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August 11, 2015

VIA HAND DELIVERY AND E-MAIL

Councilmember Jose Huizar, Co-Chair

Councilmember Marqueece Harris-Dawson, Co-Chair

Los Angeles City Council
Los Angeles City Hall
200 North Spring Street
Los Angeles, CA 90012

Re: LAMC Section 56.11
Council File 14-1656

Dear Co-Chairmen Huizar and Harris-Dawson and Members of the Los Angeles City Council:

We write on behalf of our pro bono client, the Los Angeles Community Action Network,[1] to express grave concern with Ordinance No. 183762, amending LAMC Section 56.11 to prohibit the placing of personal possessions on public property, which the Council passed on June 23, 2015, and which became effective on July 18, 2015, when the Mayor

[1] The Los Angeles Community Action Network is a community based organization of extremely low-income and homeless people that primarily live in Downtown LA and South Central LA. Its mission is to help people dealing with poverty create and discover opportunities and to have a voice in the decisions that are directly affecting the organization's membership.

determined to allow the Ordinance to become law. We urge the Council to revisit and rescind its passage of this unconstitutional ordinance as soon as possible, and for the Homelessness and Poverty Committee to begin that task on Wednesday, August 12, 2015.

In the past two decades, courts have repeatedly struck down attempts by the City to seize homeless individuals' personal property. The current ordinance—which authorizes the City's confiscation of medications, food, legal documents, basic shelter, clothing, and any other personal property placed on public property—ultimately will fare no better in the courts because it is patently unconstitutional. The proposed amendments to Section 56.11 before the Committee on August 12, 2015, will do absolutely nothing to change that fact.

In *Lavan v. City of Los Angeles*, homeless individuals sued successfully to stop the City's practice of seizing and destroying property left momentarily unattended by homeless individuals while they performed necessary tasks such as eating and showering.[2] Although the individuals had not actually abandoned their property—and the City did not have a good-faith belief that they had—the City nonetheless seized and destroyed the individuals' mobile shelters and carts, thereby permanently depriving them of their possessions. The federal district court enjoined the City from "[s]eizing property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband."[3] The Ninth Circuit affirmed, holding that a homeless individual's unabandoned possessions are constitutionally-protected "property" under the Fourth and Fourteenth Amendments, and that homeless persons are constitutionally protected from the seizure and summary destruction of their momentarily unattended personal property, even where such individuals have violated a city ordinance.[4]

The Ordinance contains many of the same legal defects as those at issue in *Lavan*. The most significant of those defects are the following:

(1) The Ordinance violates the Fourth Amendment. Homeless people have a property right in their belongings and the right to be free from unreasonable seizure. The seizure authorized by the Ordinance is unreasonable because it allows for the destruction or effective destruction of property, often without notice and without providing an opportunity first to comply with the Ordinance. Critically, the property to be seized includes medication, legal documents, bedding, and shelter—items of the highest importance to the owners. The proposed amendment removing specific reference in the definition of "Personal Property" to "personal items such as luggage, backpacks,

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[2] 797 F. Supp. 2d 1005, 1020 (C.D. Cal. 2011), *aff'd*, 693 F.3d 1022 (9th Cir. 2012).

[3] *Id.*

[4] *Lavan*, 693 F.3d at 1024-29.

clothing, documents and medication, and household items" will have absolutely no legal effect. Such items will still constitute "tangible property" and personal property as that term is understood in our laws.

(2) The Ordinance violates procedural due process rights under the Fourteenth Amendment. Given the importance of the interests at stake, the notice and hearing provisions of the Ordinance are constitutionally deficient.

(3) The Ordinance violates substantive due process rights under the Fourteenth Amendment because it allows for the confiscation of medication and critical documents. By seizing those possessions, the City affirmatively places homeless people in danger and exposes itself to danger-creation liability.

(4) The Ordinance criminalizes homelessness in violation of the Eighth Amendment by imposing criminal penalties for failing to comply, even when compliance is impossible.

(5) The Ordinance is unconstitutionally vague because it does not put ordinary people on notice as to what is meant by "storage" or "attended property," among other terms, allowing for discriminatory enforcement.

(6) The Ordinance will have severe consequences for immigrants, in particular for those otherwise eligible to seek deferred action for childhood arrivals ("DACA"); family members of citizens and permanent residents seeking adjustment of status; and applicants for naturalization.

As explained below, the proposed Amendments are purely cosmetic and do not eliminate the constitutional violations inherent in the Ordinance. We urge you to withdraw the Ordinance and avoid subjecting the City to ongoing legal liability.

1. The Ordinance Violates the Fourth Amendment

The Fourth Amendment to the Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The law is clear that the Fourth Amendment protects homeless people from unreasonable seizures of their property.[5] Homeless individuals have a property interest in their belongings, whether or not those belongings are momentarily unattended.[6] They retain such a property interest even when their property is in a public space; their possessory interest

[5] *Lavan*, 693 F.3d at 1027-28.

[6] *Id.*; *United States v. Jones*, 132 S.Ct. 945, 950-51 (2012)

does not depend on a reasonable expectation of privacy, although they may have one.[7] Nor is this property interest annulled when an ordinance is in effect. "Violation of a City ordinance does not vitiate the Fourth Amendment's protection of one's property. Were it otherwise, the government could seize and destroy any illegally parked car or unlawfully attended dog without implicating the Fourth Amendment."[8]

A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property."[9] When police seize property belonging to homeless people, like the seizure proposed in the Ordinance, it must be reasonable in order to be constitutional.[10] To determine whether a seizure was reasonable, courts perform "a careful balancing of governmental and private interests."[11]

a. The seizure permitted by the Ordinance is unreasonable because it amounts to destruction of property

In *Lavan*, the Ninth Circuit held that seizing and destroying the unabandoned possessions of homeless people is an unreasonable seizure in violation of the Fourth Amendment.[12] The Ninth Circuit approved the District Court's determination that, when balancing the possessory interests of homeless people with the City's interest in keeping the City "clean and safe," the seizure of property was unreasonable.[13] The seizure and destruction of such possessions is "likely to displace homeless individuals and threaten their ability to access charities for food,

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[7] *Id.*; *Lavan*, 693 F.3d at 1028-29 and n.6; *Miranda v. City of Cornelius*, 429 F.3d 858, 862 (9th Cir. 2005).

[8] *Lavan*, 693 F.3d at 1029; *Miranda*, 429 F.3d at 864 ("the decision to impound pursuant to the authority of a city ordinance and state statute does not, in and of itself, determine the reasonableness of the seizure under the Fourth Amendment, as applied to the states by the Fourteenth Amendment.").

[9] *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) (internal citations omitted).

[10] *Carr v. Oregon Dep't of Transp.*, 2014 WL 3741934 *3 (D. Or. July 29, 2014) ("Removing a homeless person's unattended but unabandoned property is just such an interference."). "A seizure becomes unlawful when it is 'more intrusive than necessary.'" *Ganwich v. Knapp,* 319 F.3d 1115, 1122 (9th Cir. 2003) (quoting *Florida v. Royer,* 460 U.S. 491, 504 (1983)).

[11] *Soldal*, 506 U.S. at 71 (internal citation omitted); *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose,* 402 F.3d 962, 975 (9th Cir. 2005) (quoting *Graham v. Connor,* 490 U.S. 386, 396(1989)). (To determine whether a seizure was reasonable, courts "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.")

[12] *Lavan*, 693 F.3d at 1031.

[13] *Id.* at 1030; *Lavan*, 797 F. Supp. 2d at 1015.

shelter, and assistance in Skid Row," making the seizure unreasonable notwithstanding the City's interest "in keeping public areas clean and prosperous."[14]

The Ordinance permits the seizure and immediate destruction of "bulky items," which include any object that is "too large to fit in one of the City's 60-gallon trash container with the lid closed." LAMC 56.11(2)(c). This includes bicycles, strollers, mattresses, carts, and many other common items critical to the survival of homeless people. There is no exception under *Lavan* that permits the immediate destruction of "bulky items," nor does its logic permit such an exception.

Moreover, from the perspective of homeless people, seized property that is placed into storage is functionally destroyed. Seized property is transported to storage facilities located near Skid Row.[15] For many individuals, those facilities are inaccessible, as about 80% of homeless people live nowhere near downtown.[16]

Even for those individuals who live in Skid Row, retrieving possessions from storage may be impossible because they lack transportation and conveyance that would allow them to gather and move the possessions. The inaccessibility of the storage facility is confirmed by news reports that, when items are seized and impounded, only a small fraction of them are ever claimed.[17] Only three to five people per month retrieve their property, and the vast majority of seized property is ultimately destroyed.[18]

b. The seizure permitted by the Ordinance is unreasonable because individual interest in possessions is at its highest in these circumstances

Property need not be destroyed upon seizure to make that seizure unreasonable, nor did the *Lavan* court so hold.[19] Courts have found that seizing and storing property is unreasonable

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[14] *Id.*

[15] "Lack of storage makes homeless camp clean-up laws toothless," http://www.scpr.org/news/2015/07/01/52788/unclear-how-new-homeless-camp-clean-ups-laws-will/

[16] Los Angeles Homeless Services Authority, 2015 Greater Los Angeles Homeless Count, Council Districts, http://www.lahsa.org/homelesscount_cd

[17] "Lack of storage makes homeless camp clean-up laws toothless," http://www.scpr.org/news/2015/07/01/52788/unclear-how-new-homeless-camp-clean-ups-laws-will/

[18] http://www.scpr.org/news/2015/07/01/52788/unclear-how-new-homeless-camp-clean-ups-laws-will/ ; http://www.marketplace.org/topics/wealth-poverty/skid-row-storage-helps-put-order-lives-homeless

[19] 693 F.3d at 1030 (emphasis added) ("[*E*]*ven if* the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizures unreasonable.")

when the individual's interest in the possessions is high and the government's interest low.[20] *Sandoval v. County of Sonoma*[21] is instructive as to how courts perform this analysis. That case involved the impounding of a car for 30 days from an individual who was driving without a license.[22] The court first considered the nature of the individual's interest in driving a car and found it to be significant.

> An individual has a significant interest in possessing the vehicle he owns. "The private interest in the uninterrupted use of an automobile is substantial. A person's ability to make a living and his access to both the necessities and amenities of life may depend upon the availability of an automobile when needed."[23]

Despite the fact that "Ruiz had repeatedly been convicted of driving without a California license," the court found that "Ruiz's interest in possession outweighs the government's interest in the warrantless impoundment of his vehicle for thirty days."[24] Ruiz's interest in "access to both the necessities and amenities of life" outweighed the county's interest in "protect[ing] the public from an unsafe driver," particularly where the county was willing to release the car to him after 30 days and the county had alternative means to achieve its goal.[25]

Here, the seized property is even more important than an object that provides "*access* to both the necessities and amenities of life," as in *Sandoval*; here, the property *is* the necessities and amenities of life for its homeless owners. "For many of us, the loss of our personal effects may pose a minor inconvenience. However, . . . the loss can be devastating for the homeless."[26]

The Ordinance defines "Personal Property" in the broadest possible sense as "any and all tangible property, and includes, but is not limited to, goods, materials, merchandise, tents,

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[20] *Lavan*, 797 F.Supp.2d at 1015; *See Lavan*, 693 F.3d at 1030 (approving district court's analysis).

[21] 72 F. Supp. 3d 997 (N.D. Cal. 2014).

[22] *Id.* at 1000.

[23] *Id.* at 1010 (quoting *Stypmann v. City and Cty. of San Francisco,* 557 F.2d 1338, 1342–43 (9th Cir. 1977)).

[24] *Id.* at 1010.

[25] *Id.* at 1010-11.

[26] *Lavan*, 693 F.3d at 1032 (quoting *Pottinger v. City of Miami,* 810 F. Supp. 1551, 1559 (S.D.Fla.1992)). The particularly strong interest of homeless people in their possessions distinguishes such individuals from the plaintiffs in *De-Occupy Honolulu v. City and Cty. of Honolulu*, No. CV 12-00668 JMS, 2013 WL 2285100 * 6 (D. Hawaii May 21, 2013), and *Watters v. Otter*, 955 F. Supp. 2d 1178 (D. Id. 2013). Those cases involved protestors belonging to the "Occupy Wall Street" movement, and presented no evidence that they were homeless and unable to comply with the law, or that any of the items seized were critical to their livelihood, health, or ability to find shelter.

tarpaulins, bedding, sleeping bags, hammocks, personal items such as luggage, backpacks, clothing, documents and medication, and household items." LAMC § 56.11(2)(g). The Ordinance thus allows for the seizure of the "homes" of the homeless, many of whom sleep in the tents and sleeping bags specifically mentioned.[27]

The Ordinance also expressly allows for the seizure of smaller items such as medications and documents. These possessions may quite literally be a matter of life and death for their owners. If the use of a car is deemed essential to making a living and accessing the "necessities and amenities of life," all the more important are those necessities and amenities themselves. It is impossible to conceive of circumstances in which the seizure of such possessions, when not abandoned, would be reasonable.

In contrast, the City's interest in achieving the goals of the Ordinance cannot outweigh the vital importance of the property to the homeless owners. A city's interest in "keeping public areas clean and prosperous" is insufficient to make such a seizure reasonable.[28]

c. The proposed amendments do not cure the deficiencies of the Ordinance

Two of the proposed amendments appear aimed to address, but still do not rectify, the most egregious aspects of the Ordinance with respect to the Fourth Amendment.

- Amendment to subsection (2)(g). There is no conceivable situation in which it would be reasonable to seize unabandoned medications, legal documents, and other essential personal items. In such cases, the individual interest in those documents is at their peak, as the interest is often literally a matter of life and death. In contrast, the government interest is low, as the stated concerns regarding the use of public space and cleanliness are less pressing with respect to small personal items that can be carried away on demand.

  Amending the definition of "Personal Property" as proposed in Item No. 5-A to eliminate reference to ""personal items such as luggage, backpacks, clothing, documents and medication, and household items" has no legal effect. The definition still states that "property" "includes, *but is not limited to*," the enumerated items, leaving essential items exposed to seizure. In addition, the property that can be seized still includes tents, bedding, and other property that allows homeless people to survive.

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[27] *See Soldal,* 506 U.S. at 61 (the seizure of a mobile home that was "literally . . . carried away" was subject to a reasonableness analysis).

[28] *Lavan*, 797 F. Supp. 2d at 1015; *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218 (E.D. Cal. 2009); *Justin v. City of Los Angeles*, No. CV 0012352 LGBAIJX, 2000 WL 1808426 (C.D. Cal. Dec. 5, 2000); *Kincaid v City of Fresno*, No. 106CV-1445 OWW SMS, 2006 WL 3542732 (E.D. Cal. Dec. 8, 2006); *Pottinger*, 810 F. Supp. 1551.

- Replacement of subsection 5. This Amendment's addition of an "opportunity to immediately comply" is practically meaningless. The Ordinance bans relocating to another public area; relocating to private property would be a trespass; and storage facilities are at near-maximum capacity and inaccessible to the majority of homeless people. Thus, there are essentially no means for homeless people to comply other than to dump their own necessities in the trash.

2. The Ordinance Violates the Right to Procedural Due Process under the Fourteenth Amendment

In addition to violating the Fourth Amendment right to be free of unreasonable seizure, the Ordinance also likely violates the Fourteenth Amendment right to due process. Homeless individuals, like all individuals, have an interest in the continued ownership of their personal property, which is protected by the Fourteenth Amendment of the Constitution.[29] California law also recognizes the right of ownership of personal property. Cal. Civ. Code §§ 655, 663, 671. Before taking any property, the government must provide adequate notice and a meaningful opportunity to be heard.[30] "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."[31]

Due process "is flexible and calls for such procedural protections as the particular situation demands."[32] Courts weigh three factors in order to determine what type of process is appropriate: (1) "the private interest that will be affected by the official action"; (2) "the risk of erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[33]

a. Interests and risks of deprivation

Where the interest at stake is significant, courts require greater process to protect it.[34] In determining what process is required, courts look to the particular circumstances of the interest at

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[29] *Lavan*, 693 F.3d at 1031.

[30] *Id.* at 1032.

[31] *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008).

[32] *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

[33] *Id.* at 335.

[34] *See, e.g., Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (protecting utility services, given that "the discontinuance of water or heating for even short periods of time may threaten health and safety"); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) (protecting employment, given "the severity of depriving a

(footnote continued)

stake and evaluate the stakes for the particular individual involved. For instance, "an individual 'at the very margin of subsistence' or who relies on his benefits for 'the very means by which to live' has a relatively strong private interest in the uninterrupted receipt of his benefit. In contrast, one whose benefits 'are not based upon financial need' is likely to have a weaker private interest."[35]

Here, as explained with respect to the Fourth Amendment, the private interest is of the highest order and the risks of erroneous deprivation are a matter of life and death, while the government interest is comparatively weak. The property that could be seized under LAMC §§ 56.11 includes medication, documents, bedding, and other property critically important to homeless individuals. "[T]he loss of such items such as clothes and medicine threatens the already precarious existence of homeless individuals by posing health and safety hazards."[36]

b. Notice and hearing

Given the importance of the interests at stake and the grave risks of erroneous deprivation, the notice and opportunity to be heard provided by the Ordinance are deficient.[37] The Ordinance requires no notice at all before seizing and destroying "bulky items," which include any object that is "too large to fit in one of the City's 60-gallon trash container with the lid closed." LAMC §§ 56.11(2)(c); 63.44(B)(26)(b)(1); 63.44(I)(13)(b)(1). This would cover bicycles, strollers, mattresses, carts, and many other common items critical to the survival of homeless people. This practice was clearly barred by the Ninth Circuit in *Lavan*.[38] The City must

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person of the means of livelihood"); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (protecting drivers' licenses, given that their "continued possession may become essential in the pursuit of a livelihood"); *Fuentes v. Shevin*, 407 U.S. 67, 89-90 (1972) (protecting household appliances, given that they may be "essential to provide a minimally decent environment for human beings in their day-to-day lives"); *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 (9th Cir. 1989) (quoting *Bell v. Burson,* 402 U.S. 535, 539 (1971)) (finding that a day care operator had a "high," "clearly substantial" interest in its license to operate a daycare center because "the continued possession may become essential in the pursuit of a livelihood.").

[35] *Katzman v. Los Angeles Cnty. Metro. Transp. Auth.*, 72 F. Supp. 3d 1091, 1102 (N.D. Cal. 2014) (quoting *Mathews,* 424 U.S. at 339, 340, 342).

[36] *Lavan*, 797 F.Supp.2d at 1015 (quoting *Pottinger*, 810 F.Supp. at 1573). *See also Kincaid*, 2006 WL 3542732, at *9-13 (because of the seizure of the property of homeless people, once individual lost her birth certificate, medical files used to file for Social Security disability, asthma medication and nebulizer, food , and bedding, causing her to take several trips to the emergency room and refile for social security disability.)

[37] *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950) (The "notice and opportunity for hearing" required by the constitution must be "appropriate to the nature of the case.").

[38] 693 F.3d at 1032. Notably, the ordinances at issue in *De-Occupy* and *Watters* did not contain exceptions to notice for any items. *See* Revised Ordinances of Honolulu § 29-19; Idaho Code § 67-1613A.

"take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return."[39]

Even for non-bulky items, where notice is required, those requirements are so minimal as to be ineffective. The requirement of posting notice "conspicuously on or near the Personal Property" is not likely to provide meaningful notice; a sign posted "near" property on a public street is likely to be lost, destroyed, tampered with, or invisible, even if its contents are comprehensible to the reader.

With respect to the opportunity to be heard, the Ordinance is entirely deficient. After notice (such as it is) has been provided, the police can return twenty-four hours later and seize the property even when it is attended and clearly has not been abandoned. The Ordinance as written does not provide the opportunity to immediately comply before having the property seized. This effectively deprives the individual of a meaningful opportunity to be heard. The Ninth Circuit has repeatedly made clear that "[t]he 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. This simple rule holds regardless of whether the property in question is an Escalade or an EDAR, a Cadillac or a cart."[40] As written, the City's seizure and destruction of homeless individuals' personal property is unconstitutional.

3. The Ordinance Violates Substantive Due Process Protected by the Fourteenth Amendment

The Ordinance specifically allows seizure of essential property including medication, military discharge papers, and other legal documents, as well as tents and bedding. LAMC §§ 56.11(2)(g). By including property such as shelter, medication, clothes, and hygiene kits, the Ordinance violates the Fourteenth Amendment's guarantee of substantive due process and exposes the City to "danger-creation" liability. The proposed Amendments will not prevent this type of property from being seized.

All individuals are guaranteed the protection of substantive rights under the U.S. Constitution;[41] thus, the government is forbidden from "depriving a person of life, liberty, or property in such a way that shocks the conscience or interferes with the rights implicit in the concept of ordered liberty."[42] State or local officials may be liable under substantive due process when their acts place an individual in a situation of known danger with deliberate indifference to

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[39] *Id.*(quoting *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999)).

[40] *Lavan*, 693 F.3d at 1032 (quoting *Clement*, 518 F.3d at 1093).

[41] *See Zinermon v. Burch*, 494 U.S. 113, 125-28 (1990).

[42] *Corales v. Bennett*, 567 F.3d 554, 568 (9th Cir. 2009) (internal citations and quotations omitted).

his or her personal, physical safety.[43] Under this "danger-creation" doctrine, the government's failure to protect an individual against private violence can violate the guarantee of due process where state action creates or exposes an individual to a danger which he or she would not have otherwise have faced.[44] In examining whether an officer has placed an individual in danger, courts examine "whether the officer left the person in a situation that was more dangerous than the one in which they found him."[45]

Seizing and destroying homeless person's property gives rise to a substantive due process claim based on the "danger-creation" doctrine.[46] For example, one court found that the deprivation of a plaintiff's shelter and of property essential for protection from the elements and plaintiff's allegations that the city knew or should have reasonably known that this conduct threatened the plaintiff's continued survival was "shocking to the conscience."[47] Here, the Ordinance allows the City to deprive individuals of their shelter, medication, clothes, hygiene kits, and other items of necessity, and such conduct exposes individuals to dangers to their health and safety that they would not otherwise have faced. Moreover, the City knows or should reasonably know—i.e., through the firsthand experience of City officials who deal with homeless individuals, through previous similar litigation involving the seizure of homeless people's possessions, through numerous media and journal reports by those who study the homeless—that such conduct threatens the survival of homeless individuals. The City is also aware of the severe shortage of available space in its storage facilities. By enforcing the Ordinance, the City would be acting in a manner that creates substantial risks to homeless individuals and thus would violate homeless individuals' substantive due process rights.

The proposed Amendment that removes reference to "luggage, backpacks, clothing, documents and medication, and household items" would still permit the seizure of such items. Moreover, seizing other items such as tents, shelter, and bedding could affirmatively create the danger and expose the City to danger-creation liability.

4. The Ordinance Criminalizes Homelessness in Violation of the Eighth Amendment

The Ordinance states in §§ 56.11(5) that "it shall be unlawful to fail to remove attended Stored Personal Property within 24 hours of receiving written notice." Los Angeles Municipal Code Section 11.00 applies to violations of this Subsection, making them punishable as a

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[43] *See Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006).

[44] *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989).

[45] *Ridgefield*, 439 F.3d at 1061-62.

[46] *See Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1102 (E.D. Cal. 2012).

[47] *Id.*

misdemeanor. Because the storage facilities provided by the City are at least 95% full, it would be impossible for even a fraction of the City's 25,686 homeless people to comply. Even if there were sufficient space, the single facility, located in Skid Row, is inaccessible to at least 80% of the City's homeless people not living in the Skid Row or downtown area.

Because homeless people by definition have no home and are likely to be living in public spaces with their possessions, this criminal penalty effectively criminalizes homelessness. The Ninth Circuit's opinion in *Jones v. City of Los Angeles*, although vacated,[48] is instructive. There, the court held that an ordinance that criminalized sitting, lying, or sleeping on public streets and sidewalks, violated the Eighth Amendment's prohibition against cruel and unusual punishment.[49] When *Jones* was decided, in Los Angeles County there were almost 50,000 more homeless people than available beds. The result, according to City officials, was that "[t]he gap between the homeless population needing a shelter bed and the inventory of shelter beds [was] severely large." The court held that "so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds . . . the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles."[50]

The situation here is analogous to that in *Jones*. It is undisputed in that there is not enough storage space available in the City's facilities for all homeless individuals to store their possessions—the gap between the homeless population needing a storage space and the available space is "severely large." Further, just as the *Jones* court stated it was an "impossibility" that homeless persons could avoid sitting, lying and sleeping to comply with the City's ordinance because such acts or conditions are "universal and unavoidable consequences of being human,"[51] here, needing and possessing tangible things is a universal and unavoidable consequence of being human. The reasons that an individual may need to "store" his or her possessions in violation of Subsection 3 of the Ordinance—for example, going to the bathroom, getting something to eat, seeking medical attention, taking a shower, having a conversation with someone—are also universal consequences of being human. In *Jones*, the court stated, "it is indisputable that, for homeless individuals in Skid Row who have no access to private spaces,

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[48] The United States Department of Justice recently filed a Statement of Interest asserting the continued validity of *Jones*, in *Bell v. Boise*, Case No. 09-00540 (D. Id.), Doc. No. 276, available at http://www.justice.gov/opa/file/643766/download. The United States take the position that "the Court should consider whether conforming one's conduct to the ordinance is possible for people who are homeless." *Id.* at 4. If compliance is impossible, "enforcement of the ordinances amounts to the criminalization of homelessness, in violation of the Eighth Amendment." *Id.*

[49] *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated by settlement*, 505 F.3d 1006 (2007).

[50] *Id.* at 1122, 1138.

[51] *Id.* at 1136.

these acts can only be done in public."[52] Similarly, here, homeless individuals, lacking access to private spaces, must engage in these acts and possess and/or leave their belongings in public.

Thus, as in *Jones*, the Ordinance unconstitutionally punishes individuals for being homeless—a status that the Ninth Circuit acknowledged is involuntary. And, as in *Jones*, the City cannot constitutionally criminalize or punish this involuntary status, nor can it punish acts that are an integral aspect of that status. Because there is substantial and undisputed evidence that the number of homeless persons in Los Angeles far exceeds the available storage space at all times, the Ordinance encroaches upon homeless individuals' Eighth Amendment protections by punishing the unavoidable acts that are a consequence of being human while being involuntarily homeless.

Under a proposed amendment to the Ordinance, Municipal Code Section 11.00—which imposes criminal penalties—would no longer apply to Subsection 5. But homeless people—subjected to the Hobson's choice of keeping the necessities of life or violating the Ordinance—would still be subject to citation if they failed to comply. Because the vast majority will have no means to pay such citations, the resulting incarceration for unpaid tickets will be virtually the same as if the initial violation had subjected them to criminal penalties. Like other proposed amendments, this one is practically meaningless and does nothing to save the Ordinance from its constitutional infirmities.

5. The Ordinance Is Unconstitutionally Vague

The Ordinance's failure to define key terms renders it unconstitutionally vague within the meaning of the Fourteenth Amendment's Due Process Clause. It encourages arbitrary enforcement by failing to describe with sufficient particularity what an individual must do in order to satisfy it.[53] Consequently, the Ordinance "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" and encourages arbitrary and erratic arrests, convictions, and punishment.[54]

The Ordinance does not provide individuals with the information to which they are constitutionally entitled. For example, it fails to clearly define the key term "storage." Subsection 3(a) states: "No person shall Store Personal Property in Public Areas"; and Subsection 3(b) states: "All Stored Personal Property in Public Areas may be impounded by the City." Subsection 2(k) defines "store," "stored," or "storing" as "to put aside or accumulate for use when needed, to put for safekeeping, and/or to place or leave in a location." It is unclear from

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[52] *Id.*

[53] *See Kolender v. Lawson*, 461 U.S. 352, 361 (1983).

[54] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (internal citations omitted).

this definition when an individual would be in violation of the Ordinance. For example, is an item being stored simply if it is not being used at any given moment? Is a business owner who sells luggage in a display on the sidewalk "storing" the luggage? If an item that is simply "place[d] in a location" is considered "stored," it is conceivable that the City could seize almost any object, regardless of whether doing so would further the purpose of the Ordinance. In effect, the Ordinance gives police the discretion to impound any and all possessions the homeless have that they cannot wear or carry. This allows for discriminatory enforcement of the Ordinance, exposing the City to liability.

Other terms such as "attended" property are also vague. Subsection 5 covers the "failure to remove attended personal property," but what is required for an item to be considered unattended? What if the owner is ten feet away? One hundred? What if the owner leaves the items for thirty seconds or is incapacitated? What if a non-owner is watching the property on behalf of the owner? As written, the Ordinance's language is too vague to inform individuals of what is allowed or forbidden. The City has proposed an amendment to define these terms, but it is not clear what the definitions would be or whether the law would initially go in effect without these definitions. Because these terms are not sufficiently defined, the Ordinance encourages arbitrary and erratic punishment.

6. The Ordinance Will Have Severe Consequences for Immigrants

The Ordinance will have significant and potentially devastating implications for non-citizens who find themselves homeless and without a place to store their essential personal items. For non-citizens, the choice of whether to discard all their belongings or be subject to criminal penalties is even more dire, as failing to comply with the Ordinance and suffering a misdemeanor conviction has significant immigration consequences.

a. The Ordinance may render individuals ineligible for deferred action

Failure to comply with the Ordinance could prevent a young person otherwise eligible to request Deferred Action for Childhood Arrivals ("DACA") from being considered for such relief. Individuals are barred from requesting relief under DACA if they have been convicted of one significant misdemeanor or three or more non-significant misdemeanors.[55] For the purposes of DACA, a misdemeanor is a crime "for which the maximum term of imprisonment authorized is one year or less but greater than five days."[56] A significant misdemeanor is, among other

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[55] U.S. Citizenship and Immigration Services, Consideration of Deferred Action for Childhood Arrivals Process, Frequently Asked Questions, available at http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#criminal

[56] *Id.*

things, a crime "for which the individual was sentenced to time in custody of more than 90 days."[57] A non-significant misdemeanor is one "one for which the individual was sentenced to time in custody of 90 days or less."[58]

A violation of section 5 of LAMC § 56.11 for failure to remove attended personal property after notice results in misdemeanor penalties, namely, a fine, "imprisonment in the County Jail for a period of not more than six months," or both. LAMC § 11.00(m). The failure to remove attended personal property thus clearly constitutes a misdemeanor under federal law, as the maximum incarceration period is well more than five days. In fact, a violation of LAMC § 56.11(5) may constitute a "significant misdemeanor" if the individual convicted in fact receives a sentence of more than 90 days, which is only half the maximum sentence of six months permitted by LAMC § 11.00. In that case, a person otherwise eligible for relief through DACA could lose eligibility.

In addition, and more likely, a homeless individual who is convicted of three misdemeanors for failing to move personal property out of public space would also lose eligibility for relief through DACA. It is tragically easy to imagine that a homeless person once convicted for failure to move essential belongings out of the public space will be convicted multiple times; nearly the only way for a homeless person to comply with the Ordinance is to find a home, and affordable homes are in short supply. Thus, multiple convictions are a likely consequence of the Ordinance. With three misdemeanor convictions, a homeless non-citizen—for instance, a young person brought to the United States at age 3, was orphaned, aged out of foster care, became homeless for a period, and then completed his GED—would lose eligibility for relief under DACA.

The proposed amendment eliminating criminal penalties for failure to remove attended personal property does not resolve the issue. Relief under DACA is granted solely at the discretion of the government, and the fact that a non-citizen has received multiple tickets under the Ordinance could contribute to a negative portrait of an otherwise highly sympathetic young person seeking DACA relief, which may discourage the government from exercising its discretion.

b. The Ordinance may work to deny otherwise eligible non-citizens the ability to adjust their status

The Ordinance will also have serious consequences for any non-citizen seeking adjustment of status to lawful permanent residence. One of the considerations for adjustment of

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[57] *Id.*

[58] *Id.*

status is whether an individual has "[b]een arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations."[59] Regardless of whether the amendment eliminating the Ordinance's criminal penalty is passed, non-citizens who violate the Ordinance could be refused adjustment of status due to citations and fines, much less convictions, for violations of § 56.11. This could affect a vast range of people, most notably family members of citizens and permanent residents. If these and other sympathetic individuals find themselves temporarily homeless and without a place to store their essential personal property, they could lose their ability to obtain legal status in this country, which they would otherwise be likely to obtain.

c. The Ordinance may prevent otherwise eligible non-citizens from naturalizing

The government has discretion as to whether to approve a petition for naturalization. An applicant for naturalization must show good moral character during the five-year statutory period prior to the date the naturalization application was filed, and USCIS may consider acts showing a lack of good moral character dating back further than five years.[60] An applicant is deemed not to have good moral character if that person "[i]s or was confined to a penal institution for an aggregate of 180 days pursuant to a conviction or convictions."[61] Thus, if a temporarily homeless non-citizen were convicted for failing to move his possessions under LAMC § 56.11 and were incarcerated in the county jail for six months, as permitted by LAMC § 11.00, that person would be barred from naturalization for five years, even if he had married a U.S. citizen and started a family in the meantime. Even after five years, USCIS could consider that conviction in determining whether to exercise its discretion in granting that individual naturalization.

In addition, USCIS may consider any probation, parole, or suspended sentence during the five-year statutory period in determining whether the applicant has shown good moral character, and an application cannot be approved so long as probation, parole, or suspended sentence are in effect.[62] Thus, even a suspended sentence for violation of Section 56.11 could devastate a person's chances for naturalization.

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[59] Form I-485, Application to Register Permanent Resident or Adjust Status, Part 3, question 1, available at http://www.uscis.gov/i-485.

[60] 8 C.F.R. § 316.10 (a).

[61] 8 C.F.R. § 316.10(b)(5).

[62] 8 C.F.R. § 316.10(c)(1)

In sum, the Ordinance is unconstitutional and the proposed amendments do nothing to change that fact. The City Council should reconsider and rescind its passage of the Ordinance as soon as possible and consider means to address the problem that are humane as well as constitutional.[63]

Sincerely,

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[63] *See* recommendations from the United States Interagency Council on Homelessness in their August 2015 report "Ending Homelessness for People Living in Encampments: Advancing the Dialogue," available at http://usich.gov/resources/uploads/asset_library/Ending_Homelessness_for_People_Living_in_Encampments_Aug2015.pdf.