

Paul Hancock:

DOJ has authority to participate as "Friends of the Court"

1 - Miami - dec in favor of plaintiffs - but set up "safety zones"

- urged after ^{CITR's} Nov. mtg to look into SF

SF: Law prohibiting / criminalizing homelessness, precedents: can't criminalize a status

- not sure of

- similar brief in Santa Ana

Hes. in enforcing Fair Housing Act - helping deal w/ NIMBYISM

- doesn't prohibit discrim Sec of h'less

DOJ has said the Act requires exceptions

but Sec of race, disab... → these are often h'less

recent ltr to Congress of cities

(- Fed'l McKinney Act is often returned unused Sec can't get zoning, etc approved)

few: sleeping in public

Dept slow to respond

- **District Court Invalidates Freedom Of Access To Clinic Entrances Act (FACE):** On April 1, a district court struck down FACE on the grounds that Congress lacked power under the Commerce Clause (and the Fourteenth Amendment) to enact it, and that it violated the First Amendment. Hoffman v. Hunt, (W.D. NC). The court also invalidated the North Carolina version of FACE.
- **Torts Branch Assists In Croatian Crash:** Aviation specialists on the Aviation & Admiralty Staff of the Torts Branch provided information and assistance to members of the Air Force Accident Counsel branch in the aftermath of last week's tragic crash. DOJ provided information concerning the litigation history of the Boeing 737 in recent years, and advised the Air Force concerning the inclusion of National Transportation Safety Board, Federal Aviation Administration, and Boeing representatives on the Air Force accident investigation board and the confidentiality of the investigation.
- **District Court Enjoins Discharge Of Navy Seaman For Homosexual Conduct:** On March 29, the district court issued a temporary restraining order precluding the Navy from discharging a service member who had been found to have engaged in homosexual conduct. Barnes v. Perry (D. DC). A hearing on plaintiff's motion for a preliminary injunction is set for April 12.
- **District Court Rules In Challenge To Military's "Don't Ask, Don't Tell" Policy:** On March 29, the court granted in part and denied in part plaintiff's motion for summary judgment in Holmes v. California Army Nat'l Guard, et al. (N.D. CA), a challenge to the military's "Don't Ask, Don't Tell" policy. Andrew Holmes, a former lieutenant in the California and United States Army National Guards, had his federal recognition withdrawn after sending his commanding officer a memorandum stating that he was gay. The court held that the military's policy violated Holmes' rights to equal protection and free speech.
- **United States Files Amicus Brief In Homeless Case:** On March 29, the government filed an amicus brief in the Ninth Circuit in Joyce v. City & County of San Francisco, addressing the City's enforcement of various laws (under what was once called the "Matrix" program) against homeless persons sleeping in public areas. The district court granted summary judgment for the City, holding that regardless of whether homelessness is a status, the challenged sleeping, camping, and lodging laws applied to conduct, not status, and thus did not violate the Eighth Amendment. The Department argued that enforcement of the laws against homeless persons sleeping in public when there are no available shelter beds punishes such persons for their status of being homeless in violation of the Eighth Amendment.

- **International Aviation:** On April 24, the House Transportation and Infrastructure Committee, Subcommittee on Aviation will hold a hearing on aviation relations between the U.S., U.K., and Japan. The Department has been asked to testify.
- **Meetings on Expiration of Excise Taxes:** FAA Administrator Hinson met with counsel of the Joint Tax Committee on April 3, and was informed that, although the reauthorization of the ticket taxes may not occur until July, the tax would probably be extended on a permanent or semi-permanent basis.
- **Detroit:** On April 30 - May 1, Secretary Peña will travel to Detroit to attend Northwest Airlines' inaugural event for its Detroit to Beijing route, and meet with the Big Three auto manufacturers.

UNITED STATES TRADE REPRESENTATIVE

- **Japan:** Ambassador Kantor met with Ambassador Saito in preparation for the upcoming U.S.-Japan Summit. Among the issues raised by Kantor included disappointment with Japan's position on renewal of the agreement on semiconductors, MOF's proposal on insurance, lack of progress in sound recordings negotiations, and the Government of Japan's continued refusal to engage in discussions on the Kodak/Fuji film dispute.
- **EU Trade Commissioner:** Ambassador Kantor met with Sir Leon Brittan to discuss a range of key bilateral and multilateral trade issues in advance of next week's Ministerial meeting hosted by Japan in Kobe. The discussion focused on the need to reinvigorate telecom and maritime services negotiations, progress on mutual recognition of standards, and progress on technical discussions on information technologies. The EU delegation also raised a number of concerns including the ongoing dispute over banana trade, implementation of the Helms-Burton law and U.S. efforts to renew the semiconductor agreement with Japan.

DEPARTMENT OF JUSTICE

- ***En Banc* Fourth Circuit Upholds Constitutionality Of Statements Provision Of Military's New Homosexual Policy:** *Thomasson v. Perry*, (4th Cir.). In this case, a service member was discharged because he stated he was a homosexual and then failed to rebut the presumption that he engages in, or likely will engage in, homosexual acts. The district court upheld the discharge, and the plaintiff appealed. On April 4, the *en banc* court upheld the constitutional validity of the military's policy. Applying the rationality review, the court held that the policy does not violate equal protection. This is the first appellate decision to rule on the validity of the military's new policy.

U.S. DEPARTMENT OF JUSTICE

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No. 95-16940

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOBBY JOE JOYCE, et al.

Plaintiffs-Appellants

CITY AND COUNTY OF SAN FRANCISCO,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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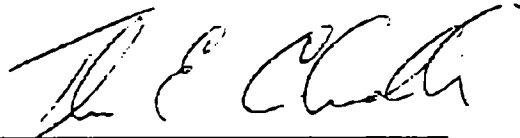
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CERTIFICATE OF COMPLIANCE PURSUANT TO
NINTH CIRCUIT RULE 32(e)(3)

Pursuant to Ninth Circuit Rule 32(e)(3), I certify that the Brief for the United States as Amicus Curiae was prepared using a monospaced typeface of 12 characters per inch and is 32 pages in length.



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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case involves the constitutional rights of homeless people who may be subject to criminal punishment for sleeping in public. The United States has an interest in the subject matter of this case. The Stewart B. McKinney Homeless Assistance Act of 1987, 42 U.S.C. 11301 et seq., reflects a federal interest in the problems of the homeless. In enacting the statute, Congress found that "the Federal Government has a clear responsibility and an existing capacity to fulfill a more effective and responsible role to meet the basic human needs and to engender respect for the human dignity of the homeless." 42 U.S.C. 11301(a)(6). The Act provided, in part, for the creation of the Interagency Council on the Homeless, comprised of the heads of various federal agencies. The McKinney Act directed the Council to coordinate federal, state, and local activities to assist

homeless individuals. See generally Interagency Council on the Homeless, Priority: Home! The Federal Plan to Break the Cycle of Homelessness at 41 (1994) ("Federal Plan on Homelessness").

The Council's 1991-1992 Annual Report described the Justice Department's role in combating the problems of the homeless. The Report noted that "[a]lthough the Department has few programs that address homelessness directly, DOJ's enforcement of anti-discrimination statutes [such as the Fair Housing Act] * * * benefits persons who are homeless." Interagency Council on the Homeless, 1991-1992 Annual Report at 204 ("Report"). The Report also noted that the Department of Housing and Urban Development (HUD) "administers McKinney Act and other homelessness * * * programs that provide housing and supportive services for homeless persons." Report at 169. Indeed, the Secretary of HUD has made clear that one of HUD's highest priorities is to assist homeless individuals in finding housing and other services.

Although that portion of the Act creating the Interagency Council has expired, the Council continues to operate as a Working Group of the White House Domestic Policy Council. See Federal Plan on Homelessness at 11. The Attorney General and the Secretary of HUD remain members of the Council. The Council continues to provide federal leadership for activities to assist homeless individuals and families.

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QUESTION PRESENTED

Whether San Francisco's enforcement of state and city laws prohibiting camping, lodging, and sleeping in public, violates the Eighth Amendment as applied against homeless persons who do not have access to shelter beds because, by criminalizing for those persons the life-sustaining activity of sleeping, it punishes the status of being homeless.^{1/}

STATEMENT OF THE CASE

1. In August 1993, the City and County of San Francisco (the "City") implemented the Matrix program, a "quality of life" program designed to address a "broad range of offenses occurring on the streets and in parks and neighborhoods." Joyce v. City & County of San Francisco, 946 F. Supp. 843, 846 (N.D. Cal. 1994) (decision on preliminary injunction). The program was principally directed toward the conduct of homeless persons. "While encompassing a wide range of services to the City's homeless, the Program simultaneously contemplates a rigorous law enforcement component aimed at those violations of state and municipal law which arguably are committed predominantly by the homeless." Id. at 845-846; see also E.R. 1310-1311.^{2/} These violations include, among others, public drinking and inebriation, obstruction of sidewalks, lodging, camping or

^{1/} Plaintiffs challenge San Francisco's enforcement of these laws against the homeless on a number of state and federal grounds. See page 8, infra. We will address only the Eighth Amendment issue.

^{2/} "E.R. ____" refers to page numbers in the five-volume Excerpts of Record filed along with appellants' opening brief.

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sleeping in public parks, and aggressive panhandling. 846 F. Supp. at 846. Institution of the program followed citizen complaints and a city report "which attributed to homelessness a \$173 million drain on sales in the City." Ibid.; E.R. 833.1.

In devising the Matrix program, the Mayor's Office Homeless Coordinator Ad Hoc Task Force stated that "[t]here are currently laws/regulations/codes which can be utilized in an effort to obtain order and accountability on the part of the homeless individuals who people the streets." E.R. 1096-1097.

Ultimately, an enforcement policy was created directing the vigorous enforcement of 18 current laws prohibiting "nuisance crimes." 846 F. Supp. at 846; see also E.R. 320-323, 1100-1106. Three of these 18 criminal prohibitions bear directly on the inherent activities of the homeless:

(1) California Penal Code 647(i) (Lodging)

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: * * * Who lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control thereof.

(2) San Francisco Park Code 3.12 (Camping)

No person shall construct or maintain any building, structure, tent or any other thing in any park that may be used for housing accommodations or camping, except by permission from the Recreation and Park Commission.

(3) San Francisco Park Code 3.13 (Sleeping)

No person shall remain in any park for the purpose of sleeping between the hours of 10:00 p.m. and 6:00 a.m., except that special permission may be granted by the Recreation and Park Department to persons providing security services between said hours in any park or for other unusual events.

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See E.R. 1318, 1320.

Evidence in the record shows that officers were instructed to take "aggressive action against all individuals who actively [a]ffect the quality of life of the citizens of San Francisco." E.R. 1115 (emphasis omitted). The commanding officer of one police station in the city stated in a memorandum that although "not one officer wants to deal with filth, flea infested, disease ridden people, * * * the [18 listed] laws * * * are to be used in a no tolerance program." E.R. 1105.^{3/} City officials were true to their word. A March 1995 Resolution of the San Francisco Board of Supervisors states that "as of January 31, 1995, over 5,714 citations have been issued for sleeping in public places, camping, lodging, obstructing sidewalks and public urination." E.R. 1018. The district court's March 15, 1994, decision stated that the City had issued over 3,000 citations to homeless persons. 846 F. Supp. at 848.

2. The record makes clear that the number of homeless persons in San Francisco substantially outnumbers the number of beds available in homeless shelters. The March 1995 Resolution of the San Francisco Board of Supervisors states that there are only 1,399 shelter beds and 798 "transitional housing units" for the "estimated 8,000 to 10,000 homeless people in San Francisco." E.R. 1016. In 1993, the City represented in an application to a

^{3/} Other laws among the 18 included in the program that are directly applicable to the homeless include Municipal Park Code 22 (outlawing the obstruction of sidewalks) and various trespassing laws. See E.R. 1101-1106.

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federal housing program that although one report stated that there were 6,000 to 8,000 homeless in San Francisco, "[c]ity agencies and local service providers believe this number to be low, giving 12,000-15,000 as a more accurate representation."

E.R. 1040; see also E.R. 830-831. A former City employee testified in his deposition that 6,000 to 10,000 persons are homeless on any given night. E.R. 830-831. The City further represented that one study indicated that as of March 31, 1993, over 500 people per night are turned away from shelter beds.

E.R. 1041, 1047. Finally, the City noted that families are 25-30% of the homeless population, but only 14% of the shelter beds are available for families with children.^{1/}

Thus, the vast majority of the homeless people in the City do not have shelter beds and have no choice but to sleep in public places.^{2/} For them, enforcement of the criminal prohibitions noted above effectively criminalizes the basic life sustaining activity of sleeping. For example, plaintiffs put evidence in the record showing that Penal Code 647(i) (lodging) has been applied to individuals who were merely sleeping in the day (when sleeping is not expressly prohibited) and their belongings surrounded them. E.R. 1126. In addition, plaintiffs

^{1/} The 1990 United States census ranked San Francisco second in the incidence of homelessness. San Francisco is one of the most expensive housing markets in the country, and the supply of affordable units has decreased over the past 15 years. E.R. 1040-1041.

^{2/} Other laws prohibit sleeping on private property without the consent of the owner. See E.R. 1101-1102.

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proffered as evidence the declarations of a number of homeless persons who were issued camping or lodging citations by police officers for doing such things as laying atop a sleeping bag during the day (E.R. 933), sleeping on a bench during the day (E.R. 936), and sleeping in a sleeping bag during the day (E.R. 937). See generally E.R. 930-974.^{5'}

In addition, Commander Dennis Martel of the San Francisco Police Department's Field Operations Bureau, testified in his deposition that if a person erected a tent that would "certainly" be a violation of Park Code 3.12 (camping), and would also "in and of itself * * * probably constitute a violation of lodging" (Penal Code 647(i)). E.R. 808. He added that if he saw a person sleeping at 8:00 in the morning, and again at 4:00 in the afternoon, and then he "came back the next day and it didn't look as though they have left, I would conclude that the person is probably lodging." E.R. 809. Martel also testified that "[i]f people are homeless and they want a place to sleep, they have to plan early in the day and canvass the different service providers that are available." E.R. 818. As the Board of Supervisors'

^{5'} The term "lodges" in Penal Code 647(i) is not defined. A police department memorandum, however, explained that the "key point" of this provision is "evidence of actions which indicate an intent to remain in a specific location for any extended period of time." E.R. 912. The memorandum also explained that "[t]he mere lying or sleeping on or in a bedroll of and in itself does not constitute a violation. However, an extended stay or the presence of an encampment (possessions laid out) would establish probable cause for a detainment, admonishment and referral, citation or arrest as appropriate, because it appears that the violator has the intent to stay for an extended period of time." E.R. 912; see also E.R. 1326.

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Resolution noted, the "practice of enforcement of Park Code sections 3.12 and 3.13 and California Penal Code Section 647(i) results in sleep deprivation by continuously disturbing homeless people from their rest, especially when many individuals cited under the Matrix program for camping and/or sleeping in a public park are forced there due to the lack of available shelter."

E.R. 1017.

3. On November 23, 1993, four homeless persons filed suit, on behalf of themselves and a class of other homeless persons, against the City and County of San Francisco seeking injunctive and declaratory relief against the enforcement of, in part, the laws prohibiting lodging, camping, and sleeping, against certain life-sustaining activities of the homeless. E.R. 1-18. The complaint alleged, inter alia, that enforcement of these provisions violates the Eighth Amendment insofar as it criminalizes plaintiffs' homeless status, abridges their right to travel under the United States and California Constitutions, and violates other provision of the United States and California Constitutions and state law. The complaint sought as relief, in part, "preliminary and final injunctive relief enjoining the City from enforcing * * * statutes and ordinances prohibiting sleeping or 'camping' or 'lodging' in public parks * * * or any other statutes or ordinances against the class of homeless persons for life-sustaining activities such as sleeping, sitting or remaining in a public place * * *." E.R. 16-17. The named plaintiffs

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alleged that they were homeless and had been subject to police enforcement efforts under the Matrix program. E.R. 2-4.

On March 15, 1994, the district court denied plaintiffs' motion for a preliminary injunction. Joyce, 846 F. Supp. 843. First, the court stated that "the proposed injunction lacks the necessary specificity to be enforceable, and would give rise to enforcement problems sufficiently inherent as to be incurable by modification of the proposal." Id. at 851. The court concluded that for this reason alone the injunction must be denied. Nevertheless, the court addressed each of the legal theories raised in the complaint, and concluded that those theories "are not plainly applicable to the grievances sought to be vindicated." Ibid. With respect to the Eighth Amendment claim, the court rejected the argument that the failure of the city to provide sufficient shelter rendered homelessness a status, stating that "status cannot be defined as a function of the discretionary acts of others." Id. at 857. The court also stated that "[a]s an analytical matter, * * * homelessness is not readily classified as a 'status'" because it is not necessarily an involuntarily acquired quality and the individual has control over the characteristic. Ibid.

4. In February 1995, defendant moved for summary judgment.^{2/} The City argued that the laws at issue address

^{2/} On August 4, 1994, the district court certified a plaintiff class consisting of "those persons present in the City and County of San Francisco who (1) are without shelter, (2) lack the financial resources or mental capacity necessary to provide for
(continued...)

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conduct, not status, and thus are constitutionally permissible. In April 1995, the court held a hearing on the motion. E.R. 1254-1307. At the end of the hearing the court requested that, in view of its earlier concerns about the specificity of plaintiffs' requested preliminary injunction, plaintiffs submit a new "specifically proposed injunction." E.R. 1306. Plaintiffs subsequently did so, requesting

injunctive relief enjoining [the defendant] from enforcing * * * Penal Code 647(i), Park Code 3.13, and the camping provisions of Park Code 3.12 against plaintiffs for sleeping, resting, or otherwise remaining in a public place with their possessions at times when plaintiffs are unable to obtain shelter, and enjoining the City from seizing or threatening to seize the non-abandoned property of homeless persons except for use as evidence of a crime.

See E.R. 1312. The requested relief also provided that "[f]or purposes of complying with this injunction, the City may ascertain whether an individual plaintiff is able to access shelter either by means of offering that plaintiff a valid voucher, immediately redeemable, for a shelter bed at a facility * * *, or by such other means as would not unduly interfere with the free exercise of plaintiffs' rights." E.R. 1312.

On August 18, 1995, the district court issued its judgment and order granting the City's motion for summary judgment. E.R. 704-755. With respect to plaintiffs' Eighth Amendment claim, the

2 (....continued)

their own shelter, and (3) have been cited or arrested for a violation of any of the portions of the Matrix Program now challenged." E.R. 1311 (internal quotation marks omitted).

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court first stated that "plaintiffs have not provided evidence demonstrating that homelessness is a status within the reasoning of Robinson [v. California, 370 U.S. 660 (1962)]." E.R. 1317. The court concluded, however, that "evaluating the constitutionality of the laws challenged in this case does not require the Court to reach this question," and thus the court declined to hold "on this factual record, that as a matter of law homelessness is or is not a status." E.R. 1317. The court stated that "whether or not homelessness is a status, the Matrix program does not punish people for being homeless. Reexamination of the challenged provisions again demonstrates that the program punishes conduct that even people who have no residence can control." E.R. 1317 (internal citation omitted).

The court addressed, in turn, the challenged lodging, sleeping, and camping laws. E.R. 1318-1320. With respect to the lodging provision (Penal Code 647(i)), the court stated that lodging in doorways and other prohibited sites is, "unlike breathing, eating, and sleeping, * * * volitional and controllable," and therefore it can "be abstained from without immediate physiological resistance." E.R. 1318. The court therefore concluded that "to regulate [lodging] is not to punish a status." E.R. 1318. With respect to the sleeping provision (Park Code 3.13), the court stated although sleeping "is a necessary part of life," individuals "control when they sleep." E.R. 1318. The court thus concluded that because the law did not prohibit sleeping at all times (but only between 10:00 p.m. and

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6:00 a.m.), the law did not prohibit the necessary and involuntary life activity of sleeping. E.R. 1319. Finally, the court stated that the camping provision (Park Code 3.12) similarly does not prohibit involuntary conduct because "[t]he construction of housing accommodations is a voluntary activity," and thus is conduct that "may constitutionally be punished." E.R. 1320. In summary, the court concluded that the "criminal provisions at issue regulate only volitional conduct, and, therefore, do not violate the Eighth Amendment." E.R. 1320-1321.

SUMMARY OF THE ARGUMENT

This case presents the issue whether San Francisco may enforce laws prohibiting lodging, sleeping, and camping in public against homeless persons who do not have available shelter, and thus have no alternative but to sleep in public. The district court granted the City's motion for summary judgment, holding that regardless of whether homelessness is a status, the laws punish only volitional conduct and thus do not violate the Eighth Amendment's bar on imposing punishment for a person's status. The court reached this conclusion by examining each statute singularly and in the abstract, without regard to whether the City applied the laws to criminalize sleeping in a public area when there is no place else for homeless persons to sleep.

The district court focused on the wrong issue. The challenge in this case is to the application of the laws to homeless persons who, because of the inadequacy of shelter space, have no choice but to sleep in public (and, when it is cold, to

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cover themselves with something). Since this issue turns not on the interpretation of the statutory language of each law, but rather on how the City has enforced the laws, and plaintiffs put evidence in the record showing that the City has applied the laws to homeless persons sleeping in public, summary judgment was inappropriate. As other courts have found, if there are not enough shelter beds for the homeless persons, such persons have no choice but to perform the life-sustaining activity of sleeping in public. Punishing homeless persons for sleeping in public in these circumstances necessarily punishes them for their status of being homeless, in violation of the Eighth Amendment. Thus, the decision of the district court should be reversed and the case remanded to the district court for further proceedings.

ARGUMENT

SAN FRANCISCO'S ENFORCEMENT OF STATE AND CITY LAWS PROHIBITING CAMPING, LODGING, AND SLEEPING IN PUBLIC, VIOLATES THE EIGHTH AMENDMENT AS APPLIED AGAINST HOMELESS PERSONS WHO DO NOT HAVE ACCESS TO SHELTER BEDS BECAUSE, BY CRIMINALIZING FOR THOSE PERSONS THE LIFE-SUSTAINING ACTIVITY OF SLEEPING, IT PUNISHES THE STATUS OF HOMELESSNESS

Homelessness is a nation-wide problem. On any given night, over a half million persons are homeless, and even if every bed in every overnight shelter is filled, a substantial number of people must sleep outside. See, e.g., Interagency Council on the Homeless, Priority: Home! The Federal Plan to Break the Cycle of Homelessness at 17, 40 (1994) ("Federal Plan on Homelessness"). Many of these persons are children; it is estimated that children comprise 15% of the nation's homeless population. Id. at 21 n.3. If homeless persons sleep on private

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property, they are likely trespassing. If they sleep on public property, they are subject to criminal punishment in those cities, like San Francisco, that enforce general criminal laws against such necessary life-sustaining activities.

The Eighth Amendment bars imposing criminal punishment for a person's status. As discussed below, since homeless residents in cities with inadequate shelter must sleep somewhere, and when it is cold must cover or shelter themselves with something, enforcement of the lodging, sleeping, and camping provisions in these circumstances has the effect of criminalizing the simple existence of homeless persons. In other words, so long as there is no place homeless people can go -- i.e., so long as the program is applied to the homeless on all public property and there is insufficient available shelter -- application of the provisions to the homeless criminalizes the status of homelessness.

1. As the district court recognized, the Supreme Court has held that the imposition of criminal punishment for a person's status violates the Eighth Amendment. In Robinson v. California, 370 U.S. 660, n.1 (1962), the defendant was convicted under a statute that made it unlawful to be "addicted to the use of narcotics." A police officer had examined the defendant's arm on the street, and observed what he believed to be needle marks and resulting scabs and scars. Although the defendant did not appear to be under the influence of narcotics at that time (or suffering withdrawal symptoms), the defendant was arrested. At trial, the

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jury was instructed that under state law it was a misdemeanor either to use narcotics or be addicted to narcotics, and that the latter portion of the statute is based on a "condition or status" that is not the same as the act of using narcotics. Id. at 662. The jury was further instructed that the status prong of the offense was "a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms." Id. at 662-663. Finally, the jury was instructed that all the government had to prove was "either that the defendant did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics." Id. at 663.

Defendant was found guilty, and the state court of appeals affirmed. The Supreme Court reversed. The Court stated that although the state might impose criminal sanctions for the manufacture, sale, purchase, possession, or use of narcotics (or anti-social behavior resulting from the use of narcotics), the challenged statute addressed the status or chronic condition of being addicted to the use of narcotics, "for which the offender may be prosecuted at any time before he reforms." Id. at 666 (internal quotation marks omitted). The Court compared the statute to one that would make it "a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease," and stated that "a law which made a criminal offense of such a disease would doubtless be universally thought

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to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Ibid. The Court concluded:

We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.

Id. at 667. The Court added that although imprisonment for 90 days is not, in the abstract, a punishment that is either cruel or unusual, "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."

Ibid.

The Court subsequently distinguished Robinson in Powell v. Texas, 392 U.S. 514 (1968), which addressed a challenge to a conviction for being found drunk in public. In affirming the conviction, the four-member plurality stated that the defendant was not convicted for being a chronic alcoholic, but for being drunk in public; thus, the state "has not sought to punish a mere status, as * * * in Robinson." Id. at 532. The plurality explained that the defendant was convicted "for public behavior which may create substantial health and safety hazards, both for [the defendant] and for members of the general public," which was

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"a far cry from convicting one for being an addict, being a chronic alcoholic, being 'mentally ill, or a leper.'" Ibid.

The plurality declined to extend Robinson to situations where the defendant is punished for conduct that might be "involuntary" or "occasioned by a compulsion." Id. at 533. The plurality stated that Robinson stands only for the proposition that "criminal penalties may be inflicted only if the accused has committed some act, [or] engaged in some behavior, which society has an interest in preventing." Ibid. Thus, the issue in Powell -- whether the defendant can be held legally responsible for his conduct (i.e., his appearance in public in a state of intoxication) -- was not presented in Robinson. The plurality stated that it would not extend Robinson to create a general constitutional doctrine of criminal responsibility, a matter "always * * * thought to be the province of the States." Id. at 535-536.

Justice White, concurring in the result, asserted that it might be unconstitutional to punish someone for the irresistible actions that result from his narcotics addiction or alcoholism. Id. at 548-554. He stated that "[p]unishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion." Id. at 548. Nevertheless, he found that the record did not support the conclusion that defendant's alcoholism compelled him to frequent

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public places when intoxicated. Id. at 549. Justice White suggested, however, that the result might have been different had the defendant been homeless:

The fact remains that some chronic alcoholics must drink and hence must drink somewhere. Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment -- the act of getting drunk.

Id. at 551.^{2/}

These cases make clear that 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). At a minimum, one such limit is criminalizing status, apart from conduct or behavior that might result from that status. As the opinions in Powell suggest, it is less clear whether such conduct

^{2/} Four justices dissented, stating that under Robinson "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." 392 U.S. at 567 (Fortas, J., dissenting). The dissent asserted that although the crime in this case differed from that in Robinson (because it had two elements -- being intoxicated and being found in a public place), the constitutional defect was the same. "[I]n both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid." Id. at 568.

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or behavior, when the result of an irresistible compulsion, might also run afoul of the Constitution.¹² But, as discussed below, that question is not implicated in applying the Eighth Amendment to the enforcement of criminal laws against homeless persons sleeping in public when inadequate shelter is available (and thus the homeless persons have no alternative to sleeping in public).¹³

2. Several lower federal courts have applied Robinson and Powell to the enforcement of similar anti-homeless provisions. In Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992), remanded for further proceedings, 40 F.3d 1155 (11th Cir. 1994), homeless persons filed suit under 42 U.S.C. 1983 alleging that the city's practice of arresting the homeless for sleeping, eating, and congregating in public violated various

¹² As one court has stated, Powell "has left this matter of criminal responsibility, as affected by the Eighth Amendment, in a posture which is, at best, obscure." Watson v. United States, 439 F.2d 442, 451 (D.C. Cir. 1970). But at least five members of the Court in Powell suggested that punishing truly involuntary conduct that results from status (i.e., where the defendant does not act by his own volition) would violate the Eighth Amendment.

¹³ The Supreme Court has made clear that the Eighth Amendment applies only after conviction. See, e.g., Ingraham, 430 U.S. at 671-672 n.40; Graham v. Connor, 490 U.S. 386, 392 n.6 (1989); Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979). In both Robinson and Powell the defendants had been convicted. In this case, the class representatives have been issued citations under the challenged laws, and members of the plaintiff class are persons who, inter alia, have been cited or arrested for violating the laws. Thus, regardless whether any of the plaintiffs have been convicted, we apply the Eighth Amendment to the relevant issue whether enforcement of the program would violate the Eighth Amendment if a homeless individual was punished for violating one of the provisions. Cf. Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995).

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constitutional protections, including the Eighth Amendment. The court held that application of ordinances prohibiting the homeless from sleeping or engaging in other life-sustaining activities in public violated the Eighth Amendment. 810 F. Supp. at 1561-1565.^{11/} Citing Robinson and Powell, the court stated that it was clear a person could not be punished for involuntary status, but less clear "whether involuntary conduct that is inextricably related to that status may be punished." Id. at 1563. The court found, however, that because the homeless plaintiffs had no realistic choice other than to live in public places, and thus to perform certain life-sustaining activities in public, "arresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless." Id. at 1564.

The court found that "the record in the * * * case amply supports plaintiffs' claim that their homeless condition compels them to perform certain life-sustaining activities in public." 810 F. Supp. at 1563. For example, the court found that "the City does not have enough shelter beds to house Miami's homeless residents." Id. at 1564-1565; see also id. at 1564 (noting evidence that there were 700 shelter beds for the city's

^{11/} The city challenged the injunctive relief on appeal, and the court of appeals remanded for clarification and possible modification of the injunction as a result of changed circumstances. 40 F.3d at 1157.

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estimated 6,000 homeless individuals).^{12/} Thus, the court stated that

the City cannot argue persuasively that the homeless have made a deliberate choice to live in public places or that their decision to sleep in the park as opposed to some other exposed place is a volitional act. * * * [T]he lack of reasonable alternatives should not be mistaken for choice.

Id. at 1565; see also ibid. ("[f]or plaintiffs, resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible."). Thus, the court concluded, "[a]s 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." Ibid. (emphasis added)).^{13/}

Similarly, in Johnson v. City of Dallas, 860 F. Supp. 344 (N.D. Tex. 1994), rev'd on other grounds, 61 F.3d 442 (5th Cir.

^{12/} The court noted that "[a]s a number of expert witnesses testified, people rarely choose to be homeless. Rather, homelessness is due to various economic, physical or psychological factors that are beyond the homeless individual's control." 810 F. Supp. at 1563.

^{13/} The court also found the case indistinguishable from those invalidating vagrancy ordinances as applied to the displaced poor. 810 F. Supp. at 1564, citing Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969), vacated on other grounds, 401 U.S. 987 (1971). See also Goldman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969) (holding that statute criminalizing vagrancy -- defined to include being "able-bodied" and "frequenting public places" or leading an "idle life" -- is unconstitutional because it punishes status). Both Wheeler and Goldman relied upon Robinson.

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1995), the court held that an ordinance prohibiting sleeping in public was unconstitutional because it punished the homeless for their status as homeless.^{14/} The court first acknowledged that the statute in Robinson criminalized addiction (or "mere status"), whereas the anti-sleeping ordinance involved "what can fairly be considered conduct or acts." 860 F. Supp. at 349.. But, the court concluded, since there were not enough shelter beds to satisfy the demand, and "being does not exist without sleeping," criminalizing sleeping necessarily "punishe[d] the homeless for their status as homeless, a status forcing them to be in public." Id. at 350. The court stated that

[f]or many of those homeless in Dallas, the unavailability of shelter is not a function of choice * * *. The evidence demonstrates that for a number of Dallas homeless at this time homelessness is involuntary and irremediable. They have no place to go other than the public lands they live on. In other words, they must be in public. And it is also clear they must sleep.

Ibid. The court thus held that the sleeping ordinance as applied against the homeless is unconstitutional. Ibid.^{15/} The court emphasized, however, the "relationship between the availability of shelter and the status of homelessness," stating that "as long

^{14/} The court of appeals reversed for lack of standing. 61 F.3d at 443-445.

^{15/} The court upheld other challenged ordinances prohibiting such things as removing waste from receptacles, coercive solicitation, and trespassing, stating that those ordinances could not be construed to punish status. 860 F. Supp. at 349-350.

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as the homeless have no other place to be, they may not be prevented from sleeping in public." Id. at 350-351.^{16/}

Another case has taken a contrary view. Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 892 P.2d 1145 (Cal. 1995). In that case, the Supreme Court of California held that Santa Ana's ordinance banning "camping" was facially valid.^{17/} In rejecting the argument that the ordinance violated the Eighth Amendment because it imposed punishment for the involuntary status of being homeless, the court stated that the "ordinance permits punishment for proscribed conduct, not punishment for status." 892 P.2d at 1166. The court stated that the "Supreme Court has not held that the Eighth Amendment prohibits punishment of acts derivative of a person's status." Ibid. The court also stated that "it is far from clear that none [of the homeless people in this case] had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations." Id. at 1167. The court noted, however, that the question whether "an involuntarily homeless person who involuntarily camps on public property may be convicted or

^{16/} The court emphasized that its holding did not mean that the city was required to provide shelter to anyone, or provide the homeless with anything. The city simply could not enforce its ordinances unconstitutionally by criminalizing sleeping in public by homeless persons who have no place else to sleep. 860 F. Supp. at 350-351.

^{17/} The "camping" ordinance, making it unlawful to "camp," occupy "camp facilities," or use "camp paraphernalia" in any public area, defined those terms to include using tents, temporary shelters, sleeping bags, or tarpaulins in a public area. 892 P.2d at 1150-1151.

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punished under the ordinance" was not before the court, but "might be raised in an as applied challenge to the ordinance." Id. at 1166 n.19.^{12/}

3. a. We believe the courts in Pottinger and Johnson are correct, and that, following the reasoning of those decisions, San Francisco's enforcement of the camping, lodging, and sleeping provisions against homeless persons sleeping on public property has the effect of unconstitutionally criminalizing the status of homelessness when there is insufficient available shelter. Homelessness is the condition of living without a place to go or be other than public lands. To exist at all, such persons must perform certain life-sustaining acts in public -- including sleeping. Thus, the harmless act of sleeping is, in a very real sense, inseparable from the condition of being homeless. In other words, in the absence of available shelter, to be homeless is to be someone who must sleep in public places (unless the person violates trespass laws). And when someone sleeps, they invariably use a blanket, sleeping bag, or other item to protect them from the weather, especially when the weather is cold.^{13/} In sum, as the Johnson court put it, "[b]ecause being does not exist without sleeping, criminalizing the latter necessarily punishes the homeless for their status as homeless, a status

^{12/} The court found that "only a facial challenge was perfected in the lower courts," and thus that it was not presented with the impact of the ordinance on homeless persons. 892 P.2d at 1150, 1158.

^{13/} The record in this case shows that the temperature at night in San Francisco frequently falls below 50 degrees. E.R. 979-1008.

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forcing them to be in public." 860 F. Supp. at 350; see also Pottinger, 810 F. Supp. at 1564 ("The harmless conduct for which [the homeless] are arrested is inseparable from their involuntary condition of being homeless.").

In its preliminary injunction decision, the court below stated that homeless persons' sleeping in public falls outside Robinson because it involves "acts" that derive from a person's status, and not the status itself. 846 F. Supp. at 856-857. That argument is not persuasive. Where the conduct, or act, is that which defines the status, there is no meaningful distinction between the notions of status and conduct. (It is similar, for example, to the relationship between having a cold and coughing and sneezing.) Thus, since a homeless person is homeless because he has no place to live or sleep, sleeping in public, where the homeless must live, is part of the status of being homeless. By contrast, as in Powell, it is not intrinsic to being an alcoholic that the alcoholic must be drunk in public (as most undoubtedly are not).

Similarly, in its decision below the court incorrectly concluded that enforcement of the laws was permissible because it "punishe[d] conduct that even people who have no residence can control." E.R. 1317. Of course, as the court concluded, in theory one can sleep other than between 10:00 p.m. and 6:00 a.m., and, as a general matter, "lodging" and "camping" are "volitional" activities. See E.R. 1318-1320. But these are not real choices. Prohibiting sleeping at night would certainly deny

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a homeless person any realistic opportunity to take the steps during the day necessary to end his homelessness (such as by seeking employment or alternative housing arrangements). Thus, enforcement of the sleeping provision by itself, at least in the absence of available shelter, could as a practical matter have the effect of criminalizing the status of homelessness. In addition, if the lodging provision is applied to persons who sleep during the day to comply with the sleeping provision, those persons clearly are subject to criminal penalties for the life-sustaining function of sleeping. Thus, the court, by examining the terms of each provision singularly and in the abstract, without regard to how the City has applied it (along with the other provisions) to the homeless, ignores the fundamental claim that, given the inadequacy of shelter space, the City's enforcement of the camping, lodging, and sleeping provisions has the effect of criminalizing homelessness by criminalizing sleeping in public.²⁶

It follows that granting summary judgment was particularly inappropriate in this case. Since the issue presented turns not on the interpretation of the statutory language of each provision, but rather on how the City has enforced the provisions, and plaintiffs put evidence in the record showing

²⁶ It is well-settled, of course, that a state is prohibited from both directly and indirectly denying constitutional rights. E.g., U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1867 (1995) ("The Constitution nullifies sophisticated as well as simple-minded modes of infringing on Constitutional protections." (internal quotation marks omitted)).

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that the City had applied the provisions to homeless persons sleeping in public, the court erred in rejecting plaintiffs' claim as a matter of law. If, for example, as discussed further below, the plaintiffs could establish as a factual matter that homeless persons were cited under the lodging provision for simply sleeping in public with a sleeping bag or their belongings, and insufficient shelter beds were available so that they had no alternative but to sleep in public, enforcement of the provision would have the effect of criminalizing status in violation of the Eighth Amendment.

b. We agree, as the court in Johnson found, that there is a direct connection between recognizing homelessness (and homeless persons sleeping in public) as a status, and the availability of shelter. It is conceivable that in some cases a homeless person might be able to avoid sleeping in public, just like the alcoholic who can avoid being drunk in public. When, because adequate shelter exists, there is such a realistic choice, it would not be impermissible to criminalize sleeping in public. But the record makes clear in this case, as it did in Johnson and Pottinger, that most homeless persons have no alternative but to live in public areas because of the inadequate number of shelter beds. For the thousands of homeless in San Francisco, and in particular for the over 500 homeless persons turned away from shelters every night (E.R. 1041, 1047), it is not a choice to live and sleep in public areas.

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Thus, the voluntariness of a homeless person's status is relevant when shelter is available that would give the person the real choice of not having to sleep in a public place, and thus not having to violate the law. But the root cause of the homeless status (e.g., loss of job or illness) has no relevance to whether, once homeless, the person's life-sustaining activities may be criminalized. Being a drug addict can be the result of voluntary choices, but in Robinson it was not relevant how the defendant became an addict. The question, as here, was whether that condition could be criminalized under the Eighth Amendment. In this case, whatever the underlying cause of homelessness, there are thousands of homeless persons who cannot avoid violating the challenged laws by sleeping in public. Thus, it is incorrect to reject homelessness as a status because it is not sufficiently involuntary and an individual has control over that characteristic. See Joyce v. City & County of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994) (preliminary injunction decision).

It is also incorrect to reject the relevance of whether the City provided enough beds for its homeless based on the view that status cannot be defined as a function of the discretionary acts of others. Joyce, 846 F. Supp. at 857 (preliminary injunction decision). The status of being homeless is not being defined by the acts of others -- at any particular time one is either homeless or not regardless of what the City might do. The question is whether the City can criminalize acts inseparable

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from being homeless, such as sleeping in a public place. As discussed above, the City may not do so when, as a practical matter, it would be impossible for the homeless to sleep, and thus exist, anywhere else. This does not mean the City is required to provide shelter for its homeless (or that there is a "right" to housing); rather, the City simply cannot constitutionally criminalize sleeping in public in the absence of adequate shelter. Plaintiffs' amended prayer for relief directly addresses this point, linking enjoining enforcement of the relevant laws to circumstances when the homeless persons are unable to obtain shelter. See page 10, supra.^{21/}

Finally, the opinions in Powell addressed the difficult question whether a statute may punish the involuntary acts that result from a particular status -- like a drug addict using drugs. That issue is distinguishable from whether sleeping is part and parcel of the status of being homeless. The former situation raises the issue of criminal responsibility, i.e., whether the person acted out of an overpowering compulsion that he could not control. The plurality in Powell sought to avoid constitutionalizing that issue. See 392 U.S. at 534-537. By contrast, a homeless person sleeps in public not because a defect in his mental processes prevents him from controlling himself and

^{21/} Since the availability of shelter affects whether the City may criminalize sleeping in public by homeless persons, it is not the mere fact of homelessness that implicates the Eighth Amendment in this type of case. Homelessness is a status within the meaning of Robinson when insufficient shelter beds are available and thus a homeless person has no choice but to sleep in public.

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making a rational decision, but because, when the number of homeless exceeds the number of shelter beds, he simply has no other choice. His conduct is by default, and thus is inseparable from his homeless status. This is especially true for the nearly 15% of the nation's homeless persons who are children. Federal Plan on Homelessness at 21 n.3.^{22/}

c. This is not to say that San Francisco may not regulate where the homeless perform the everyday functions of life, or enforce other laws against conduct such as malicious obstruction, consuming alcohol in public, and trespassing. See E.R. 1101-1103. Thus, San Francisco might make it a crime to sleep in a particular park. See, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upholding United States Park Service's ban on sleeping in Lafayette Park, across from the White House, as a reasonable time, place, or manner restriction on expression). A ban on sitting or lying on public sidewalks during certain hours likewise would not raise constitutional concerns. Cf. Roulette v. City of Seattle, 1996 WL 115937, No. 94-35354 (9th Cir. Mar. 18, 1996). But the City cannot enforce its lodging, sleeping, and similar provisions so that they extend to sleeping in every public place for those persons who have no

^{22/} Even if a homeless person's sleeping is considered to be analogous to a drug addict's use of drugs, the difference between the innocent act of sleeping and using illegal drugs makes clear that even if the latter may be criminalized, the former may not. As the plurality in Powell stated, Robinson stands for the proposition that "criminal penalties may be inflicted only if the accused has committed some act, [or] engaged in some behavior, which society has an interest in preventing." 392 U.S. at 533. Sleeping is not such an act.

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choice but to live in public. The record suggests that this is the effect of San Francisco's application of these laws to acts of sleeping on public property, or doing so with a sleeping bag or surrounded by one's belongings.

In sum, the status of being homeless is analogous to the status of drug addiction in Robinson. And, unlike in Powell, where being drunk in public is not necessarily a part of being an alcoholic, sleeping in public -- when that is the only place a homeless person can sleep -- is intrinsically part of the status of being homeless. Put another way, sleeping (and engaging in other life-sustaining acts) in public defines that status (whereas being drunk in public in no way defines being an alcoholic). Justice White, concurring in Powell, recognized as much in stating that if the alcoholic had no place to live but the streets, he could not constitutionally be punished for being drunk in public, since as to him the law would ban a single act -- "the act of getting drunk." 392 U.S. at 551. Thus, since plaintiffs put evidence in the record showing that San Francisco's enforcement of the camping, lodging, and sleeping provisions criminalizes sleeping in public, the court below erred in granting the City's motion for summary judgment.

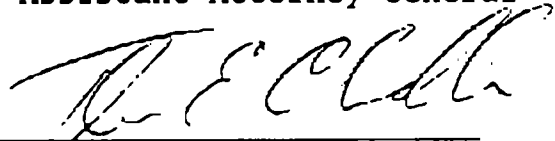
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CONCLUSION

The judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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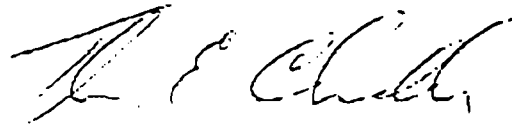
CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for the United States as Amicus Curiae, and the Application of the United States for Leave to File Brief as Amicus Curiae Out of Time, were served by first-class mail on the following counsel of record:

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