



Northern
California

April 21, 2021

VIA Email

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Hon. Sonja Brunner, Vice Mayor
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Hon. Sandy Brown, Councilmember
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Hon. Justin Cummings, Councilmember
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Hon. Renee Golder, Councilmember
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Hon. Shebreh Kalantari-Johnson, Councilmember
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City of Santa Cruz
809 Center Street
Santa Cruz, CA 95060

Re: Temporary Outdoor Living Ordinance

Dear Mayor Meyers and Members of the City Council:

We write on behalf of the American Civil Liberties Union of Northern California (“ACLU”) to express our continuing interest in the City’s approach to its unhoused population in general, and the current reconsideration of its Temporary Outdoor Living Ordinance. The Ordinance criminalizes conduct that is an unavoidable consequence of being human, and therefore infringes on the constitutional rights of unhoused persons. We applaud Mayor Meyers’ candid acknowledgment at the April 13, 2021 City Council meeting that until now, the Council has “not gotten this right,” and we hope that the Council will modify the City’s approach in ways that properly protect the rights of unhoused persons.

As you know, we have been concerned for some time about the City’s attempts to stigmatize unhoused persons and to criminalize their efforts to sustain themselves. In addition, the City’s enforcement of anti-camping ordinances through citations and fines has had a particularly devastating economic impact on the most under resourced community in the City. We urge the City to end policies that promote wealth extraction from unhoused people. The following observations do not address all of the defects of the most recent public version of the Ordinance, but we do wish to highlight some of the most obvious and severe problems associated with it.

While we are encouraged by the Council’s direction to staff to prioritize a “safe sleeping” program, the characteristics of such a program, together with its limitation to 150 spots, make it woefully inadequate to address the number of unhoused residents in the City, or to accommodate their needs. Among other things, although the contours of such a program remain unclear, it appears that the

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Council intends to limit the occupation of any encampments to nighttime hours. Such a limitation would impose unreasonable burdens on unhoused persons, effectively preventing them from living productive lives. They would be required to pack and unpack all their worldly possessions twice a day, and to be without any safe place to be during daylight hours, making it impossible for them to hold steady jobs, attend school, or attend to personal and family needs.

The decision of the Ninth Circuit Court of Appeals in *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), *as amended on denial of rehearing*, 920 F.3d 584 (2019), is quite clear:

So long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters, the jurisdiction cannot prosecute homeless individuals for involuntarily sitting, lying, and sleeping in public. That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise that they had a choice in the matter.

902 F.3d at 1048 (brackets, internal quotation marks, and citations omitted; emphasis added). The basis of this holding is the Eighth Amendment: “As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the Eighth Amendment—sleeping, eating and other innocent conduct.” *Id.* (internal brackets, quotation marks, and citation omitted).

The requirements of *Martin* go beyond merely providing “safe sleeping” during hours of darkness. Not everyone sleeps at night; some people need to be employed after dark and sleep during the day, and even those for whom daytime hours are normally spent awake occasionally want or need a place to sit, lie, or take a nap—a place “where they can lawfully be.” The requirement to pack and unpack one’s possessions twice daily further robs people of rest and dignity. Merely providing a bed during hours of darkness does not permit the City to criminalize all of the other activities that are “universal and unavoidable consequences of being human,” *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006). Unhoused persons are entitled to a safe space free from the threat of criminal enforcement during the day as well, and to be able to access their possessions without having to carry them on their backs at all times.

In this regard, we note that the provisions in the Ordinance for a “storage program” to keep people’s belongings during daytime hours do not mitigate the Ordinance’s defects, but rather compound the burdens that the Ordinance would impose on unhoused people. The notion that *in addition to* having to take down and resurrect their shelter twice a day, people would also have to travel some distance to a single location to deposit and retrieve their belongings—a location where they would presumably only have access to their belongings during certain hours and under restricted circumstances—would only multiply the burden and inconvenience to them, in addition to depriving them of ready access to their possessions during nearly all of their waking hours.

Under the rule established in *Martin*, we believe that a court would likely have enjoined enforcement of the current Ordinance, and would likely enjoin any similar attempt by the City to ban people from living outdoors. More broadly, we believe that the City must actively engage with all stakeholders to find more comprehensive and effective ways to address homelessness, including the creation of new, affordable housing and the provision of supportive services.

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We therefore urge the City, as it reconsiders its Temporary Outdoor Living Ordinance, to recognize and provide for all the needs of unhoused persons. We are willing to enter into meaningful dialogue with the City and other interested persons, and to work with you to address these issues constructively. We are also prepared to challenge any ordinance or enforcement scheme that denies unhoused people their dignity or fundamental rights.

We look forward to your prompt response.

Sincerely,

A handwritten signature in cursive script, appearing to read "William S. Freeman".

William S. Freeman

Senior Counsel

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