



December 15, 2015

Board of Supervisor Todd Spitzer, Chair
Board of Supervisor Lisa A. Bartlett, Vice Chair
Board of Supervisor Andrew Do
Board of Supervisor Shawn Nelson
Board of Supervisor Michelle Steel

Via Email

Dear Orange County Board of Supervisors,

We write to express our concerns about the County's plan to partner with local police departments to move homeless people out of the Santa Ana riverbed before the forecasted El Niño storms. Certainly, county officials are right to take seriously the public safety risks in the riverbed. But the typical strategy of county departments, including the Sheriff's Department and Orange County Public Works, to sweep through the riverbed, impound or discard people's belongings, cite people for sleeping, and order them to move along, is unconstitutional under the Eighth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment.

The Eighth Amendment proscribes the infliction of cruel and unusual punishment. In addition to "limit[ing] the kinds of punishments that can be imposed on those convicted of crimes," the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such . . ." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). The homeless people living in the riverbed are in large part chronically homeless – those with mental or physical disability who experience long-term or repeated homelessness. The County cannot criminalize people for being disabled and/or homeless by giving them citations for sleeping, resting, or lying down with their belongings – innocent activities they cannot avoid. Here, if the County cites persons in the riverbed for being homeless, a chronic condition which these individuals acquired innocently and involuntarily, the County is punishing them because of their status alone, which is beyond the power of the government to do. *See Robinson v. California*, 370 U.S. 660, 666 (1962).

Moreover, although we recognize that the County is attempting to provide homeless people in the riverbed with emergency shelter during a storm, these individuals currently have no legal place to sleep and will continue to be homeless on the days when emergency shelter space is not available to them. As you may be aware, shelter and transitional housing can only accommodate *about half* of all people experiencing homelessness, leaving the other half – over two thousand people on any given night – sleeping out of doors. Despite the County's recent request for proposals to provide an additional 440 beds for emergency purposes during a storm, the County

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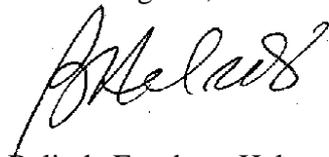
Chairs Emeriti Danny Goldberg Allan K. Jonas* Burt Lancaster* Irving Lichtenstein, MD* Jarl Mohn Laurie Ostrow* Stanley K. Sheinbaum Stephen Rohde
*deceased

only has enough permanent affordable housing for one in ten of all persons experiencing homelessness. And market rate housing is simply out of reach. Bringing along outreach workers and handing people lists of shelters and programs is not enough because these shelters and programs are full or not appropriate for some individuals, especially those that experience mental illness. As one county outreach worker told us, “It’s easy to get people out. It’s harder to find them a place to live.” Indeed, the presence of homeless encampments in the Santa Ana riverbed is a poignant indicator of the critical shortage of emergency shelter and permanent supportive and affordable housing in Orange County.

That said, if the County cites homeless individuals living in the riverbed during these anticipated sweeps, the County will also violate the Eighth Amendment by criminalizing the unavoidable act of sleeping while being involuntarily homeless and mentally or physically ill or disabled. In *Jones v. City of Los Angeles*, 444 F.3d 1118, 1132 (9th Cir. 2006), the Ninth Circuit applied the principle articulated in *Robinson*, 370 U.S. at 666 – that the Eighth Amendment prohibits punishment based on a person’s “status” – and held the city could not enforce the ordinance against homeless individuals for involuntarily sitting, lying, and sleeping in public when the number of homeless persons in the city surpassed the number of shelter beds.¹ Here, the County would be criminalizing the act or condition of sleeping outdoors in public places. Such acts, however, are “universal and unavoidable consequences of being human.” *Jones*, 444 F.3d at 1136. The homeless individuals living in the riverbed have no choice but to sleep in public because they cannot access a legal place to sleep. Therefore, sleeping in public is “involuntary and inseparable from” their status or condition of being homeless, and the County’s criminalization of such violates the federal Constitution.

We strongly urge you to follow the law and respect the constitutional rights of those individuals who are homeless and living in Orange County. If you have any questions or wish to discuss this issue further, please feel free to contact me at (714) 450-3962, ext. 102 or becobosahelzer@aclusocal.org.

Kindest regards,



Belinda Escobosa Helzer
Director, Orange County and Inland Empire Offices

¹ Although the *Jones* decision was vacated pursuant to a settlement agreement between the parties, 505 F.3d 1006 (9th Cir. 2007), its logic reasoning, and analysis of Supreme Court precedent remains sound and persuasive. The U.S Department of Justice has recently supported the reasoning in *Jones* and urged its adoption. U.S. Dept. of Justice Stmt of Interest Br. at 4, *Bell v. City of Boise*, No. 1:09-cv-540 (D. Idaho Aug. 6, 2015).

