AMERICAN CIVIL
LIBERTIES UNION
OF VERMONT

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Re: Planned Sweeps of Burlington's "Homeless Encampments"

Mayor Weinberger:

The ACLU of Vermont writes to express its serious concerns regarding the planned evictions of "homeless encampments" on public property. Specifically, the City is threatening to evict multiple homeless encampments in the coming weeks. Should the City proceed with the evictions, it would likely violate the constitutional rights of the residents of those encampments.

When homeless individuals are on public property and have no other place to go within the city, punishing them for remaining and sheltering themselves violates the Eighth Amendment to the U.S. Constitution. When these evictions include the indiscriminate seizure and destruction of all personal property left behind, as Burlington's camp evictions have in the past, seizing and destroying personal property without due process violates the Fourth and Fourteenth Amendments to the U.S. Constitution.

We write to insist that the City of Burlington respect the constitutional rights of its homeless residents, treat them with dignity, and expand available shelter for these individuals rather than unlawfully forcing them out of their current locations and destroying their property.

Evicting Homeless Residents Violates the Eighth Amendment Because Alternate Shelter Is Currently Unavailable

The Eighth Amendment forbids criminalizing a status, like homelessness, that "may be contracted innocently or involuntarily." *Robinson v. California*, 370 U.S. 660,666–67 (1962); see *Kohr v. City of Houston*, No. 4:17-cv-1473, 2017 WL 3605238, at *1-2 (S.D. Tex. Aug. 22, 2017); *Jones v. City of Los Angeles*, 444 F.3d 1118, 1131 (9th Cir. 2006), *vacated pursuant to settlement agreement*, 505 F.3d 1006 (9th Cir. 2007). The Supreme Court has applied the same principle to the status of homelessness. In *Powell v. Texas*, 392 U.S. 514 (1968), a majority of the justices agreed that a homeless person cannot be

punished for performing unavoidable acts in public if he or she has “no place else to go.” *Id.* at 551 (White, J., concurring in the judgment); *see id.* at 570 (Fortas, J., dissenting) (describing one who “does not appear in public by his own volition”).

A municipal policy, practice, or action that bans sleeping or camping in public—which is “involuntary and inseparable from” homelessness so long as emergency shelter beds are unavailable—violates the Constitution’s prohibition on cruel and unusual punishment. *Jones*, 444 F.3d at 1131-32); *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev’d in part on other grounds*, 61 F.3d 442 (5th Cir. 1995). This reasoning is consistent with that of many other courts confronting laws that criminalize homelessness, which have treated the involuntariness of acts accompanying status as “the critical factor” for triggering Eighth Amendment protection. *Jones*, 444 F.3d at 1132. *see also Kohr*, 2017 WL 3605238 at *1-2 (S.D. Tex. Aug. 22, 2017); *Cobine v City of Eureka*, No. 16-cv-2239, 2017 WL 1488464, at *4 (N.D. Cal. Apr. 25, 2017); *Bell v. City of Boise*, 834 F. Supp. 2d 1108 (D. Idaho 2011), *rev’d on othr grounds*, 709 F.3d 890, 898-901 (9th Cir. 2013); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563-65 (S.D. Fla. 1992); *State v. Adams*, 91 So. 3d 724, 753–54 (Ala. Crim. App. 2010); *cf. Anderson v. City of Portland*, No. 08-cv-1447, 2009 WL 2386056, at *7–9 (D. Or. July 31, 2009) (considering, in addition to voluntariness, the innocent nature of the prohibited conduct); *United States v. Flores-Alejo*, 531 F. App’x 422, 426 (5th Cir. 2013) (holding the same, outside the context of homelessness). Courts have repeatedly enjoined laws that punish homeless people for sleeping or camping in public because such laws effectively punish the status of homelessness itself. *E.g. Jones*, 444 F.3d at 1131; *Bell*, 834 F. Supp. 2d 1108; *Johnson*, 860 F. Supp. at 350; *Pottinger*, 810 F. Supp. at 1563–65.

In this instance, the individuals in the Burlington encampments have no place to go to access shelter. After the City posted eviction notices at Burlington-area encampments, the ACLU contacted the two emergency shelters in Burlington, COTS and ANEW Place, regarding shelter space for individuals. Both shelters are full, with ANEW Place having a waitlist.¹

Further, even assuming the individuals at the camps have not exhausted the annual maximum allowable days, Vermont’s criteria for emergency shelter are almost impossible to meet. *See Vermont Department for Children and Families General Assistance Rule 2652.3.*² Regarding more permanent housing options, Christopher Brzovic, a housing specialist at CVOEO, recently responded to an ACLU of Vermont inquiry, stating that “there are no guarantees with housing at the moment,” there is currently a two-year wait for Section 8 housing subsidies through Burlington Housing Authority (assuming eligibility), and that CVOEO cannot guarantee eligibility for their housing assistance programs to any individual.

¹ Incidentally, COTS is also cutting its case management staff. *See Erin Mansfield, Citing funding rduction, COTS lays off case managers*, Oct. 5, 2017, *VTDigger*, at <https://vtdigger.org/2017/10/05/citing-funding-reduction-cots-lay-off-case-managers/#.Wdegr1uPKiQ>

² Emergency housing is available to individuals meeting strict criteria for an annual maximum of 28 days. For those who are not elderly, receiving SSI or SSDI, parenting custodial children under six yars old, or in the third trimester of pregnancy, they must have specified and combined conditions providing them with enough “points” to qualify.

Because shelter and, if available, protected shelter such as a blanket, sleeping bag, or tent, is a basic human need, *Helling v. McKinney*, 509 U.S. 25, 32, (1993), and many if not all of the individuals in these encampments have no place else to go, we demand Burlington cease its threats to sweep the encampments and arrest individuals who remain, at least until adequate shelter space is made available for and provided to these individuals.

Seizing and Destroying Personal Property without Due Process Violates the Fourth and Fourteenth Amendments

In response to ACLU of Vermont's written questions regarding camp closures in 2016, Chief del Pozo responded that "persons who abandon their property on city land are guilty of dumping" and that "we are under no obligation to store [the property]." As a matter of law, Chief del Pozo is mistaken. Burlington officials' practice of seizing and destroying personal property at encampments, without due process of law, violates the Fourth and Fourteenth Amendments.

The Fourth Amendment of the U.S. Constitution "protects the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const., Amend. IV; *see also* Vt. Const. Art. 11; *State v. Medina*, 2014 VT 69, ¶ 2 (Vermont's Fourth Amendment analog, Article 11, provides greater protection against unreasonable searches and seizures than the Fourth Amendment). A "seizure" under the Fourth Amendment occurs "where there is some meaningful interference with an individual's possessory interest in that property." *Soldal v. Cook County Ill.*, 506 U.S. 56, 63 (1992). "An officer who happens to come across an individual's property in a public area could seize it only if Fourth Amendment standards are satisfied—for example, if the items are evidence of a crime or contraband." *Id.* at 68-69; *see also United States v. Cosme*, 796 F.3d 226, 235 (2d Cir.2015); *Harrell v. City of New York*, 138 F. Supp. 3d 479, 488–89 (S.D.N.Y. 2015).

Confiscating and destroying someone's personal property is the ultimate seizure, and must meet a high bar to be justified. *See Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1015-17 (C.D. Cal. 2011); *Kincaid v. City of Fresno*, 106CV-1445, 2006 WL 3542732, at *36-37 (E.D. Cal. Dec. 8, 2006); *Pottinger*, 810 F. Supp. at 1570-73. For example, in *Pottinger*, the Southern District of Florida held property sweeps of homeless camps in public parks to be unconstitutional because the city's interest in maintaining the beauty of its public parks could not overcome the individuals' interest in not having their belongings destroyed. 810 F. Supp. at 1570-73.

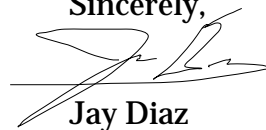
The seizure and discarding of property also violates the Fourteenth Amendment's procedural due process requirements because it lacks a pre- or post-deprivation process for people to maintain their property rights. U.S. Const., Amend. XIV. The City's seizure and destruction of property in which people have a clear and constitutionally protected property interest constitutes a "deprivation" subject to procedural due process protections.

While only post-deprivation process is required when the challenged conduct is “random and unauthorized” (so that state authorities cannot predict when such unsanctioned deprivations will occur),” the City in this case must accord individuals pre-deprivation process because the sweeps reflect an official practice or policy. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990); *Hudson v. Palmer*, 468 U.S. 517, 534 (1984). “The controlling inquiry is solely whether the state is in a position to provide for pre-deprivation process.” *Palmer*, 468 U.S. 517, 534. Since the City plans sweeps in advance, pre-deprivation process is clearly practicable and constitutionally mandated.

For the foregoing reasons, we demand the City of Burlington cease its practice of evicting homeless individuals from public property without affirmatively providing them a place to shelter themselves. Additionally, the city must stop seizing and destroying residents’ property without adequate notice and a pre-deprivation opportunity to challenge the planned seizure and destruction. We ask that you please respond in writing to this letter to confirm that the City will act in accordance with the law as outlined herein.

If you have any questions, please do not hesitate to contact me at jdiaz@acluvt.org or 802-223-6304 ext. 113.

Sincerely,



Jay Diaz
Staff Attorney

Cc: Eileen Blackwood, City Attorney; Brandon del Pozo, Burlington Police Department Chief; Chapin Spencer, Director of Department of Public Works