UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

BRIAN CROTEAU, Sr., LARRY PRIEST and RICHARD PURSELL, on behalf of themselves and all others similarly situated, Plaintiffs, v. CITY OF BURLINGTON, Defendant.	Civil Action No. _____

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

INTRODUCTION

Dozens of unsheltered homeless people live in the City of Burlington (Defendant, hereinafter the "City"). They sleep outside year-round because there is no place for them to go. Burlington's emergency shelters are almost always full, temporary and permanent housing is unaffordable, and rental subsidies through Burlington Housing Authority have a years-long waitlist. Those who wind up stuck out on the streets do their best to shelter themselves by "camping" in tents or other temporary structures on public property; usually in the City's out-of-the-way wooded areas. Stephen Marshall, a voting member of the Chittenden County Homeless Alliance Steering Committee, estimates that at least 30 people currently sleep and shelter themselves in Burlington's wooded areas owned by the City. *See* Marshall Decl. ¶ 12.

Despite the lack of available shelter, the City on a regular basis forcibly "removes" individuals who sleep and shelter themselves on City property. To accomplish the "removal," the City threatens these residents with arrest for trespassing and with seizure of any personal

property remaining on City property if the residents do not vacate their camping area by a particular date. The City asserts its actions are in accordance with Vermont's trespass statute. *See* 13 § V.S.A. § 3705. And, over the course of several years, the City in this manner has repeatedly threatened homeless residents with arrest, seized personal property left behind, and destroyed the seized property.

Plaintiffs Brian Croteau, Larry Priest, and Richard Pursell, and putative class members, are homeless individuals sleeping and sheltering on City property because they have no other option. The City affirmatively bans them from sheltering in all other public places. *See e.g.* Burlington Code of Ordinances 22-7 ("Camping in Parks Prohibited"). The Plaintiffs have attempted to access emergency shelter and have repeatedly been turned away because those shelters are full. According to the City's policy, practice, and ordinances these individuals cannot lawfully sleep or shelter anywhere within City limits.

Plaintiffs Brian Croteau, Larry Priest, and Richard Pursell live in tents in a remote wooded area off of North Avenue in Burlington. The City plans to clear Plaintiffs' encampment on October 23, 2017 for violating 13 V.S.A. § 3705 on the City's remote wooded property. The City has served warnings and notices on multiple homeless encampments on the City's remote wooded property, including Plaintiffs' pursuant to13 V.S.A. § 3705. Despite the fact that winter and cold weather are fast approaching, the City has not provided shelter or other alternatives for Plaintiffs and members of the putative class. Instead, the City has threatened them with arrest, and the seizure and destruction of their property. See Diaz Decl. ¶ 12.

Like other unsheltered homeless people in the City, as a result of the City's enforcement of 13 V.S.A. § 3705, Plaintiffs are at imminent risk of being removed or arrested solely for

attempting to meet their basic human need for sleep and shelter. Further, Plaintiffs' property is at imminent risk of being confiscated and destroyed.

Because the City's policy and practice of enforcing the 13 V.S.A. § 3705 against the Plaintiffs and those similarly situated effectively criminalizes the status of homelessness, and such "status" crimes are unconstitutional under the Eight Amendment, the Court should temporarily enjoin the City from enforcing its policy, at least during the pendency of this matter. The Court should also temporarily enjoin the City's planned warrantless seizure and disposal of Plaintiffs' property because such acts would be unconstitutional under the Fourth Amendment.

The standard for granting a temporary restraining order and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure are identical. Generally, to obtain a preliminary injunction or a temporary restraining order, the moving party must demonstrate "(1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair grounds for litigation and a balance of hardships tipping decidedly in the movant's favor." *MyWebGrocer, L.L.C. v. Hometown Info., Inc.*, 375 F.3d 190, 192 (2d Cir. 2004).

Plaintiffs seek an Emergency Temporary Restraining Order prohibiting the City from enforcing Vermont's Trespass Statute codified at 13 V.S.A. § 3705 against themselves and all other unsheltered homeless people. The City has threatened Plaintiffs with arrest and prosecution if they do not vacate their shelters and leave public land before October 23, 2017. In a letter on October 6, 2017, Plaintiffs' counsel requested directly that the City not proceed with enforcing its policy against the Plaintiffs and those similarly situated, citing much of the caselaw included in this memorandum. *See* Diaz Decl. ¶ 3, Ex. 1. Plaintiffs' counsel requested a response. To date, the City has not responded.

Because Plaintiffs have nowhere else to shelter, Plaintiffs are likely to succeed on their claims that the City's forced removal will violate their Eighth and Fourth Amendment rights. Therefore, Plaintiffs request this Court grant an Emergency Temporary Restraining Order against the City to prevent Plaintiffs' imminent and irreparable harm and so that the status quo may be temporarily preserved. Granting Plaintiffs' Temporary Restraining Order will not harm the City and, in light of the fact that the Plaintiffs have nowhere else to shelter, the balance of hardships tips in favor of granting the Plaintiffs' motion.

SUMMARY OF ARGUMENT

The Eighth Amendment forbids criminalizing a status that "may be contracted innocently or involuntarily." *Robinson v. California*, 370 U.S. 660, 666–67 (1962). A law effectively criminalizes homelessness if it bans sleeping or camping in public, which is "involuntary and inseparable from" homelessness as long as emergency shelter beds are full. *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); *see also Kohr v. City of Houston*, No. 4:17-cv-1473, 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 other 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). Burlington's homeless shelter beds were full as of October 19, 2017. Plaintiffs and members of the putative class have nowhere else

to sleep or shelter in the City. Accordingly, to remove or prosecute unsheltered homeless people for camping on Burlington's public property would violate the Eighth Amendment.

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. As both the U.S. Supreme Court and the Second Circuit have opined, an individual's property in a public area can generally only be seized "if Fourth Amendment standards are satisfied . . . ." *Soldal v. Cook County, Ill.*, 506 U.S. 56, 68-69 (1992); *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). By summarily seizing, confiscating and disposing of Plaintiffs' personal property without a warrant and as part of its encampment removal process, the City violates Plaintiffs' Fourth Amendment rights.

BACKGROUND

I. Burlington Threatens to Remove, Arrest and Prosecute Unsheltered Homeless Residents for Sheltering on Public Property.

In addition to the imminent removal of Plaintiffs on October 23, 2017, the City, relying on 13 V.S.A. § 3705, has systematically sought to remove Plaintiffs and members of the putative class from camps on remote publicly owned land. In relevant part, 13 V.S.A. § 3705 provides that "[a] person shall be imprisoned for not more than three months . . . if, without legal authority or the consent of the person in lawful possession, he or she enters or remains on any land or in any place to which notice against trespass is given . . . ." 13 V.S.A. § 3705(a)(1).

Since at least 2014, the City of Burlington has had a policy and practice of using § 3705, to threaten to arrest homeless residents when they are found sleeping or camping on public property, despite city officials knowing the emergency shelters are full. These evictions result in the removal of any belongings that remain at the site, including tents, sleeping bags, and any

other property. The City does not provide an opportunity for people to challenge the seizure or retrieve their items after the seizure; instead it immediately discards the property.

Specifically, the City's camp eviction practice is to 1) review the "encampment" internally, 2) post a "notice to vacate" threatening arrest and seizure of property for anyone or anything remaining after a specified date, and 3) enter the area on the specified date and remove any persons or property that remain.

The standard "notice to vacate" states:

> "All people currently living or visiting this area without the permission of the Owner of this property (City of Burlington) are being given notice by the Owner that You are trespassing on the property and must take your things and leave and not return or face prosecution under 13 V.S.A. § 3705 for trespass and removal of the things you leave on the property."

Pursuant to § 3705 the City has adopted a policy and practice of threatening to arrest, removing, and/or prosecuting homeless people who are sheltering on publicly owned land. *See* Diaz Decl. ¶ 12. In addition, any property the City arbitrarily deems non-valuable and "abandoned," is "discarded" rather than stored in a way that would allow individuals to claim their property. *See* Diaz Decl. ¶ 8.

According to the Burlington Police Department (BPD), a police officer may cite or arrest people for violating 13 V.S.A. § 3705. *See* Priest Decl. ¶ 11. Because BPD officers have already issued written notices to vacate, there is no procedural barrier to an officer immediately arresting any resident of an encampment before, during, or after the October 23, 2017 removal date. *See* 13 V.S.A. § 3705. Further, there is currently nothing to prevent the City from unconstitutionally confiscating and destroying Plaintiffs' personal property as it has done in the past.

BPD officers have repeatedly threatened Plaintiffs and other residents of their encampment with arrest and prosecution pursuant to the City's policy and 13 V.S.A. § 3705.

These threats have been both written and verbal in press statements and in personal interactions. On October 2, 2017, BPD distributed another written threat to the named Plaintiffs. *See* Priest Decl. ¶ 12.[1] It stated: "Attention Campers [:] Notice to Vacate . . . you must take your things and leave and not return or face prosecution under 13 V.S.A. § 3705…[if you do not pick up your campsite] the City will remove the camp and all things left on the property on October 23, 2017." See Priest Decl. ¶ 12; see also Ex. 5.

II. Plaintiffs Are Involuntarily Sheltering on Public Land Because Burlington's Shelter Beds Are Full.

There are currently dozens of unsheltered homeless people in Burlington. *See* Marshall Decl. ¶¶ 12-13. "Unsheltered" means that a homeless person is living in a place unfit for human habitation, such as in the woods, on the street, or in a car. *See* Diaz Decl. ¶ 11 Ex. 4, n. 2. Both of the two shelters that currently operate in Burlington are full beyond capacity. The only shelter that maintains a waiting list, ANEW Place, has a long waiting list to access shelter there. Mr. Pursell is on the waitlist at ANEW Place. Plaintiffs Priest and Croteau Sr. have requested to be on the waitlist.

On October 19, 2017, Plaintiffs' contacted COTS, one of the two Burlington shelters. COTS was filled to capacity. *See* Croteau Decl. ¶ 12. ANEW Place, the second Burlington shelter, did not respond to inquiries but is consistently full and has a long waitlist. Each of the named Plaintiffs has called to get on the waitlist at ANEW Place. *See* Croteau Decl. ¶ 12; *see* Pursell Decl. ¶ 11; *see* Priest Decl. ¶ 10. One thing is clear: camping homeless residents who want to comply with a Notice to Vacate have nowhere else to go in the City. This is not an

[1] Plaintiffs have filed the following declarations in support of this motion: Declaration of Brian Croteau, Sr. in Support of Plaintiffs' Emergency Motion for Temporary Restraining Order ("Croteau Decl."); Declaration of Richard Pursell in Support of Plaintiffs' Emergency Motion for Temporary Restraining Order ("Pursell Decl."); Declaration of Larry Priest in Support of Plaintiffs' Emergency Motion for Temporary Restraining Order ("Priest Decl.").

uncommon or temporary problem—to the contrary, the shelters in Burlington have been regularly full for years. *See* Marshall Decl. ¶ 15.

III. Plaintiffs Require Emergency Temporary Relief from this Court To Protect Themselves from the City's Imminent Actions to Remove Plaintiffs and their Shelters.

As early as June 2016, Plaintiffs' representatives have repeatedly communicated their concerns about the City's policies to City officials, in the hopes of avoiding unnecessary litigation and arriving at an outcome that respects the rights and safety of Burlington's homeless population. *See* Diaz Decl. ¶ 10. The City, however, has refused to substantively respond or change their policy and practice. Accordingly, Plaintiffs' only available recourse for protecting the status quo and the Plaintiffs constitutional rights is the relief sought by this motion.

ARGUMENT

It is appropriate to protect the status quo with a preliminary injunction or temporary restraining order if the movant demonstrates "(1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair grounds for litigation and a balance of hardships tipping decidedly in the movant's favor." *MyWebGrocer, L.L.C. v. Hometown Info., Inc.*, 375 F.3d 190, 192 (2d Cir. 2004). Because the Plaintiffs meet this standard, their Emergency Motion should be granted.

I. Plaintiffs Will Suffer Irreparable Harm Through the Deprivation of Constitutional Rights in the Absence of an Emergency Temporary Restraining Order.

The Plaintiffs will suffer irreparable injury should the City enforce its written policy, practice, and/or notice to vacate pursuant to 13 V.S.A. § 3705. As discussed *infra*, the City's policy and actions pursuant to that policy will violate the Plaintiffs' constitutional rights, a violation that, "for even minimal periods of time, unquestionably constitutes irreparable injury."

See Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) (addressing First Amendment harms). The Second Circuit, reviewing an Eighth Amendment claim rooted in prison overcrowding, concluded that "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984); *see also Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (recognizing a "presumption of irreparable injury that flows from violation of constitutional rights"). As applied and on its face, the City's policy and practice pursuant to 13 V.S.A. § 3705 also threatens incarceration, loss of protective shelter, and loss of personal property. These irreparable harms aside, deprivation of Plaintiffs' constitutional rights under the Eighth and Fourth Amendments alone is sufficient to satisfy the irreparable harm component of the temporary restraining order standard.

II. Plaintiffs Are Likely to Succeed on the Merits Because Burlington Threatens to Violate Basic Constitutional Limitations on Punishment and Due Process.

Plaintiff can satisfy the second component of the temporary restraining order because the City has threatened Plaintiffs with enforcement of laws criminalizing camping on public land, even when those camping have no other place to sleep or shelter.[2] Plaintiffs are likely to succeed on the merits of their Eighth Amendment claim because criminalizing the Plaintiffs' basic life-sustaining activities effectively criminalizes the status of homelessness. *E.g., Jones*, 444 F. 3d 1118 (9th Cir. 2006) *vacated pursuant to a settlement agreement*, 505 F. 3d 1006 (9th Cir. 2007); *Kohr, 2017 WL 3605238, at *1-2; Bell v. City of Boise*, 834 F. Supp. 2d 1108 (D. Idaho 2011) *rev'd on other grounds*, 709 F. 3d 890, 898-901 (9th Cir. 2013); *Johnson*, 860 F. Supp. at 350; *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563–65 (S.D. Fla. 1992). Further, Burlington

[2] Burlington has an ordinance banning overnight camping in its parks. *See* Burlington Code of Ordinances 22-7 ("Camping in Parks Prohibited"). Obsturcting streets and sidewalks is also banned in Burlington. See Id. at 27-4 ("Unnecessary interference with use of sidewalk");

has threatened Plaintiffs with the confiscation of their private property. Plaintiffs are likely to succeed on the merits of their Fourth Amendment claim because seizing property without a warrant, absent exigent circumstances, is prohibited by the Fourth Amendment. *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.

A. Burlington Has Effectively Criminalized the Status of Homelessness in Violation of Plaintiffs' Eighth Amendment Rights.

1. The Eighth Amendment Prohibits Criminalizing the Involuntary Status of Homelessness and Involuntary "Acts" Inseparable from Homelessness.

The U.S. Supreme Court, the U.S. Department of Justice and several Circuit courts have made it clear that it is unconstitutional to attach criminal penalties to a status that "may be contracted innocently or involuntarily." *Robinson v. California*, 370 U.S. 660, 666–67 (1962). In *Robinson*, the Court addressed a California law that criminalized a person's ongoing existence as an addict. *Id.* at 666. The Court concluded that a person's ongoing existence as an addict could not be punished consistent with the Eighth Amendment and struck down the California law. *Id*. In doing so, the Court set forth the principle that the criminalization of a person's status violates the Eighth Amendment. *Id.*

Following *Robinson*, in 1968 the U.S. Supreme Court decided *Powell v. Texas*. 392 U.S. 514 (1968). In *Powell*, a majority of the justices agreed that a person cannot be punished for performing unavoidable acts in public if that person has "no place else to go." 392 U.S. 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" and being joined by three other justices). The justices' interpretation of *Robinson* rejected a rigid status/act distinction, instead focusing on the

voluntariness of the criminalized conduct. *See id.* at 548–51 (White, J., concurring in the judgment). While several justices expressed concern about limiting *Robinson*, a majority agreed that, at the very least, *Robinson* meant the state could not simply criminalize an involuntary status "under a different name" by criminalizing an associated involuntary act made necessary by one's involuntary status. *Id.* at 548 (White, J., concurring in the judgment) ("Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu . . . but permitting punishment for running a fever.").

Interpreting *Robinson* and *Powell*, courts have repeatedly enjoined laws that punish homeless people for sleeping or camping in public, holding that such laws effectively punish the status of homelessness itself. In each of these cases, the courts have focused on the fact that homelessness, like the status of being addicted to narcotics or alcohol, is an involuntary status – particularly when the need to shelter on public land is a result of the fact that no shelter beds are available. *See e.g.*, *Jones*, 444 F.3d at 1131; *Bell v. City of Boise*, 834 F. Supp. 2d 1108 (D. Idaho 2011), *rev'd on other grounds*, 709 F.3d 890, 898–901 (9th Cir. 2013); *Johnson*, 860 F. Supp. at 350; *Kohr, 2017 WL 3605238, at *1-2; Anderson*, 2009 WL 2386056, at *7.

The U.S. Department of Justice (DOJ) has also taken the position that enforcing a homeless camping ban on public land, as Burlington has done and intends to do in this case, "amounts to criminalization of homelessness, in violation of the Eighth Amendment." *See* Diaz Decl. ¶ 14, Ex. 7 (Statement of Interest of the United States 4, *Bell v. City of Boise*, No. 09-cv-0540 (D. Idaho Aug. 6, 2015), ECF No. 276 (endorsing the reasoning in *Jones*)). Citing the U.S. Supreme Court's decisions in *Robinson* and *Powell*, as well as the Ninth Circuit's decision in *Jones*, the DOJ asserted that where a homeless person has no other option but to sleep in public (as a result of a lack of local shelter beds or access to other lawful residence), prohibiting the

"act" of sleeping and taking shelter violates the Eighth Amendment because it "amounts to the criminalization of homelessness." *Id.* The DOJ argued that *Powell* forbids punishing homeless people for "unavoidable consequences of being human"—even if they are technically "acts," like sleeping—if there are not enough emergency shelter beds available to homeless people on the street. *Id*. The City's policy and practice of banning camping and confiscating personal property and its enforcement of 13 V.S.A. § 3705 in this case are no different.

While the Second Circuit has yet to rule on this specific issue, a host of other courts have concluded that city actions similar to those Burlington intends to take violate the Eighth Amendment. In *Jones*, the Ninth Circuit struck down a Los Angeles ordinance that criminalized homelessness by banning sleeping in public. 444 F.3d at 1132, 1136. The *Jones* court interpreted *Robinson* and *Powell* to conclude that the Eighth Amendment protects acts that are "involuntary and inseparable from" homelessness. *Id.* This standard acknowledges that a majority of the justices in *Powell* rejected a strict status/act distinction, but narrows the focus to acts that are essentially a proxy for status. *See* Diaz Decl. ¶ 14, Ex. 7 (Statement of Interest of the United States 4, *Bell v. City of Boise*, No. 09-cv-0540 (D. Idaho Aug. 6, 2015), ECF No. 276 (endorsing the reasoning in *Jones*)). Applying this standard, the *Jones* court held that it was unconstitutional to punish homeless people for sleeping, an act that by definition is universal, simply because a homeless person has no other choice but to sleep and shelter on public land. *Jones*, 444 F.3d at 1136. As is the case here in Burlington, the Ninth Circuit explained that homelessness in Los Angeles was involuntary because the number of unsheltered homeless people exceeded the number of available emergency shelter beds. *Id.* at 1141. And, further, sleeping outside is involuntary and inseparable from unsheltered homelessness because sleeping is a "universal . . . consequence of being human." *Id.* at 1136. Therefore, criminalizing the act of sleeping on public

land, as the City of Burlington attempts to do here, is tantamount to criminalizing one's status as homeless – in contravention of the Eighth Amendment.

This reasoning is consistent with that of many other courts confronting laws that criminalize homelessness. These courts have concluded that the involuntariness of acts necessitated by one's status is "the critical factor" for triggering Eighth Amendment protection. *Cobine v. City of Eureka*, No. 16-cv-2239, 2017 WL 1488464, *4 (N.D. Cal. Apr. 25, 2017); *Bell*, 834 F. Supp. 2d at 1108; *Pottinger*, 810 F. Supp. at 1563–65; *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, *7–*9 (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).

Sheltering, too, is an involuntary basic human need that cannot be criminalized for those with no other place to go. The U.S. Supreme Court, explainined that shelter is among the "basic human needs." *Helling v. McKinney*, 509 U.S. 25, 32 (1993). As cited to previously, other courts faced with challenges to camping bans have reached similar conclusions. *Cobine*, 2017 WL 1488464, at *4 (holding camping is conduct that, depending on shelter capacity, "may be involuntary"); *Anderson*, 2009 WL 2386056, at *7 (describing a camping ban as criminalizing "the involuntary and innocent conduct of sleeping on public property"). As a human necessity, sheltering is central to the Plaintiff's status as homeless because, by definition, they have no other shelter available to shield them from the elements.

In the context of prisons, the U.S. Supreme Court explained that the Constitution requires adequate shelter. *Helling*, 509 U.S. at 32. The Second Circuit applied *Helling* in explaining that "prisoners may not be denied 'the minimal civilized measure of life's necessities' . . . [and that]

[u]nder the Eighth Amendment, States must not deprive prisoners of their 'basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety.'" *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting *Helling*, 509 U.S. at 32). There can be little dispute that homeless people also have the same basic human need for shelter as prisoners, and the City cannot punish people for attempting to innocently and involuntarily meet that basic need.

2. Burlington's Policy and Practice Criminalizes the Status of Homelessness in Violation of the Eighth Amendment.

The named Plaintiffs and those similarly situated are struggling to survive without available or affordable indoor shelter. Mr. Croteau, Mr. Priest, Mr. Pursell, and the putative class members, have no choice but to sleep and shelter themselves outside. They lack the resources to pay for temporary or permanent indoor residence. *See* Croteau Decl. ¶ 10; *see* Pursell Decl. ¶ 9; *see* Priest Decl. ¶ 8. Burlington's shelter beds are consistently and currently full. *See* Marshall Decl. ¶ 15-17. After having received the City's Notice to Vacate, Plaintiffs literally have nowhere to legally sleep or shelter. *See* Croteau Decl. ¶ 22; *see* Pursell Decl. ¶ 22; *see* Priest Decl. ¶ 21 In short, the unsheltered homeless Plaintiffs and those similarly situated truly have "no place else to go." *Powell*, 392 U.S. 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"); *see, e.g.*, *Jones*, 505 F.3d at 1141; *Johnson*, 860 F. Supp. at 350.

Burlington's policy and practice in enforcing 13 V.S.A. § 3705 violates the Eighth Amendment as applied to unsheltered homeless people such as Plaintiffs and members of the putative class. This conclusion is consistent with other challenges to sleeping and camping bans: cities enforcing such bans against unsheltered homeless people have either backed down or lost, repeatedly, because of their lack of emergency shelter beds. *Jones*, 444 F.3d at 1131–32 (affirming injunction); *Bell*, 834 F. Supp. 2d at 1111–14 (discussing city's promise to refrain

from enforcement); *Cobine v. City of Eureka*, No. 16-cv-2239, 2016 WL 1730084, *6 (N.D. Cal. May 2, 2016) (discussing city's promise to provide sufficient shelter beds); *Cross v. City of Sarasota*, 2016 WL 3476421 (M.D. Fla. settled June 22, 2017) (agreeing to limit enforcement in settlement); *Lightsey v. City of Manteca*, No. 2:15-cv-2368 (E.D. Cal. filed Nov. 13, 2015) (settling with Plaintiffs); *Ryden v. City of Santa Barbara*, No. 09-cv-1578 (C.D. Cal. settled Sept. 15, 2009) (agreeing to fund affordable housing and refrain from enforcement); *Siprelle v. City of Laguna Beach*, No. 08-cv-1447 (C.D. Cal. settled June 25, 2009) (repealing ordinance and settling); *Spencer v. City of San Diego*, No. 04-cv-2314 (S.D. Cal. May 2, 2006) (agreeing to limit enforcement in settlement); *Johnson*, 860 F. Supp. at 349–50 (enjoining enforcement); *Pottinger*, 810 F. Supp. at 1565 (same).

The constitutional message underpinning these decisions is crystal clear: it is cruel to punish homelessness. To permit local governments such as the City to criminalize the mere presence of entire classes of people sheltering from the impending winter on public land is tantamount to designating them as second-class citizens. This sort of status-based punishment is prohibited by constitutional principles and controlling law.

In short, courts from across the country have agreed that it is unconstitutional to criminalize sleeping or sheltering on public land when there is nowhere else for a homeless person to go. The City of Burlington cannot prohibit Plaintiffs from sheltering themselves on public land because Plaintiffs' doing so is innocent, involuntary, and inseparable from their status as homeless. The City's policy and practice violates the Eighth Amendment.

B. Burlington's Policy and Practice of Confiscating and Destroying the Personal Property of Homeless Residents Violates Plaintiffs' Fourth Amendment Rights.

The Fourth Amendment "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. 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 it 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.

In a case largely similar to this one, 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. *Pottinger*, 810 F. Supp. at 1570-73. "'The government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking.'" *Lavan*, 693 F.3d at 1032 (quoting *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008)).

Here, the City has a policy and practice of discarding personal property while dismantling the camps of homeless residents. *See* Diaz Decl. ¶¶ 8, 12. (referencing the city's conclusion that any property of homeless campers remaining on public land after a noticed date to vacate is *de facto* abandoned or garbage.) ("Instead of criminalizing [sic] the homeless for [the criminal act

of dumping on city land] we may elect to discard the property they have dumped"). City officials have asserted their intent to seize and destroy property in their correspondence, their notices, and official news releases. *See* Diaz Decl. ¶¶ 8, 12. The City has discarded property in previous camp sweeps and, consistent with the Notice to Vacate directed at the named Plaintiffs, is likely to do so again on October 23, 2017 when it removes Plaintiffs' camp. Plaintiffs have materials they use to shelter themselves and maintain basic human functions including tents, sleeping bags, blankets, bureaus to protect their clothes, clothing, other personal effects, and bicycles for transportation. *See* Croteau Decl. ¶ 15; *see* Pursell Decl. ¶ 14; *see* Priest Decl. ¶ 13. They cannot carry all of their personal property at one time. See *See* Croteau Decl. ¶ 16; *see* Pursell Decl. ¶ 15; *see* Priest Decl. ¶ 14. They have nowhere to store their personal property, except outside on public land. With no place available to legally store their property, the City policy and practice leaves the Plaintiff's and those similarly situated with no choice but to continuously risk seizure and destruction of their property.

The City is forcing Plaintiffs to decide between two untenable options: They may stay and protect their personal property in the face of arrest and prosecution, or leave and have any property that they are unable to carry away arbitrarily and summarily confiscated and disposed of by the City. The Constitution does not permit the City to put Plaintiffs in this bind. Because the City's policies and intended actions violate the Fourth Amendment, the City must be restrained to prevent the destruction of the Plaintiffs' and putative class members' property.

III. Vindicating Plaintiffs' Constitutional Rights Is in the Public Interest, and Will Not Harm the City

The final factor to consider in issuing a temporary restraining order is the balance of hardships. *MyWebGrocer, L.L.C. v. Hometown Info., Inc.*, 375 F.3d 190, 192 (2d Cir. 2004). Here, the balance of hardships weighs heavily in favor of a temporary restraining order.

"The purpose of a temporary restraining order is to preserve an existing situation in status quo until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction." *Pan Am. World Airways, Inc. v. Flight Engineers' Int'l Ass'n, PAA Chapter, AFL-CIO*, 306 F.2d 840, 842 (2d Cir. 1962).

In this case, the status quo is that Plaintiffs and those similarly situated be allowed to continue occupying their camps, which are their only available source of shelter, without being arrested or prosecuted and without having their property seized or destroyed. A restraining order will preserve the status quo, assuring Plaintiffs that they will have a place to shelter as winter approaches so that they can go about their ordinary lives until the Court can render judgment on the legality of the City's actions.

If this temporary restraining order causes any injury to the City whatsoever, it is miniscule in comparison to the fact that forcing Plaintiffs out of their only shelter and potentially confiscating said shelter and sheltering implements just as winter approaches and temperatures drop may cause life-threatening harm and human suffering. These concerns are not merely hypothetical—homeless individuals have died in recent years apparently due to exposure to the elements. *See* Molly Walsh, *Homeless Man's Death Triggers Shelter Talk*, Burlington Free Press (DATE) (available at http://www.vtaffordablehousing.org/news/wp-content/uploads/2011/12/paul-otoole-death.pdf) (highlighting a recent example of a homeless person freezing to death in Burlington apparently because he had no place to shelter during the winter). Risk of freezing aside, without a temporary restraining order, the Plaintiffs' harms will also include violation of constitutional rights, prosecution, arrest, jail time, and warrantless seizure and destruction of personal possessions. Plaintiffs and members of the putative class have been sheltering on this public land for up to half of the previous year, with others present in the

same location long before their arrival. During that time, it does not appear that this sheltering has harmed the City in any material way. In other words, the City has no urgent need to remove the Plaintiffs' from their camp on Monday, October 23, 2017.

Plaintiffs' requested relief would not prevent Defendants from promoting their publicly stated and laudable goals of reducing homelessness and protecting public health and safety – the City could still work to improve health and safety within the City, including Plaintiffs' camps. Rather, a temporary restraining order would simply preserve the status quo, preventing any constitutional violations until the Court, with the benefit of full briefing and argument, can rule on a motion for a preliminary injunction.

CONCLUSION

As applied to the Plaintiffs and putative class members, the City's policy, practice and enforcement of 13 V.S.A. § 3705 criminalizes the status of homelessness in violation of Plaintiffs' Eighth Amendment rights. Furthermore, the City's policy, practice and enforcement of 13 V.S.A. § 3705 violates Plaintiffs and class members Fourth Amendment rights when it results in the destruction of their personal property. Plaintiffs respectfully request that this Court enjoin Burlington from continuing its policy and practice or enforcing 13 V.S.A. § 3705 as outlined in the attached proposed emergency temporary restraining order, until such time as the Court can rule on the preliminary injunction.

Respectfully Submitted,

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