

1 DAN SIEGEL, SBN 56400
2 ANNE BUTTERFIELD WEILLS, SBN 139845
3 EMILYROSE JOHNS, SBN 294319
4 SIEGEL, YEE & BRUNNER
5 475 14th Street, Suite 500
6 Oakland, California 94612
7 Telephone: (510) 839-1200
8 Facsimile: (510) 444-6698

9 Attorneys for Plaintiffs
10 CLARK SULLIVAN, JAMES BLAIR,
11 TOAN NGUYEN, ARIKA MILES,
12 and ADAM BREDENBERG

13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 CLARK SULLIVAN, JAMES BLAIR,
16 TOAN NGUYEN, ARIKA MILES, and
17 ADAM BREDENBERG,

18 Plaintiffs,

19 vs.

20 BAY AREA RAPID TRANSIT DISTRICT,
21 and CITY OF BERKELEY,

22 Defendants.

) Case No. C 17-06051 WHA

)

) **PLAINTIFFS' MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT OF MOTION FOR A**
) **PRELIMINARY INJUNCTION**

)

) Hearing: October 31, 2017

) Time: 9 a.m.

) Courtroom 8

)

) Case Filed: October 23, 2017

)

23 **INTRODUCTION**

24 "Everyone has the right to a standard of living adequate for the health and well-
25 being of himself and of his family, including food, clothing, housing and medical care
26 and necessary social services, and the right to security in the event of unemployment,
27 sickness, disability, widowhood, old age or other lack of livelihood in circumstances
28 beyond his control." *United Nations Universal Declaration of Human Rights, Article*
25.

1 "Stable housing is the foundation upon which people build their lives —
2 absent a safe, decent, affordable place to live, it is next to impossible to achieve
3 good health, positive educational outcomes or reach one's economic potential."
4 Statement on behalf of President Barack Obama, June 22, 2010.

5 Homelessness is a disgrace of 21st Century America. At the beginning of 2017,
6 there were 972 homeless people in Berkeley. The vast majority (76%) were residents of
7 Alameda County prior to becoming homeless. Only 32% of Berkeley's homeless were
8 housed in shelters; the other 68% (664 men, women, and children) were left to fend for
9 themselves on the street. Living in makeshift camps, vehicles, or in the doorways of
10 shops, Berkeley's homeless residents are exposed to cold, rain, street violence, and
11 officialdom's efforts to keep them from becoming too comfortable.

12 The courts have only recently begun to address the rights of our homeless
13 neighbors. In *Bell v. City of Boise*, 709 F.3d 890, 896 (9th.Cir. 2013), the Ninth Circuit
14 held that the courts had jurisdiction over the claims of homeless plaintiffs that their
15 Eighth Amendment right to be free of cruel and unusual punishment was violated by
16 the city's enforcement of its ordinances against camping and sleeping in public, given
17 the unavailability of overnight space in Boise's homeless shelters.

18 In *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1024 (9th.Cir. 2012), the Ninth
19 Circuit upheld the district court's injunction forbidding city police from seizing and
20 destroying unabandoned, but momentarily unattended, personal property.

21
22
23 **STATEMENT OF FACTS**

24 Plaintiffs are among the approximately 1000 homeless residents of the City of
25 Berkeley. Like two-thirds of Berkeley's homeless, they lack housing in available shelters.

26 For the past 10 months plaintiffs have lived in an "intentional community" of 20-
27 30 persons known as "HERE/THERE" at the intersection of Adeline Street, Stanford
28 Street, and Martin Luther King Jr. Way on the west side of the BART tracks in south

1 Berkeley. Members of the community have created and enforced a set of rules that,
2 among other things, forbid the use of alcohol and hard drugs.¹ Members of the
3 community enforce the rules against drug and alcohol use and maintain a safe
4 environment. No-one has died at the camp since it was established.

5 Members of the community keep the space clean. They are supported by
6 neighbors and the organization "Friends of Adeline," who have helped them by renting a
7 porta-potty, removing garbage, and installing solar panels. Some members of this
8 community hold jobs. Some have left it for permanent housing or shelters.

9 Of the current residents of HERE/THERE, xx were residents of Alameda County
10 before they lost their residences.

11 The City of Berkeley does not have shelter space for the plaintiffs and other
12 residents of their camp. The City's reports indicate that only 308 of the 972 homeless
13 people counted in Berkeley in January 2017 are in shelters.

14 Plaintiffs and other residents of HERE/THERE will have nowhere to go if they
15 are evicted. With cold and wet weather on the horizon, plaintiffs will suffer cruelly from
16 discomfort and the threat of illness. They will face an increased risk of being victimized
17 by street crime. New efforts to establish a camp will incur the risk of repeated evictions
18 and loss of property at the hands of the police.

19 The property where the HERE/THERE camp is established is open to the public.
20 A path used by walkers and bicyclists runs through the property. The property is not
21 posted against trespass.

22 On October 24, 2017, BART police served members of the community with a
23 "Notice of Trespass," claiming that they were trespassing on "private property" in
24 violation of California Penal Code §602(m) and ordering them to vacate the premises
25

26 _____
27 ¹ At the hearing of this matter on October 24, 2017, counsel mistakenly advised the
28 Court that the prohibition of drug use included forbidding the use of marijuana. Counsel
has since learned that his statement regarding marijuana use was incorrect and
apologizes to the Court for that error.

1 and "PERMANENTLY" remove all of their property "within 72 hours." The notice states
2 that property not removed within 72 "will be removed by BART." Plaintiffs reasonably
3 infer that they will be arrested and that their property will be seized and either
4 destroyed or damaged if they violate BART's order.

5
6 **STATEMENT OF LAW**

7 **I. PLAINTIFFS MEET THE STANDARDS FOR ISSUANCE OF A**
8 **PRELIMINARY INJUNCTION.**

9 "A plaintiff seeking a preliminary injunction must establish that he is likely to
10 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
11 preliminary relief, that the balance of equities tips in his favor, and that an injunction is
12 in the public interest." *Winter v. Natural Resources Defense Council, Inc.* (2008) 555
13 U.S. 7, 20. "In each case, courts 'must balance the competing claims of injury and must
14 consider the effect on each party of the granting or withholding of the requested relief.'"
15 *Id.* at 24, quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987).
16

17 Here, the evidence that plaintiffs will suffer irreparable injury if they are evicted
18 from the camp is clear. For the past 10 months, plaintiffs and other residents of
19 HERE/THERE have enjoyed the relative comfort of a clean, safe camp. Their alternative
20 is bleak - cold, wet, insecure, and dangerous conditions.

21 The balance of equities favors the plaintiffs as well. Members of the
22 HERE/THERE camp have conducted themselves in a responsible manner for the past
23 10 months. They should not be punished because their poverty and society's disregard
24 have forced them into homelessness. Eviction will clearly add to their misfortune.

25 Plaintiffs do not deny that their presence is inconvenient for BART and
26 unwelcome to some of their neighbors. But the Court is required to "balance the
27
28

1 equities." There can be little doubt that plaintiffs and the other members of
2 HERE/THERE will face far greater suffering from being evicted than BART, the
3 neighborhood, and society overall will face from their being allowed to stay.
4

5 As plaintiffs here demonstrate, they face the immanent violation of their rights
6 under the Eighth, Fourth, and Fourteenth Amendments. Unless this Court issues a
7 preliminary injunction to restrain the actions of police employed by the City of Berkeley
8 and the Bay Area Rapid Transit District, the plaintiffs will face their ejection, at pain of
9 arrest, from the camp they have called home for the past 10 months, and the risk that
10 their meager personal property will be seized and destroyed.

11 Plaintiffs need not wait until they have been arrested to invoke the Court's
12 jurisdiction. A party invoking a court's jurisdiction must "show that he personally has
13 suffered some actual or threatened injury as a result of the putatively illegal conduct of
14 the defendant, and that the injury fairly can be traced to the challenged action and is
15 likely to be redressed by a favorable decision." *Valley Forge Christian College v.*
16 *Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)
17 (citation and internal quotation marks omitted). In a suit for prospective injunctive
18 relief, a plaintiff is required to demonstrate a real and immediate threat of future injury.
19 *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (the threat must be " 'real and
20 immediate' " as opposed to " 'conjectural' or 'hypothetical' "). The key issue is whether
21 the plaintiff is "likely to suffer future injury." *Id.* at 105.
22

23 Here, plaintiffs have been threatened with eviction and face arrest if they refuse
24 to leave. They have been advised that their property will be seized if they do not leave.
25 Indeed, we know what will happen to them based upon BART's treatment of the
26 residents of a neighboring camp, who were evicted and whose property was seized on
27 the day following the Court's issuance of the temporary restraining order in this matter.
28 (Declaration of Grace Lin)

The remaining issue, of course, is whether plaintiffs are likely to succeed on the

1 merits of their claims. They now turn to these issues.

2 **II. PLAINTIFFS' EVICTION WILL RESULT IN VIOLATIONS OF**
3 **THEIR CONSTITUTIONAL RIGHTS.**

4 **A. Criminalizing homeless people who have no place to take**
5 **shelter violates their Eighth Amendment right to be free**
6 **from cruel and unusual punishment.**

7 "The Cruel and Unusual Punishment clause 'circumscribes the criminal process
8 in three ways: First, it limits the kinds of punishment that can be imposed on those
9 convicted of crimes ...; second, it proscribes punishment grossly disproportionate to the
10 severity of the crime ...; and third, it imposes substantive limits on what can be made
11 criminal and punished as such ..." *Bell v. City of Boise*, 993 F.Supp.2d 1237, 1242 (D.
12 Idaho 2014), quoting *Ingraham v. Wright*, 430 U.S. 651, 667-68. (The Supreme Court
13 cautioned in *Ingraham* that the third limitation should be applied sparingly." *Id.*)

14 For example, in *Robinson v. California*, 370 U.S. 660, 661, 666-67 (1962) the
15 Supreme Court ruled that imposing punishment on a person because of his status,
16 having the disease of narcotics addiction, would violate the Eighth Amendment. In the
17 same sense, punishing an individual who is involuntarily homeless would violate the
18 Eighth Amendment. In *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th.Cir.
19 2006), *vacated by settlement*, 505 F.3d 1006 (9th.Cir. 2007), the Ninth Circuit held
20 that an ordinance that criminalized sitting, lying, or sleeping in a public place at any
21 time of day was unconstitutional as applied to the homeless. The Court reasoned that
22 such behavior is an unavoidable consequence of being homeless without any available
23 shelter in the City of Los Angeles. *Id.*

24 In *Cobine v. City of Eureka*, 250 F.Supp.3d 423, 432 (N.D. Cal. 2017), Judge
25 White denied the City's motion to dismiss plaintiffs' Eighth Amendment claims based
26
27
28

1 on facts very similar to those presented here. After reviewing the same authorities
2 discussed above, the Court concluded that it would be necessary for the parties to
3 develop a complete factual record regarding the availability of adequate homeless
4 shelter space. The Court concluded that in the absence of available shelter space, the
5 City's enforcement of its anti-camping ordinance could be viewed as punishing
6 homeless people for their involuntary conduct.
7

8 Plaintiffs urge this Court to follow Judge White's reasoning in *Cobine*. Unlike the
9 situation in Eureka, it appears uncontestable here that the City of Berkeley does not
10 have shelter space available for plaintiffs and the other members of the HERE/THERE
11 camp. Allowing plaintiffs to be evicted or arrested for refusing to leave would violate
12 their Eighth Amendment right not to be punished because of their status and
13 involuntary conduct as homeless people. *Pottinger v. City of Miami*, 810 F.Supp. 1551,
14 1565 (S.D. Florida 1992), *remanded on a limited basis*, 40 F.3d 1155 (11th Cir.1994).
15 The Court should enjoin their eviction pending further developments and the creation
16 of an acceptable plan by the City of Berkeley to provide adequate shelter for its homeless
17 residents.
18

19
20 **B. Seizing the property of homeless people violates their**
21 **rights under the Fourth and Fourteenth Amendments.**

22 In *Lavan v. City of Los Angeles, supra* the district court issued a preliminary
23 injunction barring the City from "(1) Seizing property in Skid Row absent an objectively
24 reasonable belief that it is abandoned, presents an immediate threat to public health or
25 safety, or is evidence of a crime, or contraband; and (2) Absent an immediate threat to
26 public health or safety, destruction of said seized property without maintaining it in a
27 secure location for a period of less than 90 days." 693 F.3d at 1024. The purpose of the
28

1 injunction was not to interfere with the City's right to protect public health and safety,
2 but merely to prevent the City "from *unlawfully* seizing and destroying personal
3 property that is not abandoned without providing any meaningful notice and
4 opportunity to be heard." *Id.*, *emphasis in original*.

5
6 On appeal, the Court ruled "that the Fourth and Fourteenth Amendments protect
7 homeless persons from government seizure and summary destruction of their
8 unabandoned, but momentarily unattended, personal property." *Id.* The Court
9 recounted that this matter arose in the context of a settlement agreement that it had
10 approved in 2007, allowing the homeless to occupy the sidewalks of Skid Row. *Jones v.*
11 *City of Los Angeles*, 444 F.3d 1118 (9th Cir.2006), *vacated due to settlement*, 505 F.3d
12 1006 (9th Cir. 2007). The settlement, noteworthy as this Court considers further
13 proceedings in this matter, limits Los Angeles' ability to arrest homeless persons for
14 sleeping, sitting, or standing on public streets "until the City constructs 1250 units of
15 permanent supportive housing for the chronically homeless ..." *Jones v. City of Los*
16 *Angeles*, No. 03-CV-01142 (C.D.Cal. Sept. 15, 2008).

17
18 Explaining its decision, the *Lavan* court stated:

19
20 "The Fourth Amendment 'protects two types of expectations, one
21 involving "searches," the other "seizures." A "search" occurs when the
22 government intrudes upon an expectation of privacy that society is
23 prepared to consider reasonable. A "seizure" of property occurs when
24 there is some meaningful interference with an individual's possessory
25 interests in that property.' (citation omitted) Appellees need not show a
26 reasonable expectation of privacy to enjoy the protection of the Fourth
27 Amendment against *seizures* of their unabandoned property.

28 693 F.3d at 1027-28 (emphasis in original)

The Court further concluded that the seizure and destruction of the property of
homeless persons violated the due process clause of the Fourteenth Amendment. *Id.* at

1 1031-1033. "Any significant taking of property by the State is within the purview of the
2 Due Process Clause." *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). Once it is established
3 that a property interest is at stake, the court must then determine what procedures
4 constitute "due process of law." *Ingraham, supra*, 430 U.S. at 672.
5

6 The Ninth Circuit emphasized, "As we have repeatedly made clear, '[t]he
7 government may not take property like a thief in the night; rather, it must announce its
8 intentions and the give the property owner a chance to argue against the taking." *Id.*, at
9 1032, citing *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir.2008). Because
10 homeless persons' unabandoned possessions are "property" within the meaning of the
11 Fourteenth Amendment, the government must give such individuals notice and an
12 opportunity to be heard *before* depriving them of their property. *See also, Pottinger,*
13 *supra*, 810 F.Supp. at 1570-73.
14

15 CONCLUSION

16 Plaintiffs have demonstrated that they are likely to succeed on the merits, that
17 they are likely to suffer irreparable harm in the absence of preliminary relief, that the
18 balance of equities tip in their favor, and that an injunction is in the public interest.
19 Unless this Court issues a preliminary injunction, plaintiffs face the strong likelihood
20 that they will be evicted from their camp or be arrested for refusing to cooperate in their
21 eviction. Subjecting plaintiffs to arrest would violate their Eighth Amendment rights,
22 because doing so would punish them for their status as homeless people in a city that
23 does not have shelter space for them. Plaintiffs also show the likelihood that their
24 eviction would result in the loss or destruction of their personal possessions without
25 notice or an opportunity to be heard, in violation of the Fourth and Fourteenth
26 Amendments.
27
28

