Peter E. Martin, SBN 121672
Shelley K. Mack, SBN 209596
Peter E. Martin, A Law Corporation
917 Third Street
Eureka, California 95501
Tel: (707) 268-0445
Fax: (707) 667-0318
peter@petermartinlaw.com
shelley@petermartinlaw.com

Attorneys for Plaintiffs
STACY COBINE, NANETTE DEAN,
CHRISTINA RUBLE, LLOYD PARKER,
GERRIANNE SCHULZE, SARAH HOOD,
AARON KANGAS, LYNETTE VERA,
AUBREY SHORT, MARIE ANNTONETTE KINDER,
and JOHN TRAVIS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STACY COBINE, NANETTE DEAN, CHRISTINA RUBLE, LLOYD PARKER, GERRIANNE SCHULZE, SARAH HOOD, AARON KANGAS, LYNETTE VERA, AUBREY SHORT, MARIE ANNTONETTE KINDER, and JOHN TRAVIS,

Plaintiffs,

vs.

CITY OF EUREKA, EUREKA POLICE DEPARTMENT, and ANDREW MILLS, in his official capacity as Chief of Police,

Defendants.

CASE NO. 16-cv-02239-JSW

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Date: July 1, 2016
Time: 9:00 a.m.
Department: 5
Judge: Hon. Jeffrey S. White

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I. INTRODUCTION

Defendants' Rule 12(b)(6) Motion to Dismiss should be denied because Plaintiffs' detailed Complaint sufficiently pleads facts to support causes of action for violations of their Eighth, Fourth and Fourteenth Amendment rights, their constitutional right to privacy, and the Uniform Relocation Assistance Act. Defendants' decision to proceed with the eviction of the Palco Marsh encampment on May 2 has not mooted any cause of action Plaintiffs are continuing to pursue in this case, and Defendants' efforts to cast Plaintiffs' claims as untenable as a matter of law should meet with no more success than they did at the recent hearing on Plaintiffs' motion for a temporary restraining order. The Court should flatly reject Defendants' invitation to assume facts contrary to those pled by Plaintiffs and to adopt inferences contrary to the non-moving party, both of which are impermissible on a motion to dismiss. To the extent any of Plaintiffs' claims are dismissed, Plaintiffs respectfully request that leave to amend be granted.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Pre-Suit Factual Background

The eleven Plaintiffs are homeless individuals residing in the City of Eureka. (D.I. 1 at ¶¶ 11, 16, 22, 27, 31, 37, 42, 46, 52, 55, 59.) As of 2015, there were approximately 730 homeless individuals residing in the City of Eureka. (*Id*. at ¶ 73.) The number of unsheltered homeless in Eureka far exceeds the number of emergency shelter beds; even including temporary shelter only available through November 2016, there are no more than 130 emergency shelter beds available in the City of Eureka – enough to accommodate less than a third of its homeless population. (*Id*. at ¶¶ 7, 116-118.) Even if space is available, many Plaintiffs are unable to meet shelter eligibility requirements because they lack legal identification papers or have pets that cannot be accommodated. (*Id*. at ¶¶ 13, 21, 36-38, 41, 50, 55, 62.) Despite the fact that inadequate resources exist to shelter the involuntarily homeless, the City has enacted an anti-camping ordinance – Eureka Municipal Code Section 93.02 ("the Ordinance") -- prohibiting camping on any public or private land within the Eureka city limits. [1]

[1] The full text of Section 93.02 is set forth at Paragraph 86 of the Complaint.

None of the Plaintiffs are homeless voluntarily; all have attempted to obtain housing, but their efforts have been unsuccessful. (D.I. 1 at ¶¶ 15, 21-22, 30, 36, 41, 45, 50-51, 54-55, 59.) Plaintiffs' efforts to obtain shelter or permanent housing are impeded by the various mental illnesses and physical disabilities from which they suffer (*id*. at ¶¶ 12, 15, 20-21, 33, 49-50, 56, 61), along with other factors such as lack of legal identification (*id*. at ¶¶ 36, 41, 50, 62).

Until May 2, Plaintiffs were members of the large homeless encampment at the Palco Marsh. (*Id*. at ¶¶ 11, 16, 22, 27, 31, 37, 42, 46, 52, 55, 59.) The Palco Marsh encampment was at least tacitly sanctioned by Defendants (*id*. at ¶ 2), as they elected not to enforce the Ordinance there (*id*. at ¶¶ 2-3), affirmatively instructed many homeless (including some of the Plaintiffs) to camp there (*id*. at ¶¶ 2, 23, 34, 38, 60, 108-10, 113), and told Plaintiffs and others that they would not be cited or arrested for camping there as long as they caused no trouble (*id*. at ¶¶ 14, 26, 29, 34, 53, 58).

At the Palco Marsh, Plaintiffs resided in tents and makeshift shelters where they could store their personal belongings and enjoy a modicum of privacy. (*Id*. at ¶¶ 2, 13, 22, 38, 247.) However, during the time they have been homeless in Eureka, many Plaintiffs have had their personal property summarily seized, and in some cases immediately destroyed, by members of the Eureka Police Department. (*Id*. at ¶¶ 24, 36, 39, 62.) Defendants have long maintained a policy of confiscating the personal belongings of its homeless residents at will, sometimes impounding that property for storage and other times immediately destroying it. (*Id*. at ¶¶ 94, 97-98, 100, 197-99.) Defendants provide no pre- or post-hearing procedures by which such seizure and impoundment and/or destruction of property may be challenged. (*Id*. at ¶ 242.)

On March 18, 2016, the Eureka City Council voted to vacate the Palco Marsh encampment on May 2, 2016 and begin strictly enforcing the Ordinance. (*Id*. at ¶ 183.) On March 22, 2016, EPD officers distributed flyers entitled "Notice to Vacate" to residents of the Palco Marsh encampment, warning them that "[i]t is a violation of law to camp on public or private property within the City of Eureka," and stating that "[a]ll personal property must be removed. Any property remaining after **May 2, 2016** will be removed by the City of Eureka. Any property that is deemed to be a health and safety hazard shall be removed **immediately and**

discarded. Any property that is deemed abandoned will be **immediately discarded**. This notice applies to all personal property that is deemed to have been relocated to another area within the City of Eureka or public right of way in response to this notice." (*Id*. at ¶¶ 184-85.)

B. Plaintiffs' Lawsuit and Related Proceedings

On April 25, 2016, Plaintiffs filed their Complaint against Defendants, seeking monetary, declaratory and injunctive relief for alleged violations of: (1) the Eighth Amendment prohibition against cruel and unusual punishment (as-applied challenge only); (2) the Uniform Relocation Assistance Act, 42 U.S.C. §§ 4601 *et seq*.; (3) the substantive due process guarantees of the Fourteenth Amendment and Article I, Section 7 of the California Constitution (as-applied challenge only); (4) the Fourth Amendment prohibition against unreasonable seizures (facial and as-applied challenges); (5) the procedural due process guarantees of the Fourteenth Amendment and Article I, Section 7 of the California Constitution (facial and as-applied challenges); and (6) the right to privacy guaranteed by the United States Bill of Rights and Article I, Section 1 of the California Constitution (as-applied challenge only). (D.I. 1 at ¶¶ 10, 214-253; D.I. 27 at 6:16-9:16.) Along with the Complaint, Plaintiffs also filed an Ex Parte Motion for Temporary Restraining Order, seeking immediate injunctive relief from this Court prior to the impending May 2 eviction of the Palco Marsh encampment. (D.I. 4.)

After Plaintiffs' motion for a temporary restraining order was fully briefed by the parties (D.I. 4; D.I. 17; D.I. 19), this Court held a lengthy hearing on Plaintiffs' motion on April 29, 2016. (D.I. 22; D.I. 27.) At the conclusion of that hearing, the Court enjoined Defendants from evicting Plaintiffs from the Palco Marsh on May 2 unless they were first offered emergency shelter and specific procedures were followed regarding storage of their property. (D.I. 24.)

C. Post-TRO Events

On May 2, 2016, Defendants proceeded with the planned Palco Marsh eviction. Defendants made arrangements with private service provider Betty Chinn to offer Plaintiffs temporary emergency shelter in converted metal shipping container units, beginning on the day of the eviction and continuing for approximately 90 days (with a maximum of 180 days), but subject to Ms. Chinn's unilateral discretion to evict any resident of those units for at any time

and for any reason. Approximately half of the Plaintiffs accepted shelter in Ms. Chinn's metal shipping container units. Of the remaining Plaintiffs, one is in the hospital; one could not be located in time to convey the offer of shelter before it expired; one mentally ill Plaintiff stayed in the shipping containers for several days then left after the constant noise of other residents and 29 dogs through the thin metal walls drove her into a panic; one Plaintiff stayed for a short period before Ms. Chinn evicted him for sleeping one night at the city-owned parking lot at Washington and Koster instead of in his shipping container; and counsel is informed and believes that another Plaintiff has left because Ms. Chinn would not stop pressuring her to leave her long-term partner. The Plaintiffs currently housed at the shipping container facility will be forced to leave in just a matter of weeks and at present have no alternative prospects of shelter or housing after that time; once evicted, they will again be subject to potential citation and arrest under the Ordinance for camping within the Eureka city limits, and will face summary seizure, impoundment and/or destruction of their personal property. Those Plaintiffs not housed in the shipping containers are already subject to those risks again.

With respect to this Court's order that Defendants observe specific procedures in storing Plaintiffs' personal belongings (D.I. 24 at 13:7-14:26), Defendants accepted for storage the personal belongings of at least eight Plaintiffs; one Plaintiffs' possessions were apparently destroyed by Defendants because he was not present at his campsite on May 2, and the fate of two Plaintiffs' belongings is still unknown to counsel. Because none of the Plaintiffs yet have attempted to retrieve any of their belongings held in storage, however, it remains to be seen whether Plaintiffs' belongings have actually been stored instead of being destroyed, and whether Plaintiffs will be able to retrieve them from Defendants as promised. As to the personal belongings of those Palco Marsh residents not parties to this case, some of those items appear to have been stored by Defendants in Conex boxes for later retrieval by their owners, and others were seized by Defendants on May 2 and immediately discarded and/or destroyed.

III. LEGAL STANDARDS GOVERNING RULE 12(b)(6) MOTIONS TO DISMISS

In reviewing the adequacy of the complaint on a motion to dismiss, the court must accept all well-pleaded factual allegations as true. *See, e.g., Campanelli v. Bockrath*, 100 F.3d 1476,

1479 (9th Cir. 1996); *Brown v. Hain Celestial Group, Inc.,* 913 F. Supp. 2d 881, 894 (N.D. Cal. 2012). When evaluating a motion to dismiss for failure to state a claim, the court must also construe the complaint in the light most favorable to the non-moving party, draw all reasonable inferences in favor of the non-moving party, and resolve all doubt in the non-moving party's favor. *See*, *e.g.*, *Barker v. Riverside County Office of Ed*., 584 F.3d 821, 824 (9th Cir. 2009); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

A complaint should not be dismissed if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Dismissal is improper "unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989) (citation omitted). Motions to dismiss civil rights complaints should be scrutinized with special care before any motion to dismiss is granted. *See Johnson v. State of California*, 207 F.3d 650, 653 (9th Cir. 2000).

IV. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED

A. Plaintiff's Request for Injunctive Relief Is Not Moot

Although Defendants evicted all residents of the Palco Marsh on May 2,[2] Plaintiffs' request for injunctive relief is not moot because Defendants' challenged conduct (its enforcement of the Ordinance and summary seizure and impoundment and/or destruction of Plaintiffs' personal property) is capable of repetition but evading review. "'[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *City of Erie v. Pap's A.M*., 529 U.S. 277, 287 (2000) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). Defendants bear the "heavy" burden of showing mootness. *West v. Secretary of the Dep't of Transp*., 206 F.3d 920, 924-25 (9th Cir. 2000).

A case is not moot if it "falls within a special category of disputes that are 'capable of

[2] Defendants characterize this as a "relocation" that "occurred pursuant to a Court order" (D.I. 26 at 9:24-26, 10:22-23, 11:21-23), but what occurred on May 2 was a dispersal, not a relocation, and it did not occur "pursuant to a Court order" in the sense of being compelled by one.

repetition' while 'evading review.'" *Turner v. Rogers*, 131 S. Ct. 2507, 2514-15 (2011) (citing *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)). "A dispute falls into that category, and a case based on that dispute remains live, if '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.'" *Turner v. Rogers*, 131 S. Ct. 2507, 2515 (2011 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). A challenged action lasting for less a year is too short in duration to be fully litigated before its cessation. *See*, *e.g.*, *Turner*, 131 S. Ct. at 2515.

Here, Defendants' challenged conduct – their enforcement of the Ordinance to evict Plaintiffs from their encampments at the Palco Marsh and to summarily seize and immediately impound and/or destroy their personal belongings – is capable of repetition yet evading review because (1) each instance of such enforcement, including the Palco Marsh eviction on May 2, lasts only a matter of moments to hours (the entire eviction of more than 100 residents of the Palco Marsh encampment took place in less than 36 hours on May 2); and (2) there is a reasonable expectation that Plaintiffs will be subjected to such enforcement again. Those Plaintiffs who are not currently housed in the metal shipping container facility are already subject to such enforcement now – they could be cited or arrested at any time for violation of the Ordinance, and their property immediately seized and impounded or destroyed. Those Plaintiffs currently housed in the shipping containers will see their temporary shelter end in just a matter of weeks, leaving them, too, back on the streets and subject to enforcement of the Ordinance at any time. In addition, none of the Plaintiffs whose belongings were stored by Defendants on May 2 have yet attempted to retrieve those items, and their request for injunctive relief in connection with their Fourth Amendment claim still presents a live and actual controversy.

To the extent that Defendants argue Plaintiffs' injunctive relief request is moot because, with the conclusion of the May 2 eviction, they have voluntarily ceased its allegedly unlawful conduct, such voluntarily cessation "ordinarily does not suffice to moot a case."[3] *Friends of the*

[3] Defendants argue that "if the intervening event is owing either to the plaintiffs' own act, or to a power beyond the control of either party," the dispute should be considered moot, and incredibly

Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 174, 189 (2000). The Supreme Court's standard determining whether a case has been mooted by a defendant's voluntary cessation of the challenged conduct "is stringent: 'A case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 189-90 (emphasis added) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)). "When, for example, a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her postcomplaint transfer to a community-based program will not moot the action, despite the fact that she would have lacked initial standing had she filed the complaint after the transfer." *Id.* at 190-91 (citing *Olmstead v. L.C.*, 527 U.S. 581, 594 n.5 (1999)).

Here, the fact that the March 2 eviction already has occurred "does not deprive this court of the power to decide this case" because "the plaintiffs have a reasonable expectation that the City will resume the alleged illegal treatment of the homeless that it might have ceased, and because the public has an interest in having the legality of the City's practices settled…." *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992). Defendants have not disavowed their intent to enforce the Ordinance going forward; on the contrary, they have proudly publicized the number of individuals arrested for illegal camping in Eureka since the date of the eviction. So long as the Ordinance remains enforceable and in effect, Defendants' refusal to offer this assurance demonstrates that the controversy presented in Plaintiffs' Complaint remains alive and viable. *See Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000); *City of Mesquite v. Aladdin's Castle Inc.*, 455 U.S. 283, 288-89 (1982).

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claim that "either the Plaintiffs' action (filing the suit) or a power beyond the control of either party (the Court's Order) specified the manner in which the removal would proceed. The City complied with the Court's Order and thus the court should 'stay its hand' and dismiss as moot the injunction claims." (D.I. 26 at 11:23-12:6.) This argument does not pass the straight face test. First, the Palco Marsh encampment was vacated due to Defendants' unilateral decision to do so – not because Plaintiffs requested that the encampment be vacated by filing this suit (they did not), and not because the Court ordered Defendants to vacate the encampment in its May 2 order (it did not). Second, whether Defendants complied with the Court's May 2 order remains to be proven, and is certainly not a fact to be presumed in favor of Defendants and against Plaintiffs on a motion to dismiss. *See*, *e.g.*, *Brown,* 913 F. Supp. 2d at 894.

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B. Plaintiff's Complaint Properly Pleads an Eighth Amendment Claim

Plaintiffs' Complaint also properly states an as-applied cause of action for violation of the Eighth Amendment's prohibition against cruel and unusual punishment. 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). An ordinance that criminalizes the unavoidable acts of sitting, lying, or sleeping at night while being involuntarily homeless, when the number of homeless consistently exceeds the number of available shelter beds, is unconstitutional. *See Jones v. City of Los Angeles*, 444 F.3d 1118, 1120, 1132 (9th Cir. 2006), *vacated by settlement*, 505 F.3d 1006 (9th Cir. 2007);[4] *see also*, *e.g.*, *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992); *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995).

Citing *Robinson v. California*, 370 U.S. 660 (1962), Defendants argue that Plaintiffs fail to plead an Eighth Amendment claim because the Ordinance criminalizes conduct, not status, and thus passes Eighth Amendment scrutiny. (D.I. 26 at 13:6-9.) In *Jones*, the Ninth Circuit found it was error for the district court to "not engag[e] in a more thorough analysis of Eighth Amendment jurisprudence under *Robinson []*, and *Powell v. Texas*, 392 U.S. 514 (1968), when it held that the only relevant inquiry is whether the ordinance at issue punishes status as opposed to conduct, and that homelessness is not a constitutionally cognizable status." 444 F.3d at 1131.

Powell was a fractured decision, with the plurality joined by four justices, another four justices dissenting, and Justice White concurring in his own separate opinion. That notwithstanding, "five Justices in *Powell* understood *Robinson* to stand for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Id.* at 1135. "Whether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human. It is undisputed that, for homeless individuals [] who have no access to private

[4] The decision in *Jones* was vacated at the request of the parties to that litigation following settlement. *See* 505 F.3d at 1006. While the Ninth Circuit's decision in *Jones* is no longer binding precedent, its analysis is instructive as to the unconstitutionality of the Ordinance. (D.I. 6, Ex. AA (Stat. of Int. of the United States in *Bell v. City of Boise*) at 4, 10-14.)

spaces, these acts can only be done in public." *Id.* at 1136; *accord Johnson*, 860 F. Supp. at 350. The "conduct at issue here is involuntary and inseparable from status – they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." *Jones*, 444 F.3d at 1136. The same is true for the Ordinance, even though it ostensibly prohibits sleeping with a sleeping bag or other items that might be construed as camping equipment; its intent and purpose is clear. As the Court held in *Jones*, "[t]he City could not expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment, nor can it criminalize acts that are an integral part of that status." *Id.* at 1132; *see also*, *e.g.*, *Pottinger*, 810 F. Supp. at 1564; *Johnson*, 860 F. Supp. at 350.

Defendants cite *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069 (1995), *Ashbaucher v. City of Arcata*, 2010 U.S. Dist. LEXIS 126627 (N.D. Cal. Aug. 19, 2010), *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218 (E.D. Cal. 2009), and *City of Eureka v. Carr*, Cal. Super. Ct., App. Div. Humboldt Co. Case No. CR1201892, in support of a "status versus conduct" rule for Eighth Amendment claims, but those decisions fundamentally misunderstand and misapply the rule established by the Supreme Court in *Robinson* and *Powell*. In *Ashbaucher*, Magistrate Judge Vadas based his decision on the status versus conduct discussion of the plurality opinion in *Powell*, but that opinion garnered only four votes on the Court; the majority holding – the narrowest ruling on the issue – is set forth in Justice White's concurring opinion. 2010 U.S. Dist. LEXIS 126627 at **28-29; *see also Jones*, 444 F.3d at 1135; D.I. 6, Ex. AA at 8, 11. The *Lehr* and *Tobe* courts made the same legal error. *See Tobe*, 9 Cal. 4th at 1104-1105 (upholding facial validity of anti-camping ordinance, but reserving opinion on its constitutionality as applied to people who involuntarily camp on public property); *Lehr*, 624 F. Supp. 2d at 1228-29. The decision in *City of Eureka v. Carr* should also be rejected on the same grounds. That opinion, citing no authorities and consisting of only ten sentences, does not even indicate whether the challenge at issue was facial or as-applied, though some of the court's analysis of the face of the statute suggests the challenge was facial.

Finally, while Defendants argue that "the Court has already made a finding that sufficient beds were provided to shelter these remaining 11 individual plaintiffs" (D.I. 26 at 13:13-14), that

determination was made in the context of the motion for temporary restraining order and does not constitute a finding for all purposes in this case.[5] Regardless of any earlier ruling based on evidence provided outside the pleadings, on a motion to dismiss, the Court must accept as true Plaintiffs' allegations that they have been unable to find housing, and that the number of homeless in Eureka far exceeds the number of available emergency shelter beds. (D.I. 1 at ¶¶ 7, 15, 21-22, 30, 36, 41, 45, 50-51, 54-55, 59, 116-18.) Those allegations are sufficient to survive a motion to dismiss for failure to state an Eighth Amendment claim. *See*, *e.g.*, *Anderson v. City of Portland*, 2009 WL 2386056, at *7 (D. Or. May 21, 2013); *Jones*, 444 F.3d at 1120.

C. Plaintiff's Complaint Properly States a Claim Under the Uniform Relocation Assistance Act

Plaintiffs have also properly stated a claim for violation of the Uniform Relocation Assistance Act ("URAA"), 42 U.S.C. §§ 4601 *et. seq*. While Defendants argue Plaintiffs are not "displaced persons" under the URAA because they were not "forced to move either their person or their property based on an acquisition" and "not a project subsequent to an acquisition," citing 42 U.S.C. § 4601(6) and *Alexander v. U.S. Dept. of Housing and Urban Development,* 441 U.S. 39, 59-60 (1979), the URAA was amended in 1987 to prevent exactly this narrow interpretation. The 1987 Amendments to the URAA expanded the scope of the Act to apply to rehabilitation and demolition activities that do not involve the acquisition of real property. *See*, *e.g.*, 49 C.F.R. § 24.2(a)(1) ("The term Agency means the Federal Agency, State, State Agency, or person that acquires real property *or displaces a person*.") (emphasis added). As amended in 1987, the URAA's definition of "displaced person" includes "any person who … moves his or her personal property from [] real property" "[a]s a direct result of a written notice of intent to acquire (see § 24.203(d))" or "[a]s a direct result of rehabilitation or demolition for a project" using Federal funding. See 49 C.F.R. §§ 24.2(a)(9)(i)(A), (B). Section 24.203(d) provides that a "notice of

[5] The motion to dismiss also ignores the fact that even if space is available in a shelter, it may not be a "viable alternative" to arrest and prosecution under the Ordinance for a variety of reasons, including that a particular Plaintiff may not meet the eligibility requirements of a particular shelter or may not want to be subject to religious proselytizing. *See*, *e.g.*, *Pottinger*, 810 F. Supp. at 1580 n.34; *Johnson*, 860 F. Supp. at 350.

intent to acquire is a displacing Agency's written communication that is provided to a person to be displaced, *including those to be displaced by rehabilitation or demolition activities from property acquired prior to the commitment of Federal financial assistance to the activity….*" 42 C.F.R. § 24.203(d) (emphasis added).

Furthermore, *Kong v. City of Hawaiian Gardens Redevelopment Agency*, 125 Cal. Rptr. 2d 1 (2002), cited by Defendants during the recent TRO hearing, also undercuts Defendants' claim that those displaced from real property long after its acquisition by a public entity are not "displaced persons" for purposes of the URAA. The *Kong* court, considering plaintiff's claim under the parallel California Relocation Assistance Law ("CRAL"), reversed an order below denying plaintiff's petition for writ of mandate to compel defendants to pay CRAL relocation benefits where the plaintiff was displaced from the subject property "six years after the Agency's initial acquisition of the premises…." 125 Cal. Rptr. 2d at 10. Defendants' motion to dismiss Plaintiffs' URAA claim should be denied accordingly.

D. Defendants' Motion to Dismiss Plaintiffs' As-Applied[6] Fourth Amendment Claim Must Be Denied

Defendants' motion to dismiss Plaintiffs' as-applied Fourth Amendment claim must also be denied. Plaintiffs' Complaint alleges that Defendants have summarily seized and impounded and/or destroyed their own personal property and the personal belongings of other homeless persons in Eureka and are likely to do so again in the future. (D.I. 1 at ¶¶ 9, 24, 36, 39, 62, 94, 97-98, 100, 197-99.) Defendants have not disavowed their intent to continue enforcing the Ordinance and confiscating and impounding and/or destroying the personal belongings of homeless residents charged with its violation. Nothing more is required for Plaintiffs to state this cause of action. *See*, *e.g.*, *Lavan v. City of Los Angeles* ("*Lavan I*"), 797 F. Supp. 2d 1005, 1011 (C.D. Cal. 2011). In addition, Defendants have impounded the personal belongings of almost all of the Plaintiffs in connection with the May 2 eviction, and whether Defendants will comply with

[6] In light of the Court's order on Plaintiffs' motion for temporary restraining order, and the process and procedures it specified for Defendants' eviction of Plaintiffs from the Palco Marsh encampment on May 2, Plaintiffs withdraw their facial challenge under the Fourth Amendment without prejudice to their ability to bring a new challenge for any violation after May 2, 2016.

the retrieval procedures specified in this Court's May 2 order remains to be seen.[7]

While Defendants argue Plaintiffs have not adequately alleged a facial Fourth Amendment challenge, Plaintiffs no longer pursue a facial challenge to Defendants' conduct, and the motion to dismiss does not address Plaintiffs' as-applied Fourth Amendment challenge beyond noting its existence. (D.I. 26 at 16:2-9.) Defendants' motion to dismiss Plaintiffs' Fourth Amendment claim should be denied accordingly.

E. The Complaint Properly Alleges an As-Applied Violation of Plaintiffs' Fourteenth Amendment Substantive Due Process Rights[8]

Plaintiffs' complaint also properly states an as-applied cause of action for violation of their Fourteenth Amendment substantive due process rights. The Fourteenth Amendment protects the right to bodily integrity. *See*, *e.g.*, *Ingraham*, 430 U.S. at 673-74. "[A]lthough the state's failure to protect an individual against private violence does not generally violate the guarantee of due process, it can where the state action 'affirmatively place[s] the plaintiff in a position of danger,' that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1060 (9th Cir. 2006) (citing *DeShaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189, 197, 201 (1989); *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1977) (right against state-created dangers "clearly established")). In substantive due process cases asserting the danger-creation doctrine, the Ninth Circuit considers two factors: whether the danger was affirmatively created by state action, and whether the state acted with deliberate indifference to a known danger (or one so obvious that knowledge may be inferred). *Kennedy*, 439 F.3d at 1062-64.

Here, the Complaint contains detailed allegations regarding both (1) the dangers

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[7] Even if a seizure is lawful at its inception it may nevertheless violate the Fourth Amendment in its manner of execution, such that if items are not stored properly or returned to their rightful owners upon demand, that conduct may "turn[] what could be an otherwise lawful seizure into an unlawful one by forever depriving an owner of his or her interests in possessing the property without recourse." *Lavan I*, 797 F. Supp. 2d at 1016.

[8] In light of the Court's order on Plaintiffs' motion for temporary restraining order, and the process and procedures it specified for Defendants' eviction of Plaintiffs from the Palco Marsh encampment on May 2, Plaintiffs withdraw their facial challenge under the Fourth Amendment without prejudice to their ability to bring a new challenge for any violation after May 2, 2016.

Plaintiffs' eviction from the Palco Marsh encampment would subject them to (D.I. 1 at ¶¶ 5-7, 199-202, 233-35) and (2) Defendants' actual knowledge and disregard of those dangers (*id*. at ¶¶ 7-8, 233). Defendants even point to some of these allegations in their motion to dismiss (D.I. 26 at 17:8-12, citing D.I. 1 at ¶ 201), but argue that the Court should disbelieve or disregard Plaintiffs' allegations of the substantial physical dangers posed by their eviction from the Palco Marsh encampment because they "have been homeless for some time" and have spent much of it in Humboldt County. (D.I. 26 at 17:12-14.) Defendants' argument fails for three reasons. First, the Complaint explains that, even though Plaintiffs were already homeless, their eviction from the Palco Marsh encampment exposed them to substantial dangers they would not otherwise have faced but for that eviction. (D.I. 1 at ¶¶ 5-7, 199-202, 233-35.) Second, the fact that the Complaint alleges Plaintiffs have lived in Humboldt County for extended periods of time does not mean they enjoy the benefits of having support networks in the Humboldt County housed community; Plaintiffs instead are largely ostracized from those support networks and are broadly mischaracterized as lazy addicts and criminals. Finally, Defendants' argument ignores the fact that on a motion to dismiss, all well-pleaded factual allegations in the complaint are assumed to be true. Defendants are essentially arguing with the facts pleaded in the Complaint, not alleging their absence, and invite the Court to assume facts contrary to the pleadings and draw inferences against the non-moving party. Such inferences and conclusions are impermissible on a motion to dismiss. *See, e.g., Twombly*, 550 U.S. at 556 (Rule 12(b)(6) does not permit "dismissals based on a judge's disbelief of a complaint's factual allegations"); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Defendants also argue Plaintiffs' substantive due process claim should be dismissed because they gave Plaintiffs notice of the impending eviction, "provided for their property," and "held service fairs to connect plaintiffs to assistance" and therefore were not "deliberately indifferent" to the danger they created. (D.I. 26 at 18:1-4.) None of these contentions negate the fact that (as alleged in the Complaint) by evicting Plaintiffs from their homes at the Palco Marsh encampment on May 2, Defendants knowingly exposed Plaintiffs to serious physical and mental health risks they would not otherwise have faced. (D.I. 1 at ¶¶ 5-8, 199-202, 233-35.) Plaintiffs'

1 allegations must be assumed true on a motion to dismiss, and Defendants' motion must be denied
2 as a result. *See*, *e.g.*, *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1099, 1100 (E.D. Cal. 2012).

3 **F. The Complaint Sufficiently Alleges a Cause of Action for Violation of**
4 **Plaintiff's Federal and State Constitutional Rights to Privacy**

5 Plaintiffs' Complaint also properly alleges an as-applied cause of action for violation of
6 their autonomy privacy rights under the federal Bill of Rights and the California Constitution.
7 The Complaint alleges that Plaintiffs made their homes at the Palco Marsh, some of them for as
8 much as a decade. (D.I. 1 at ¶¶ 11, 16, 22, 27, 31, 37, 42, 46, 52, 55, 59.) They built dwellings
9 there that kept them safe from the elements as well as the eyes of their neighbors and passers-by.
10 (*Id*. at ¶¶ 2, 13, 22, 38, 247.) They decided who could enter their homes and when and shared
11 their homes with others as they wished. The right to autonomy privacy is associated with the
12 right to live as one chooses in one's home. *See*, *e.g.*, *Hill v. NCAA*, 7 Cal. 4th 1, 24 (1994);
13 *CALHO v. City of Santa Monica*, 88 Cal. App. 4th 451, 459 (2001) ("In short, the right to privacy
14 includes the right to be left alone in our homes."). By robbing them of their homes at the Palco
15 Marsh, and conditioning the benefits offered by temporary emergency shelters on surrendering
16 control over when and with whom they live and sleep and when and where they have visitors --
17 rights they previously enjoyed in their homes at the Palco Marsh – Defendants violated
18 Plaintiffs' right to autonomy privacy.[9] *See*, *e.g.*, *Robbins v. Superior Court*, 38 Cal. 3d 199, 207
19 (1985). While Defendants argue they have a competing interest in the "socially beneficial
20 activities" of "providing alternative shelter for the individuals who were illegally squatting in an
21 environmentally sensitive area, engaging in criminal activity, and seriously jeopardizing federal
22 funding,"[10] none of these is a "compelling government interest" sufficient to defeat the right to
23
24 [9] Plaintiffs' right to privacy is not lessened by the fact that they are homeless and have made their homes on public land. *See, e.g., U.S. v. Sandoval*, 200 F.3d 659, 660-61 (9th Cir. 2000);
25 *Pottinger*, 810 F. Supp. at 1571-72.
26 [10] Regarding this assertion, Plaintiffs note further that: (1) Defendants are not "providing alternative shelter" to anyone -- a private organization is providing temporary shelter for some of
27 the eleven Plaintiffs, and Defendants made no arrangements to "provid[e] alternative shelter" for any residents of the Palco Marsh other than the eleven named Plaintiffs when they vacated the
28 encampment on May 2; (2) the pleadings contain no reason to believe Plaintiffs were "engaging in criminal activity" beyond simply existing on public property; and (3) while Defendants no appear to assert that the Palco Marsh encampment was "jeopardizing federal funding,"

1 privacy. *See Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 288 (2009) (countervailing state
2 interest must be compelling in autonomy privacy cases); *Williams v. Rhodes*, 393 U.S. 23, 31-34
3 (1968); *Pottinger*, 810 F. Supp. at 1581, 1554 (quoting *Edwards v. California*, 314 U.S. 160, 177
4 (1941); citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972)).

5
6 **G. In the Event That Any of Plaintiffs' Claims Are Dismissed, Plaintiffs Should Be Granted Leave to Amend Their Complaint**

7 In the event any of Plaintiffs' claims are dismissed, the Court should grant Plaintiffs
8 leave to amend the Complaint. Leave to amend should be liberally granted unless the complaint
9 "could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122,
10 1130 (9th Cir. 2008); *see also*, *e.g.*, *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th
11 Cir. 2011). Plaintiffs should be allowed at least one opportunity to cure any deficiencies in its
12 content before their claims are dismissed with prejudice. *See National Council of La Raza v.*
13 *Chegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) ("black-letter law" that district court must give
14 at least one chance to amend absent clear showing amendment would be futile).

15 **V. CONCLUSION**

16 For all of the foregoing reasons, Plaintiffs respectfully request that Defendants' Motion to
17 Dismiss for Failure to State a Claim be denied in its entirety, and to the extent that any portion of
18 that Motion is granted, that Plaintiffs be permitted leave to amend the Complaint.

19 Dated: May 31, 2016 Respectfully Submitted,

20
21 /s/ Shelley K. Mack

22 Peter E. Martin
23 Shelley K. Mack
Attorneys for Plaintiffs
24 STACY COBINE, NANETTE DEAN,
CHRISTINA RUBLE, LLOYD PARKER,
GERRIANNE SCHULZE, SARAH HOOD,
25 AARON KANGAS, LYNETTE VERA, AUBREY
SHORT, MARIE ANNTONETTE KINDER, and
26 JOHN TRAVIS

27
28 Defendants argued at the recent TRO hearing that no federal funds were being used for the Waterfront Trail project used to justify the Palco Marsh eviction.