

**STATE OF MICHIGAN**  
**IN THE 15<sup>TH</sup> DISTRICT COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 09-0776-SM

v.

Hon. Elizabeth Pollard Hines

CALEB G. POIRIER

Defendant.

\_\_\_\_\_ /

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**AMICUS CURIAE BRIEF**  
**OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN**

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## INTEREST OF AMICUS CURIAE

The American Civil Liberties Union Fund of Michigan (“ACLU”) is the Michigan affiliate of a nationwide nonpartisan organization of nearly 500,000 members dedicated to protecting the liberties and civil rights guaranteed by the United States Constitution. The ACLU regularly and frequently participates in litigation in state and federal courts seeking to protect the constitutional rights of United States and Michigan citizens. We believe that this case involving the criminalization of homelessness raises important civil liberties issues and that our amicus brief will bring additional authorities and perspectives to the attention of the court.

## INTRODUCTION

The Federal Constitution prohibits “cruel and unusual punishment.” US Const, Am VIII. The Michigan Constitution, which provides greater protection than the Federal Constitution, mandates that “cruel *or* unusual punishment shall not be inflicted.” Const 1963, art 1, § 16 (emphasis added); see *People v Bullock*, 440 Mich 15, 30-31; 485 NW2d 866 (1992). There is perhaps no punishment that is more cruel than penalizing an individual for something over which they have no control.

As the economic crisis continues to worsen, an increasing number of men, women and children have become involuntarily homeless in our state. In 2008, the estimated number of homeless individuals in Michigan increased by over 10% to reach 86,169 people. *The State of Homelessness in Michigan: 2008 Annual Summary*, Michigan State Housing Development Authority [Attached as Attachment A].<sup>1</sup> Due to the shortage of shelter beds and the limited availability of public housing, many of these individuals have no choice but to live on the street. *Homes Not Handcuffs: The Criminalization of Homelessness in U.S. Cities*, The National Law

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<sup>1</sup> Available at [http://www.michigan.gov/documents/mshda/homelessness\\_summary\\_2009\\_web\\_282448\\_7.pdf](http://www.michigan.gov/documents/mshda/homelessness_summary_2009_web_282448_7.pdf).

Center on Homelessness & Poverty and the National Coalition for the Homeless (July 2009), at 8 [hereinafter *Homes Not Handcuffs*] [Attached as Attachment B].<sup>2</sup> To arrest people in these circumstances for trespassing when they conduct life-sustaining activities such as sleeping, eating or sitting public property punishes them for the mere act of existing. Because this penalization violates our constitutional proscriptions against cruel and/or unusual punishment, the ACLU urges the court to dismiss all trespassing charges against involuntarily homeless individuals.

### STATEMENT OF FACTS

Although Detroit has been the focus of much national attention over the past two years, communities within Washtenaw County have also been devastated by the current economic crisis. In 2008, the poverty rate in Ann Arbor rose to 24.9%. *Community Homelessness: Ann Arbor Area 2009*, City of Ann Arbor, One Community and Washtenaw County Michigan, at 2 [hereinafter *Community Homelessness*] [Attached as Attachment C]. This number, which includes University of Michigan Students, represents a 5% increase from the past year. *Community Homelessness* at 2.

Not surprisingly, this reality has led to a drastic increase in the number of individuals who have lost their homes. As noted by the Office of Community Development in Washtenaw County, “it is estimated that at least 1,200 county residents were evicted last year.” ANN ARBOR, MICH, Enactment R-09-431 (Nov 5, 2009), at 2 [hereinafter Enactment R-09-431] [Attached as Attachment D].<sup>3</sup> Between 2006-2008, foreclosures in the county rose by 105%. *Community Homelessness* at 2. Indeed, the rate of foreclosure in Ann Arbor is currently 2%, which is double

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<sup>2</sup> Available at [http://www.nationalhomeless.org/publications/crimreport/CrimzReport\\_2009.pdf](http://www.nationalhomeless.org/publications/crimreport/CrimzReport_2009.pdf).

<sup>3</sup> Available at <http://a2gov.legistar.com/LegislationDetail.aspx?ID=535787&GUID=0BB8B6C0-9658-4F6B-9EBC-E3978F965EEC>.

the rate in Detroit. Enactment R-09-431 at 2. According to the United States Department of Housing and Urban Development, the number of homeless individuals in Washtenaw County rose to over 4,200 individuals during in calendar year 2008. *Annual Report 2008-2009: Shelter Association*, Shelter Association of Washtenaw County, at 1 [Attached as Attachment E]. This number, which represents a 30% increase from the previous year, is expected to rise again in 2009. Ellen Schulmeister Aff ¶ 4 [Attached as Exhibit C to Def Brief].

During this period of economic crisis, local homeless shelters are experiencing an overwhelming increase in the need for services and shelter at the exact time that their resources are dwindling. In 2009, 65% of local nonprofit agencies experienced a decrease in philanthropic gifts and overall revenues. Enactment R-09-431 at 2. Because this decrease in resources has coincided with a drastic increase in need, the former has unfortunately been unable to meet the latter. At the time of Mr. Porier's arrest, there were only 189 beds for those experiencing homelessness in Ann Arbor. Enactment R-09-431 at 189. Of these, only a little over 100 were made available to single men. *Community Homelessness* at 10; Ellen Schulmeister Aff ¶7. As noted by the Office of Community Development in Washtenaw County, "demand exceeds this capacity." Enactment R-09-431 at 2; see also Ellen Schulmeister Aff ¶¶5, 9 (noting that the system could not even meet the community's needs in 2007 and that "despite th[e] array of shelters and services, neither the SAWC nor the shelter services offered by the WHA agencies can meet the need for shelter beds and services of our community's homeless population"). Indeed, 100% of the emergency shelter beds available to homeless individuals were used on an average night between October 2007 and September 2008. *2008 Washtenaw County and City of Ann Arbor: Annual Homeless Assessment Report*, Amy Ramirez, Office of Community Development (August 18, 2009) [Attached as Attachment F]. Given the worsening economic

climate, it is certain that an increasing number of homeless individuals are left without a bed once these emergency shelters reach capacity.

## ARGUMENT

### I. TRESPASSING CHARGES BROUGHT AGAINST THOSE WHO ARE INVOLUNTARILY HOMELESS MUST BE DISMISSED AS CRUEL AND UNUSUAL PUNISHMENT.

#### A. It is Unconstitutional to Punish Individuals for Their Involuntary Status.

For over forty years, it has been clearly established that criminalizing an individual's involuntary status constitutes cruel and unusual punishment that violates the Eighth Amendment. See *Robinson v State of California*, 370 US 660; 82 S Ct 1417; 8 L Ed 2d 758 (1962). In *Robinson*, the defendant was convicted under a California statute that made the status of narcotic addiction a criminal offense for which the offender could be prosecuted even if he had never bought, sold or used narcotics in California, nor engaged in any other type of disruptive behavior. *Id.* at 666. Reversing the conviction, the United States Supreme Court emphasized that even the broad power of the state to regulate drug trafficking within its borders could not authorize the criminalization of an involuntary status. *Id.* at 666-667. The Court explained that a law that made it a criminal offense for a person to be afflicted with a sexually transmitted infection, mentally ill or a leper "would doubtless be universally thought to be infliction of cruel and unusual punishment," and went on to conclude,

[w]e 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 returned to the question of involuntary status when it addressed a conviction under Texas' public intoxication statute in *Powell v State of Texas*, 392 US 514; 88 S Ct 2145; 20 L Ed 2d 1254 (1968). Although *Powell* did not produce a majority opinion, five of the justices agreed that it is unconstitutional to criminalize an involuntary condition.<sup>4</sup> As Justice Fortas explained, "it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens" that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change" because he is "powerless to choose not to violate the law." *Id.* at 567 (Fortas, J. dissenting).

Additionally, these five justices made clear that contracting an infectious disease is not the only situation that qualifies as a constitutionally-cognizable involuntary status. Instead, extreme poverty also constitutes an involuntary status for which an individual cannot be punished. Consequently, Justice White explained that it would be unconstitutional to penalize the public intoxication of the chronic alcoholics who are homeless as a result of their extreme poverty because it was as impossible for them to resist drunkenness as it was to avoid public places when they were intoxicated. *Id.* at 551 (White, J. concurring in the result).

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<sup>4</sup> A majority of the Court, comprised of the four dissenting justices and Justice White, who concurred in the result, agreed upon the *legal* proposition that it would be unconstitutional to punish public intoxication when the record demonstrated that this condition was involuntary. See *Powell*, 392 US at 551 (White, J. concurring in the result) and *id.* at 567 -568 (Fortas, J. dissenting). The concurring and dissenting opinion disagreed only with respect to the *factual* question regarding the voluntary nature of the specific defendant's public intoxication. Compare *id.* at 552-554 (White, J. concurring in the result) (noting the record did not provide a reason that the defendant needed to drink public) with *id.* at 567-568 (Fortas, J. dissenting) (determining that the defendant could not prevent himself from appearing intoxicated in public due to his chronic alcoholism). A minority of the court, comprised of the four justices who joined the plurality opinion, distinguished between the criminalization of involuntary status and the criminalization of conduct that necessarily occurs as a result of an individual's involuntary status. See *id.* at 531-536. Critically, however, "[g]iven Justice White's views, the dissent co[m]es closer to speaking for the majority of the Court than does the plurality opinion." Grenawalt, "*Uncontrollable*" *Actions and the Eighth Amendment; Implications of Powell v Texas*, 69 COLUM L REV 927, 931 (June 1969).

Critically, this determination that the state cannot punish involuntary poverty is also reflected in numerous opinions that have struck down state vagrancy statutes as unlawful. See, e.g., *Wheeler v Goodman*, 306 F Supp 58, (WD NC, 1969) vacated on other grounds 58 US 987; 91 S Ct 1219; 28 L Ed 2d 524 (1971). As the *Wheeler* court explained, “idleness and poverty, without fault, cannot be made the elements of a crime” because “to make poverty and misfortune criminal [would be] contrary to our fundamental beliefs.” *Id.* at 63; see also *Fenster v Leary*, 20 NY2d 309, 315-316; 229 NE2d 426 (NY 1967) (noting that “the only persons arrested and prosecuted as common-law vagrants are alcoholic derelicts and other unfortunates” and yet “it seems clear that they are more properly objects of the welfare laws and public health programs than of the criminal law”); *Headley v Selkowitz*, 171 So 2d 368, 370; 12 ALR3d 1443 (Fla 1965) (“Innocent victims of misfortune ostensibly appearing to be vagrants, but who are not such either by choice or intentional conduct should not be charged with vagrancy.”). “These cases support the proposition that the courts will no longer tolerate the abuse of constitutional freedoms under the guise of crime prevention,” and that penalizing involuntary poverty is far too high a price to achieve this otherwise worthy goal. *Wheeler*, 306 F Supp at 64-65.

**B. Charging Individuals with Trespassing When They Conduct Life-Sustaining Activities on Public Property Due to Involuntary Homelessness is an Unconstitutional Criminalization of Involuntary Status.**

*Robinson* and *Powell* clearly establish that the state cannot criminalize the mere act of “being” without violating the Eighth Amendment. Thus, it is unquestionable that the state cannot criminalize the status of homelessness itself. However, there are several life-sustaining activities, such as sleeping, eating and sitting, that homeless individuals must conduct in public because they literally have “no place else to go and no place else to be.” *Powell*, 392 US at 551 (White, J. concurring in result). Numerous federal courts have therefore determined that when the harmless

conduct for which an individual is arrested is inseparable from her involuntary condition of being homeless, criminalizing the former is as unconstitutional as criminalizing the latter.

The seminal opinion *Pottinger v City of Miami*, 810 F Supp 1551, 1564 (SD Fla 1992), was the first to recognize this logical corollary of *Robinson* and *Powell*, persuasively reasoning, “arresting homeless people for [the] harmless acts they are forced to perform in public effectively punishes them for being homeless.” Federal courts in a variety of other circuits soon adopted similar holdings. See, e.g., *Jones v City of Los Angeles*, 44 F3d 1118 (CA 9 2006) vacated 505 F3d 1006 (CA 9 2007); *Johnson v City of Dallas*, 860 F Supp 344 (ND Tex 1994) rev’d on other grounds 61 F3d 442 (CA 5 1995).<sup>5</sup> Each of these decisions emphasized that two central factual proofs are necessary to establish an Eighth Amendment violation when the state arrests a homeless individual for trespassing.

First, the homeless individual must demonstrate that her condition is involuntary by establishing a lack of available reasonable housing alternatives. For instance, in *Pottinger*, the court repeatedly noted that the City of Miami had only 700 beds available in its homeless shelters. 810 F Supp at 1558; see also *id.* at 1563-1565. Given the alarming rate at which Miami’s homeless population was growing, this rather sparse offering meant that the court had “no difficulty in finding that the majority of homeless individuals literally have no place to go.”

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<sup>5</sup> *Jones* was vacated in October 2007 to facilitate a settlement between the parties. 505 F3d 1006. Nevertheless, courts continue to cite *Jones*’ reasoning as persuasive authority. See, e.g., *Anderson v City of Portland*, -- F Supp 2d --; 2009 WL 2386056, \*9 n1 (D Or July 31, 2009); *Lehr v City of Sacramento*, 624 F Supp 2d 1218, 1225-1226 (ED Cal 2009) (describing *Jones* as informative authority that is “highly persuasive” on the issue of standing); see also *DHS, Inc v Allianz AGF MAT, Ltd*, 425 F3d 1169, 1176 (CA 9 2005) (“[A] vacated opinion still carries informational and perhaps even persuasive or precedential value.”) (Beezer, J., concurring); *McKenszie v Day*, 57 F3d 1493, 1494 (CA 9 1995) (utilizing vacated opinion as persuasive authority and adopting analysis). *Johnson* was reversed on the basis of standing concerns that do not apply within the context of a motion to dismiss criminal charges. 61 F3d at 443. Its reasoning regarding the merits of an Eighth Amendment claim is therefore still persuasive with respect to this case.

*Id.* at 1559. This mathematical reality was buttressed by the testimony of expert witnesses who explained that “people rarely choose to be homeless” and instead “homelessness is due to various economic, physical or psychological factors that are beyond the homeless individual’s control.”

*Id.* at 1563. Both *Jones* and *Johnson* similarly relied upon the fact that the only realistic and reasonable choice for the individuals involved in their respective cases was to live in public places. See *Jones*, 444 F3d at 1132; *Johnson*, 860 F Supp at 350.

Second, the homeless individual must demonstrate that the conduct for which she was arrested was harmless and life-sustaining. Arresting a homeless individual who assaults a police officer in the park or purchases narcotics on the street does not violate the Eighth Amendment. Unlawful behavior that happens to occur in public does not suddenly become lawful because the individual who commits the crime is homeless. The courts acknowledge, however, that there are certain innocent activities, such as sitting, sleeping and eating, that all humans *must* perform. See *Jones*, 444 F3d at 1136; *Pottinger*, 810 F Supp at 1565; *Johnson*, 860 F Supp at 350.

To arrest an individual for performing such life-sustaining activities in public when the individual is homeless is cruel and unusual punishment because the homeless individual can neither resist the need to perform these activities nor avoid public places when engaged in this otherwise innocent conduct. *Pottinger*, 810 F Supp at 1565. By criminalizing the “biologically compelled” acts of sitting, sleeping and eating for individuals who are forced to perform such activities in public, the state effectively, and unconstitutionally, criminalizes an individual’s homeless status. *Jones*, 444 F3d at 1136-37. As *Johnson* explained,

Although sleeping is an act rather than a status, the status of being could clearly not be criminalized under *Robinson*. Because being does not exist without sleeping, criminalizing the latter necessarily punishes the homeless for their status as homeless, a status forcing them to be in public.

860 F Supp at 350.

Notably, the few instances in which the courts have rejected homeless individuals' Eighth Amendment claims almost uniformly involve individuals who have failed to establish one or both of the critical elements described above. *See Joel v City of Orlando*, 232 F3d 1353 (CA 11 2000); *Veterans for Peace Greater Seattle v City of Seattle*, -- F Supp 2d --, 2009 WL 2243796 (WD Wash July 24, 2009); *Joyce v City and County of San Francisco*, 846 F Supp 843 (ND Cal 1994). For instance, in *Joyce*, the plaintiff class of homeless individuals challenged the City's enforcement of a program that directed rigorous law enforcement against offenses occurring on public property. 846 F Supp at 845-846. In its decision to deny the plaintiffs' motion for a preliminary injunction, the court emphasized that (1) homeless shelters had agreed to set aside beds for individuals with referral slips, and yet the vast majority of homeless individuals refused to accept the referral slips, *id.* at 848, (2) each of the named plaintiffs appeared to have available housing alternatives, *id.* at 849-50 and (3) only a very small percentage of the arrests involved otherwise "innocent" conduct such as sleeping, *id.* at 847.

Similarly, the court in *Veterans for Peace Greater Seattle* refused to issue a temporary restraining order to prevent the city from dismantling a homeless encampment on public property where "the record establishe[d] that Plaintiffs [we]re not completely without solutions if they [we]re forced to leave their current encampment." 2009 WL 2243796 at \*4. Finally, in a case that challenged the enforcement of an anti-camping municipal ordinance against homeless individuals, *Joel* granted summary judgment in favor of the city only because "the City [] presented unrefuted evidence that the Coalition, a large homeless shelter, ha[d] never reached its

maximum capacity and that no individual ha[d] been turned away because there was no space available or for failure to pay the one dollar nightly fee.” 232 F3d at 1262.<sup>6</sup>

In order to deny the plaintiffs’ claims, each of these opinions relied upon the fact that the individuals involved were either voluntarily homeless or engaged in harmful behavior. They therefore support the determination that, in contrast, it is unconstitutional to arrest an involuntarily homeless individual for performing harmless, life sustaining activities in public.

**C. The Michigan Constitutional Prohibition Against Cruel or Unusual Punishment Provides at Least as Much Protection for Individuals who Conduct Life-Sustaining Activities on Public Property Due to Involuntary Homelessness as the Eighth Amendment.**

Arresting involuntarily homeless individuals for performing harmless, life-sustaining activities on public property also violates the Michigan Constitution. The Eighth Amendment prohibits “cruel *and* unusual” punishment, whereas art 1, § 16 of the Michigan Constitution prohibits “cruel *or* unusual” punishment. “This textual difference does not appear to be accidental or inadvertent.” *Bullock*, 440 Mich at 30. Instead, our Supreme Court has emphasized that this distinction provides *greater* protection against unconstitutional punishments under state law, explaining

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<sup>6</sup> But see *Lehr v City of Sacramento*, 624 F Supp 2d 1218 (ED Cal 2009). Notwithstanding a lack of available housing alternatives, *Lehr* nevertheless refused to enjoin the city from enforcing an anti-camping against homeless individuals who were performing harmless, life-sustaining activities in public. *Id.* at 1222. *Lehr*’s reasoning is not persuasive, however, as it largely relied upon an erroneous fear of a “slippery slope.” *Id.* at 1232-1234. Indeed, the court argued that if it were to grant the plaintiffs’ claim, then there would be no reason that an individual could not be excused from murder, using drugs or committing a criminal sexual offense so long as they could claim that they “involuntarily” committed the act. *Id.* Yet, there is a critical distinction between these two sets of claims. A homeless individual who is arrested for sleeping, eating or sitting on public property is engaged in behavior that is harmless and otherwise entirely innocent aside from the fact that it is occurring on public property as a result of her homeless status. In contrast, each of the crimes enumerated by the *Lehr* court are obviously harmful and criminal irrespective of where they occur. Because *Lehr*’s argument is fundamentally flawed, it should not inform this Court’s analysis.

It seems self evident that any adjectival phrase in the form “A *or* B” necessarily encompasses a broader sweep than a phrase in the form “A *and* B.” The set of punishments which are *either* “cruel” *or* “unusual” would necessarily seem broader than the set of punishments which are *both* “cruel” *and* “unusual.”

*Id.* at 30 n11 (emphasis in original).

A plain reading of the texts dictates that any form of punishment that is considered both “cruel and unusual” will necessarily be the “cruel or unusual” standard. Thus, because arresting involuntarily homeless individuals for performing harmless, life-sustaining activities on public property violates the Eighth Amendment, it automatically violates the Michigan constitution as well. Cf. *People v Nunez*, 242 Mich App 610, 618 n2; 619 NW2d 550 (2000).

### CONCLUSION

The number of homeless individuals has continued to climb over the past two years. Unfortunately, given the current economic crisis, local nonprofit organizations have fewer resources with which to address this growing need. As a result, “[t]he lack of available shelter space leaves many homeless persons with no choice but to struggle to survive on the streets of our cities.” *Homes Not Handcuffs* at 14. “The lack of sufficient shelter, of course, is not the City’s problem alone.” *Pottinger*, 810 F Supp at 1564-1565 n19. However, when the City does not provide sufficient shelter to house homeless individuals within its borders, it cannot then arrest them for performing harmless acts in public areas when they have no place else to go. *Id.* Because such penalization would violate our constitutional proscriptions against cruel and/or unusual punishment, the ACLU urges the court to dismiss all trespassing charges against involuntarily homeless individuals.

Respectfully submitted,

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