THE CRIMINALIZATION OF HOMELESSNESS

Spring 2024

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READINGS, Parts I & II

Part I

Part II

JORDAN, Circuit Judge:

In understanding what is going on around us, context matters. Food shared with company differs greatly from a meal eaten alone. Unlike a solitary supper, a feast requires the host to entertain and the guests to interact. Lady Macbeth knew this, and chided her husband for "not giv[ing] the cheer" at the banquet depicted in Shakespeare's play. As she explained: "To feed were best at home; From thence, the sauce to meat is ceremony. Meeting bare without it." William Shakespeare, The Tragedy of Macbeth, Act III, scene 4 (1606).

Fort Lauderdale Food Not Bombs, a non-profit organization, hosts weekly events at a public park in Fort Lauderdale, sharing food at no cost with those who gather to join in the meal. FLFNB's members set up a table and banner with the organization's name and emblem in the park and invite passersby to join them in sitting down and enjoying vegetarian or vegan food. When the City of Fort Lauderdale enacted an ordinance in 2014 that restricted this food sharing, FLFNB and some of its members (whom we refer to collectively as FLFNB) filed suit under 42 U.S.C. § 1983. They alleged that the ordinance and a related park rule violated their First Amendment rights of free speech and free association and were unconstitutionally vague.

The district court granted summary judgment in favor of the City. It held that FLFNB's outdoor food sharing was not expressive conduct protected by the First Amendment and that the ordinance and park rule were not vague. *See Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, 2016 WL 5942528 (S.D. Fla. Oct. 3, 2016) (final judgment). FLFNB appeals those rulings.

Resolving the issue left undecided in *First Vagabonds Church of God v. City of Orlando, Florida*, 638 F.3d 756, 760 (11th Cir. 2011) (en banc), we hold that on this record FLFNB's outdoor food sharing is expressive conduct protected by the First Amendment. We therefore reverse the district court's grant of summary judgment in favor of the City. On remand, the district court will need to determine whether the ordinance and park rule violate the First Amendment and whether they are unconstitutionally vague.

I

FLFNB, which is affiliated with the international organization Food Not Bombs, engages in peaceful political direct action. It conducts weekly food sharing events at Stranahan Park, located in downtown Fort Lauderdale. Stranahan Park, an undisputed public forum, is known in the community as a location where the homeless tend to congregate and, according to FLFNB, "has traditionally been a battleground over the City's attempts to reduce the visibility of homelessness." D.E. 41 at 8.

At these events, FLFNB distributes vegetarian or vegan food, free of charge, to anyone who chooses to participate. FLFNB does not serve food as a charity, but rather to communicate its message "that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all." D.E. 39 at 1. Providing food in a visible public space, and partaking in meals that are shared with others, is an act of political solidarity meant to convey the organization's message.

FLFNB sets up a table underneath a gazebo in the park, distributes food, and its members (or, as the City describes them, volunteers) eat together with all of the participants, many of whom are homeless individuals residing in the downtown Fort Lauderdale area. *See* D.E. 40-23. FLFNB's set-up includes a banner with the name "Food Not Bombs" and the

organization's logo—a fist holding a carrot—and individuals associated with the organization pass out literature during the event. *See id*.

On October 22, 2014, the City enacted Ordinance C-14-42, which amended the City's existing Uniform Land Development Regulations. Under the Ordinance, "social services" are

> [a]ny service[s] provided to the public to address public welfare and health such as, but not limited to, the provision of food; hygiene care; group rehabilitative or recovery assistance, or any combination thereof; rehabilitative or recovery programs utilizing counseling, self-help or other treatment of assistance; and day shelter or any combination of same.

D.E. 38-1, § 1.B.6. The Ordinance regulates "social service facilities," which include an "outdoor food distribution center." D.E. 38-1, § 1.B.8. An "outdoor food distribution center" is defined as

> [a]ny location or site temporarily used to furnish meals to members of the public without cost or at a very low cost as a social service as defined herein. A food distribution center shall not be considered a restaurant.

D.E. 38-1, § 1.B.4.

The Ordinance imposes restrictions on hours of operation and contains requirements regarding food handling and safety. Depending on the specific zoning district, a social service facility may be permitted, not permitted, or require a conditional use permit. *See* D.E. 38-1 at 9. Social service facilities operating in a permitted use zone are still subject to review by the City's development review committee. *See id.*

Stranahan Park is zoned as a "Regional Activity Center—City Center," D.E. 38-34, and requires a conditional use permit. *See* D.E. 38-1 at 9. To receive a conditional use permit, applicants must demonstrate that their social service facilities will meet a list of requirements set out in § 1.E of the Ordinance.

The City's "Parks and Recreation Rules and Regulations" also regulate social services. Under Park Rule 2.2,

> [p]arks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City.
>
> As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

D.E. 38-35.

The City has voluntarily not enforced Ordinance C-14-42 and Park Rule 2.2 since February of 2015.

II

FLFNB contends that the Ordinance and Park Rule 2.2 violate its rights to free speech and free association guaranteed by the First Amendment, which is made applicable to state and local governments through the Due Process Clause of the Fourteenth Amendment. *See* D.E. 1 at 21; *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). It also argues that the ordinance and regulation are unconstitutionally vague, both facially and as applied. *See* D.E. 1 at 27.

The City defends the district court's summary judgment ruling. It asserts that the food sharing events at Stranahan Park are not expressive conduct because the act of feeding is not inherently communicative of FLFNB's "intended, unique, and particularized message." *See* City's Br. at 35. Understanding the events, according to the City, depends on explanatory speech, such as the signs and banners, indicating that FLFNB's conduct is not inherently expressive.

We review the district court's grant of summary judgment *de novo*. *See Rodriguez v. City*

of Doral, 863 F.3d 1343, 1349 (11th Cir. 2017). The same plenary standard applies to questions of constitutional law. *See Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1181 (11th Cir. 2017) (en banc). In reviewing the parties' cross-motions for summary judgment, we "draw all inferences and review all evidence in the light most favorable to the non-moving party." *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012) (quotation marks omitted and alteration adopted).

There is an additional twist to these standards of review in the First Amendment context. Because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace ... we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 567, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). *See also Flanigan's Enters., Inc. v. Fulton Cnty., Ga.*, 596 F.3d 1265, 1276 (11th Cir. 2010) (applying First Amendment independent review standard in a summary judgment posture).

III

Constitutional protection for freedom of speech "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). The First Amendment guarantees "all people [ ] the right to engage not only in 'pure speech,' but 'expressive conduct' as well." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (citing *United States v. O'Brien*, 391 U.S. 367, 376–77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). As one First Amendment scholar has explained, "[a] sharp line between 'words' and 'expressive acts' cannot ... be justified in Madisonian terms. The constitutional protection is afforded to 'speech,' and acts that qualify as signs with expressive meaning qualify as speech within the meaning of the Constitution." Cass R. Sunstein, Democracy and the Problem of Free Speech 181 (1993).

Several decades ago, the Supreme Court formulated a two-part inquiry to determine whether conduct is sufficiently expressive under the First Amendment: (1) whether "[a]n intent to convey a particularized message was present;" and (2) whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Since then, however, the Court has clarified that a "narrow, succinctly articulable message is not a condition of constitutional protection" because "if confined to expressions conveying a 'particularized message' [the First Amendment] would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (citing *Spence*, 418 U.S. at 411, 94 S.Ct. 2727). So, "in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman*, 370 F.3d at 1270 (emphasis in original) (citing *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338). *See also Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) ("*FAIR*") (explaining that, to merit First Amendment protection, conduct must be "inherently expressive").

A

On this record, we have no doubt that FLFNB intended to convey a certain message. *See Spence*, 418 U.S. at 410, 94 S.Ct. 2727. Neither the district court nor the City suggest otherwise. *See* D.E. 49 at 1, 2; D.E. 78 at 24. As noted, the message is "that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all." D.E. 39 at 1. Food sharing in a visible public

space, according to FLFNB, is "meant to convey that all persons are equal, regardless of socio-economic status, and that everyone should have access to food as a human right." *Id*. at 2.

"Whether food distribution [or sharing] can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in an as-applied challenge[.]" *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006). The critical question, then, is "whether the reasonable person would interpret [FLFNB's conduct] as *some* sort of message." *Holloman*, 370 F.3d at 1270. In answering this question, "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, 418 U.S. at 410, 94 S.Ct. 2727 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)). History may have been quite different had the Boston Tea Party been viewed as mere dislike for a certain brew and not a political protest against the taxation of the American colonies without representation. *See* James E. Leahy, *Flamboyant Protest, the First Amendment, and the Boston Tea Party*, 36 Brook. L. Rev. 185, 210 (1970). *Cf.* Rodney A. Smolla, Free Speech in an Open Society 26 (1992) (maintaining that mass demonstrations "are perhaps the single *most* vital forms of expression in human experience"); Thomas I. Emerson, The System of Freedom of Expression 293 (1970) ("The presence of people in the street or other open public place for the purpose of expression, even in large numbers, would also be deemed part of the 'expression.' ").

It should be no surprise, then, that the circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive and similar activity that is not. Context separates the physical activity of walking from the expressive conduct associated with a picket line or a parade. *See United States v. Grace*, 461 U.S. 171, 176, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) ("There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment."); *Hurley*, 515 U.S. at 568, 115 S.Ct. 2338 ("[W]e use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way."). Context also differentiates the act of sitting down—ordinarily not expressive—from the sit-in by African Americans at a Louisiana library which was understood as a protest against segregation. *See Brown v. Louisiana*, 383 U.S. 131, 141–42, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). And context divides simply "[b]eing in a state of nudity," which is "not an inherently expressive condition," from the type of nude dancing that is to some degree constitutionally protected. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (quotation omitted). *Compare also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing is expressive conduct, although "only marginally so"), *with City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989) (noting that "recreational dancing" by clothed dance hall patrons is not sufficiently expressive).[11]

The district court concluded that "outdoor food sharing does not convey [FLFNB's] particularized message unless it is combined with other speech, such as that involved in [FLFNB's] demonstrations." D.E. 78 at 24. This focus on FLFNB's particularized message was mistaken. As *Holloman* teaches, the inquiry is

[1] *See also Stewart v. Baldwin Cnty. Bd. of Educ.*, 908 F.2d 1499, 1501, 1505 (11th Cir. 1990) (holding that a school employee's "quiet and non-disruptive" early departure from a mandatory meeting communicated an objection to the superintendent's position).

whether the reasonable person would interpret FLFNB's food sharing events as "*some* sort of message." 370 F.3d at 1270.

B

The district court also failed to consider the context of FLFNB's food sharing events and instead relied on the notion that the conduct must be "combined with other speech" to provide meaning. *See* D.E. 78 at 24. As we explain, the surrounding circumstances would lead the reasonable observer to view the conduct as conveying some sort of message. That puts FLFNB's food sharing events on the expressive side of the ledger.

First, FLFNB sets up tables and banners (including one with its logo) and distributes literature at its events. This distinguishes its sharing of food with the public from relatives or friends simply eating together in the park. *Cf. Hurley*, 515 U.S. at 570, 115 S.Ct. 2338 (holding that participation in a parade was expressive in part because group members "distributed a fact sheet describing the members' intentions" and held banners while they marched).

Second, the food sharing events are open to everyone, and the organization's members or volunteers invite all who are present to participate and to share in their meal at the same time. That, in and of itself, has social implications. *See* Mary Douglas, "Deciphering a Meal," in Implicit Meanings: Selected Essays in Anthropology 231 (1975) ("Like sex, the taking of food has a social component, as well as a biological one.").

Third, FLFNB holds its food sharing in Stranahan Park, a public park near city government buildings. *See Spence*, 418 U.S. at 410, 94 S.Ct. 2727. The parties agree that Stranahan Park is a traditional public forum. *See* D.E. 39 at ¶ 9; D.E. 49 at ¶ 9. That agreement is not surprising, for, public parks have, "time out of mind, [ ] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)). They are places "historically associated with the exercise of First Amendment rights." *Carey v. Brown*, 447 U.S. 455, 460, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). And they are places that "commonly play an important role in defining the identity that a city projects to its own residents and to the outside world." *Pleasant Grove City v. Summum*, 555 U.S. 460, 472, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). Although the choice of location alone is not dispositive, it is nevertheless an important factor in the "factual context and environment" that we must consider. *See Spence*, 418 U.S. at 409–10, 94 S.Ct. 2727. *Cf. Johnson*, 491 U.S. at 406, 109 S.Ct. 2533 (concluding that a flag burning demonstration at Dallas City Hall conveyed an anti-government/lack of patriotism message).

Fourth, the record demonstrates without dispute that the treatment of the City's homeless population is an issue of concern in the community. The City itself admits that its elected officials held a public workshop "on the Homeless Issue" in January of 2014, and placed the agenda and minutes of that meeting in the summary judgment record. *See* City's Br. at 12; D.E. 38 at ¶ 16; D.E. 38-19. That workshop included several "homeless issues, including public feedings in the C[ity's] parks and public areas." D.E. 38 at ¶ 16. It is also undisputed that the status of the City's homeless population attracted local news coverage beginning years before that 2014 workshop. We think that the local discussion regarding the City's treatment of the homeless is significant because it provides background for FLFNB's events, particularly in light of the undisputed fact that many of the participants are homeless. This background adds to the likelihood that the reasonable observer would understand that FLFNB's food sharing sought to convey some message. *See Johnson*, 491 U.S. at 406, 109 S.Ct. 2533 (noting that flag burning "coincided with the

convening of the Republican Party and its renomination of Ronald Reagan for President"); *Spence*, 418 U.S. at 410, 94 S.Ct. 2727 (noting that the exhibition of a peace symbol taped on a flag "was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy"); *Tinker*, 393 U.S. at 505, 89 S.Ct. 733 (noting that a black armband was worn during the Vietnam War).

Fifth, it matters that FLFNB uses the sharing of food as the means for conveying its message, for the history of a particular symbol or type of conduct is instructive in determining whether the reasonable observer may infer some message when viewing it. *See Monroe v. State Court of Fulton Cnty.*, 739 F.2d 568, 571 n.3 (11th Cir. 1984) (explaining that, to be sufficiently expressive, "the actor must have reason to expect that his audience will recognize his conduct as communication") (citation omitted). In *Johnson*, for example, the Supreme Court explained the historical importance of our national flag, noting that it is "the one visible manifestation of two hundred years of nationhood" and that "[c]auses and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner." 491 U.S. at 405, 109 S.Ct. 2533 (quotations and citations omitted). Given this history, the American flag was recognized as a symbol for the United States, and its burning constituted expressive conduct. *See id*. at 405–06, 109 S.Ct. 2533. *See also Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015) (affirming the district court's determination on summary judgment that tattooing is protected activity, and relying in part on a historical analysis).

Like the flag, the significance of sharing meals with others dates back millennia. The Bible recounts that Jesus shared meals with tax collectors and sinners to demonstrate that they were not outcasts in his eyes. *See Mark* 2:13–17; *Luke* 5:29–32. In 1621, Pilgrims and Native Americans celebrated the harvest by sharing the First Thanksgiving in Plymouth. President Abraham Lincoln established Thanksgiving as a national holiday in 1863, proclaiming it as a day of "Thanksgiving and Praise to our beneficent Father" in recognition of blessings such as "fruitful fields and healthful skies." John G. Nicolay & John Hay, 2 Abraham Lincoln: Complete Works 417–418 (1894). Americans have celebrated this holiday ever since, commonly joining with family and friends for traditional fare like turkey and pumpkin pie.

On this record, FLFNB's food sharing events are more than a picnic in the park. FLFNB has established an intent to "express[ ] an idea through activity," *Spence*, 418 U.S. at 411, 94 S.Ct. 2727, and the reasonable observer would interpret its food sharing events as conveying *some* sort of message. *See Holloman*, 370 F.3d at 1270.

C

The City, echoing the district court's analysis, relies on *FAIR*, in which the Supreme Court explained that "[t]he fact that [ ] explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*." 547 U.S. at 66, 126 S.Ct. 1297. This language from *FAIR*, however, does not mean that conduct loses its expressive nature just because it is also accompanied by other speech. If it did, the fact that the paraders in *Hurley* were "carrying flags and banners with all sorts of messages" would have placed their conduct outside the realm of First Amendment protection. *See Hurley*, 515 U.S. at 569, 115 S.Ct. 2338. *See also Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43–44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam) (considering the denial of a stay of an injunction in a case where members of the National Socialist Party of America sought to parade in uniforms displaying a swastika). The critical question is whether the explanatory speech is *necessary* for the reasonable observer to perceive a message from the conduct.

In *FAIR*, a number of law schools claimed that

the Solomon Amendment—which denies federal funding to an institution that prohibits the military from gaining access to its campus and students " 'for purposes of military recruiting in a manner that is at least equal in quality and scope to access to campuses and to students that is provided to any other employer' "—violated their rights under the First Amendment. *See* 547 U.S. at 55, 126 S.Ct. 1297 (quoting 10 U.S.C. § 938(b)). Among other things, the schools asserted that their restriction of military recruiters' access to law students due to a disagreement with the government's then-existing policy excluding homosexuals from the military (such as, for example, requiring them to interview students on the undergraduate campus) was protected expressive conduct. *See id*. at 51, 126 S.Ct. 1297.

The Supreme Court held that it was not. *See id*. at 66, 126 S.Ct. 1297. It noted that "law schools 'expressed' their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the law schools accompanied their conduct with speech explaining it." *Id*. at 66, 126 S.Ct. 1297. Such speech was necessary to provide explanation because "the point of requiring military interviews to be conducted on the undergraduate campus is not 'overwhelmingly apparent.' An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id*. (citation omitted). Thus, the "explanatory speech" in *FAIR* was speech that was necessary to explain the law school's conduct. Without it, the conduct alone (requiring military recruiters to see students off-site) was not sufficiently expressive and the reasonable observer would not be likely to infer some message.

Explanatory speech is not necessary in this case. Although such speech cannot create expressive conduct, *see id.* at 66, 126 S.Ct. 1297, context still matters. Here, the presence of banners, a table, and a gathering of people sharing food with all those present in a public park is sufficiently expressive. The reasonable observer at FLFNB's events would infer some sort of message, e.g., one of community and care for all citizens. Any "explanatory speech"—the text and logo contained on the banners—is not needed to convey that message. Whether those banners said "Food Not Bombs" or "We Eat With the Homeless" adds nothing of legal significance to the First Amendment analysis. The words "Food Not Bombs" on those banners might be required for onlookers to infer FLFNB's *specific* message that public money should be spent on providing food for the poor rather than funding the military, but it is enough if the reasonable observer would interpret the food sharing events as conveying "some sort of message." *See Holloman*, 370 F.3d at 1270 (holding that a "generalized message of disagreement or protest directed toward [a teacher], the school, or the country in general" is sufficient under the *Spence* test, as modified by *Hurley*) (citing *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338).

We decline the City's invitation, *see* City's Br. at 21, to resurrect the *Spence* requirement that it be likely that the reasonable observer would infer a particularized message. The Supreme Court rejected this requirement in *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (a "narrow, succinctly articulable message is not a condition of constitutional protection"), and it is not appropriate for us to bring it back to life.

The district court expressed some concern that *FAIR* does not align with the understanding in "*Holloman*[ ] and perhaps also *Hurley*[ ] ... of a particularized message." D.E. 78 at 21. We do not believe that *FAIR* undermines *Hurley* or that it abrogates *Holloman*. *FAIR* does not discuss the need for a particularized message at all. Nor does it cite to how *Spence* phrased that requirement. *FAIR* did, however, discuss *Hurley*. The Supreme Court explained that "the law

schools' effort to cast themselves as just like ... the parade organizers in *Hurley* ... plainly overstates the expressive nature of their activity," and was therefore unavailing. *FAIR*, 547 U.S. at 70, 126 S.Ct. 1297. In our view, FLFNB's conduct here is more like that of the paraders in *Hurley* than that of the law schools in *FAIR*. The reasonable observer of the law schools' conduct in *FAIR* was not likely to infer *any* message beyond that the interview rooms were full or that the military preferred to interview elsewhere. *See id*. at 66, 126 S.Ct. 1297. FLFNB's food sharing events are markedly different. Due to the context surrounding them, the reasonable observer would infer some sort of message.

IV

"[T]he nature of [FLFNB's] activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that [FLFNB] engaged in a form of protected expression." *Spence*, 418 U.S. at 409–10, 94 S.Ct. 2727. We therefore reverse the district court's grant of summary judgment in favor of the City.

We decline to address whether Ordinance C-14-42 and Park Rule 2.2 violate the First Amendment and whether they are unconstitutionally vague. These issues are best left for the district court to take up on remand.[2]

REVERSED AND REMANDED.

[2] The district court stated that its rejection of FLFNB's vagueness challenges was affected, although "to a lesser extent," by its ruling that FLFNB's conduct was not protected by the First Amendment. *See* D.E. 78 at 27. Given our ruling that FLFNB's food sharing events constitute expressive conduct, we think that the district court is in the best position to reassess its ruling on the vagueness issues in the first instance.

Before LAGOA, HULL, and MARCUS, Circuit Judges.

MARCUS, Circuit Judge:

This case presents the second appellate skirmish in Fort Lauderdale Food Not Bombs's ("FLFNB") challenge to Fort Lauderdale's efforts to shut down the practice of sharing food with the homeless in downtown Stranahan Park. FLFNB hosts food-sharing events in order to communicate the group's message that scarce social resources are unjustly skewed towards military projects and away from feeding the hungry. In Round One, a panel of this Court held FLFNB's food sharing to be expressive conduct protected by the First Amendment and remanded the case to the district court to address whether the City's regulations actually violated the First Amendment. Now, in Round Two, we must decide whether Fort Lauderdale Park Rule 2.2, which requires City permission for social service food-sharing events in all Fort Lauderdale parks, can withstand First Amendment scrutiny as applied to FLFNB's demonstrations.

It cannot. The Park Rule commits the regulation of FLFNB's protected expression to the standardless discretion of the City's permitting officials. The Park Rule bans social service food sharing in Stranahan Park unless authorized pursuant to a written agreement with Fort Lauderdale (the "City"). That's all the rule says. It provides no guidance and in no way explains when, how, or why the City will agree in writing. As applied to FLFNB's protected expression, it violates the First Amendment. It is neither narrowly drawn to further a substantial government interest that is unrelated to the suppression of free expression, nor, as applied, does it amount to a reasonable time, place, and manner regulation on expression in a public forum. Accordingly, we reverse the district court's order granting summary judgment in favor of the City and remand for further proceedings consistent with this opinion.

…

II.

Before we can consider the merits of the Plaintiffs' claims, we are required to address three threshold matters. …

A.

First, the City argues that FLFNB, as an unincorporated association, is not a "person" that may bring suit under § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (emphasis added). There is some historical support for the City's reading, but this view stands in tension with the text's ordinary meaning, Supreme Court precedent, successive amendments to § 1983, and longstanding, settled practice. Absent clear direction from the Supreme Court, we decline the City's invitation to bar all unincorporated associations (other than unions) from being able to sue under § 1983.

"As with any statutory interpretation question, our analysis 'must begin, and usually ends, with the text of the statute.' " United States v. Stevens, 997 F.3d 1307, 1314 (11th Cir. 2021) (citation omitted). When examining the phrase

"any citizen of the United States or other person," "person" must refer to something beyond individuals who are United States citizens; otherwise, the term would be redundant. See, e.g., Corley v. United States, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (noting that "one of the most basic interpretive canons" is "that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant' ") (citation omitted and alteration accepted). At the very least, the phrase extends a § 1983 cause of action to non-citizen individuals. Congress enacted Section 1 of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act), the original version of what is now § 1983, in order to enforce the Fourteenth Amendment. See, e.g., Ngiraingas v. Sanchez, 495 U.S. 182, 187, 110 S.Ct. 1737, 109 L.Ed.2d 163 (1990). The word "person" in the Fourteenth Amendment includes not only citizens but also non-citizens within the United States. E.g., Graham v. Richardson, 403 U.S. 365, 371, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); see also Hague v. Comm. for Indus. Org., 307 U.S. 496, 526, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (opinion of Stone, J.) ("It will be observed that the cause of action, given by [Section 1 of the 1871 Civil Rights Act], extends broadly to ... those rights secured to persons, whether citizens of the United States or not, to whom the [Fourteenth] Amendment in terms extends the benefit of the due process and equal protection clauses."). We also know that the word "person" in § 1983 extends to corporations, both municipal and otherwise. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 687, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Indeed, in Monell, the Supreme Court observed that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." Id. at 687, 98 S.Ct. 2018.

However, the Supreme Court has also ruled that Native American Tribes seeking to vindicate sovereign rights, States, State officers acting in their official capacities, Territories, and Territory officers acting in their official capacities are not "persons." Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 712, 123 S.Ct. 1887, 155 L.Ed.2d 933 (2003) (reasoning that § 1983 "was designed to secure private rights against government encroachment" to reach this conclusion in the case of a Tribe suing to vindicate its right to sovereign immunity from state process); Ngiraingas, 495 U.S. at 187–92, 110 S.Ct. 1737 (examining historical sources and the context surrounding amendments to § 1983 to reach this conclusion with respect to Territories and their officers); Will v. Mich. Dep't of State Police, 491 U.S. 58, 64–67, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (relying on federalism concerns, the Eleventh Amendment, and the "often-expressed understanding that 'in common usage, the term "person" does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it' " to reach this conclusion regarding States and their officials) (alterations accepted and citation omitted). Monell, Ngiraingas, and Will each interpreted the first use of the word "person" in § 1983, which relates to which entities may be proper § 1983 defendants -- "[e]very person" who under color of law causes a deprivation of federal rights shall be liable to the party injured. By contrast, today we interpret § 1983's second use of the word "person" -- "any citizen or other person" -- a phrase that delineates which entities may be proper § 1983 plaintiffs. But these cases are nonetheless instructive, because we "generally presume that 'identical words used in different parts of the same act are intended to have the same meaning.' " United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 213, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001) (citation omitted).

In order to decide whether FLFNB has a cause of action in this case, we must determine whether "other persons," in addition to including non-citizen individuals and corporate entities, extends to unincorporated associations.

The words "other person," by themselves, do not definitively answer the question. Cf. Ngiraingas, 495 U.S. at 187, 110 S.Ct. 1737 ("[Section 1983] itself obviously affords no clue as to whether its word 'person' includes a Territory."). Unlike sovereign entities, there is no presumption that unincorporated associations are not persons. To the contrary, the ordinary meaning of "person" in legal contexts includes unincorporated associations. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 273 (2012) ("Traditionally the word person ... denotes not only natural persons (human beings) but also artificial persons such as corporations, partnerships, associations, and both public and private organizations.") (second emphasis added). Thus, the most natural reading of § 1983 extends a cause of action to unincorporated associations.

On the other hand, we "normally interpret[ ] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." Bostock v. Clayton Cnty., —— U.S. ——–, 140 S. Ct. 1731, 1738, 207 L.Ed.2d 218 (2020). And in 1871, unincorporated associations were not legal persons with the capacity to sue or be sued absent some express authorization. United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344, 385, 42 S.Ct. 570, 66 L.Ed. 975 (1922) ("Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member."); Wesley A. Sturges, Unincorporated Associations as Parties to Actions, 33 Yale L.J. 383, 383 (1924) (citing authorities dating as far back as 1884 to observe that "[t]he cases are remarkably in accord that, in the absence of enabling statute, an unincorporated association cannot sue or be sued in the common or association name").

Moreover, reading the word "person" to exclude unincorporated associations is fully consonant with the 1871 version of the Dictionary Act, which expressly limited "person" to "bodies politic and corporate." See, e.g., Will, 491 U.S. at 69 n.8, 109 S.Ct. 2304. The Dictionary Act -- a statute that provides general definitions for common terms used across the United States Code, see 1 U.S.C. § 1 -- did not expand to include "associations" until 1948. See Act of June 25, 1948, Pub. L. No. 80-772, § 6, 62 Stat. 683, 859 (1948); Lippoldt v. Cole, 468 F.3d 1204, 1214 (10th Cir. 2006). The 1871 Dictionary Act definition matches the definition of "person" found in the first edition of Black's Law Dictionary, published in 1891, which confirms that an entity needed some express authorization in positive law to achieve legal personhood. Person, Black's Law Dictionary (1891) ("Persons are divided by law into natural and artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws, for the purposes of society and government, which are called 'corporations' or 'bodies politic.' ").

What's more, the legislative history surrounding the adoption of the 1871 Civil Rights Act does not suggest any departure from the established legal meaning of "person" as it related to the capacity to sue in 1871. See Monell, 436 U.S. at 690, 98 S.Ct. 2018 (analyzing the legislative history of Section 1 to interpret § 1983). The drafters of Section 1 of the 1871 Civil Rights Act likely did not contemplate that unincorporated associations were "persons" under the Act. The Republican sponsors of the Civil Rights Act were aghast at reports of widespread vigilante violence against federal officials, northern transplants, Blacks, and Republicans in the post-war South. These attacks, they believed, were the work of recalcitrant Confederates, including individuals organized as the Ku Klux Klan, who faced only weak opposition from ineffectual state officials. See, e.g., Cong. Globe, 42d Cong., 1st Sess., 320 (1871) (hereinafter "Globe") (Rep. Stoughton) ("There exists at this time in the southern States

a treasonable conspiracy against the lives, persons, and property of Union citizens, less formidable it may be, but not less dangerous, to American liberty than that which inaugurated the horrors of the rebellion."); id. at 820 (Sen. Sherman) (observing that the bill was based on the fact that "an organized conspiracy, spreading terror and violence, murdering and scourging both white and black, both women and men, and pervading large communities of this country, now exists unchecked by punishment, independent of law, uncontrolled by magistrates" and that "of all the multitude of injuries not in a single case has redress ever been meted out to one of the multitude who has been injured").

Section 1 itself "was the subject of only limited debate and was passed without amendment." Monell, 436 U.S. at 665, 98 S.Ct. 2018. At most, read together with statements about the 1871 Act generally, floor discussions of Section 1 suggest that both proponents and opponents of the 1871 Act believed that the typical plaintiff would be an individual who suffered a violation of constitutional rights, especially the denial of the equal protection of the laws at the hands of state officials. Thus, for example, proponent Senator Dawes spoke of "citizen[s]" who suffered violations of their rights -- phrasing that implies a concern for the individual plaintiff. Globe at 477 ("I conclude ... [that] Congress has power to legislate for the protection of every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution; and that this may be done ... [b]y giving him a civil remedy in the United States courts for any damage sustained in that regard."). For their part, Democrats who opposed the passage of Section 1 generally claimed that it was too broad, but notably did not argue that the word "person" did anything to expand the range of entities that could traditionally sue. They, too, seemed to envision individual plaintiffs. E.g., id. at 337 (Rep. Whithorne) (complaining that "any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution" would be able to sue and conjuring the hypothetical example of a drunk suing a police officer who had confiscated his pistol).

All told, historical context suggests that the word "person" as used in Section 1 of the 1871 Civil Rights Act did not extend to unincorporated associations. But this does not end the analysis, because we are not interpreting Section 1 of the 1871 Civil Rights Act. Instead, we must apply § 1983 of Title 42 of the United States Code as it exists today, that is, as thrice amended since its initial enactment in 1871. We must therefore account for any changes in the legal meaning of "person" that may have informed Congress's decision to perpetuate that term across amended versions of § 1983. Indeed, the Supreme Court in Ngiraingas looked not only to the history of the 1871 Civil Rights Act but also to "the successive enactments of [§ 1983], in context" -- and to changes to the definition of "person" in the Dictionary Act -- in order to interpret the word "person." 495 U.S. at 189, 191 n.10, 110 S.Ct. 1737.

Congress amended the text of § 1983 twice after the 1948 amendment to the Dictionary Act -- which made clear that "person" in "any Act of Congress" includes "associations" and "societies" in addition to "corporations," "companies," "firms," "partnerships," "joint stock companies," and "individuals." See 62 Stat. at 859; 1 U.S.C. § 1. A congressional amendment in 1979 extended § 1983's coverage to injuries inflicted by those acting under the color of District of Columbia law; a 1996 amendment limited the availability of injunctive relief against judicial defendants. See Act of December 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (1979); Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996). In neither re-enacted version of § 1983 did Congress narrow the definition of "person" in light of the intervening clarification in the Dictionary Act that associations are "persons" as that term is

used in federal statutes. Cf. United States v. Bryant, 996 F.3d 1243, 1258 (11th Cir. 2021) ("[W]hen interpreting statutes, what Congress chose not to change can be as important as what it chose to change.").

Similarly, Congress enacted both of these amendments after the 1937 promulgation of Federal Rule of Civil Procedure 17(b), which provided "that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or law of the United States." Parties, 1937 Rep. Advisory Comm. on Civ. Rules 47 (1937); see also Fed. R. Civ. P. 17(b)(3) (the Rule's current text remains nearly identical to that of the original version); Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay, 954 F. Supp. 2d 127, 137 (E.D.N.Y. 2013) (relying on Rule 17(b)(3) to conclude that "an unincorporated association[ ] ha[d] legal capacity to bring [a § 1983] suit because all of its claims allege[d] violations of the United States Constitution"), aff'd, 868 F.3d 104 (2d Cir. 2017), and aff'd, 705 F. App'x 10 (2d Cir. 2017); Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R., 698 F. Supp. 401, 413–14 (D.P.R. 1988) (similar analysis regarding the unincorporated Puerto Rico Cable Television association), aff'd as modified on other grounds, 906 F.2d 25 (1st Cir. 1990).

And perhaps most significantly, the Supreme Court held in 1974 that an unincorporated union could "sue under 42 U.S.C. § 1983 as [a] person[ ] deprived of [its] rights secured by the Constitution and laws." Allee v. Medrano, 416 U.S. 802, 819 n.13, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974). Thus, by the time of the 1979 and 1996 amendments to § 1983, federal law made it quite clear that unincorporated associations were "persons" that could sue to enforce constitutional rights under § 1983. It is telling that against this backdrop, Congress did not choose to restrict the scope of the term "person" when it re-enacted amended versions of § 1983. See Pollitzer v. Gebhardt, 860 F.3d 1334, 1340 (11th Cir. 2017) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (emphasis added) (quoting Lorillard v. Pons, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978)); Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011) ("Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.") (emphasis added) (quoting Lorillard, 434 U.S. at 583, 98 S.Ct. 866); Scalia & Garner, supra, at 322 ("The clearest application of the prior-construction canon occurs with reenactments: If a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction ... a later version of that act perpetuating the wording is presumed to carry forward that interpretation."). Whatever "person" meant in 1871, its meaning included unincorporated associations by the time Congress "perpetuated" the word "person" in new versions of § 1983 in 1979 and 1996. See Scalia & Garner, supra, at 322.

Even setting these textual and historical considerations aside, Allee suggests that an unincorporated entity like FLFNB, just like the unincorporated union in that case, is a "person" for § 1983 purposes. In Allee, individual organizers and a union brought a § 1983 action against Texas officials on behalf of a class of union members, alleging that law enforcement had threatened and harassed them for engaging in union organizing activities, including by bringing criminal charges in bad faith. 416 U.S. at 804–09, 94 S.Ct. 2191. A question arose as to whether there were pending state prosecutions against any of the plaintiffs -- if not, the plaintiffs' request for injunctive relief would be partially moot. Id. at 818, 94 S.Ct. 2191. The Supreme Court instructed that on remand, if there were indeed pending prosecutions against the unnamed class members, the district court

"must find that the class was properly represented" by the named plaintiffs in part because the named-plaintiff union was a "person[ ]" that could sue under § 1983 and that had standing to complain of the unlawful intimidation of its members. Id. at 819, 94 S.Ct. 2191 n.13; see also id. at 831, 94 S.Ct. 2191 (Burger, C.J., concurring in the result in part and dissenting in part) (acknowledging that the union plaintiff was unincorporated).

In holding that "[u]nions may sue under 42 U.S.C. § 1983 as persons," the Court in Allee did not rest on any distinctive features of unions or suggest that unions should be treated differently than any other kinds of unincorporated associations. Id. at 819, 94 S.Ct. 2191 n.13. The Court might have relied on, but did not so much as mention, characteristics surrounding unions that other types of unincorporated associations may not share, such as their affirmative recognition and privileges in federal and state law. See Coronado Coal Co., 259 U.S. at 385–90, 42 S.Ct. 570. Instead, the Court concluded, without limiting its reasoning, that unincorporated unions were § 1983 "persons." The understanding of the meaning of the term "person" at the time the Civil Rights Act was passed in 1871 presented no obstacle to the result the Supreme Court reached in Allee. A union was neither an individual nor a corporation, yet the Supreme Court held that it still fell within the ambit of the term "other person."

In keeping with a broad reading of Allee, most federal courts to have confronted the question of whether a non-union unincorporated association is a "person" under § 1983 have answered in the affirmative. In Barrett v. United States, the Second Circuit reasoned that an estate administratrix could bring a § 1983 suit on behalf of the estate beneficiaries because they were a group of individuals "associated for a special purpose." 689 F.2d 324, 333 (2d Cir. 1982) ("Unions and unincorporated associations have also been found to possess standing to assert a § 1983 claim."). The Second Circuit weighed in again in Jund v. Town of Hempstead, this time to hold that unincorporated local Republican committees were proper § 1983 defendants. 941 F.2d 1271, 1279–80 (2d Cir. 1991). And at least two district courts have adopted this reading. In Gay-Straight All. of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty., a court in the Southern District of Florida held that an "unincorporated, voluntary association of students" at a Florida high school was a § 1983 "person." 477 F. Supp. 2d 1246, 1248, 1249–51 (S.D. Fla. 2007). A court in the Northern District of Illinois similarly held that an unincorporated organization representing the interests of a public housing development could bring a § 1983 suit and noted that "[u]nincorporated organizations have been found to be 'persons' entitled to bring suit under § 1983." Cabrini-Green Loc. Advisory Council v. Chi. Hous. Auth., No. 04 C 3792, 2005 WL 61467, at *3 (N.D. Ill. Jan. 10, 2005).

Moreover, there is a longstanding and robust practice of treating unincorporated associations as proper § 1983 plaintiffs as a matter of course. The Eleventh Circuit and an array of other courts have evaluated § 1983 claims brought by all manner of unincorporated associations seeking to vindicate a diverse array of constitutional interests -- including the Orlando and Santa Monica local Food Not Bombs chapters -- without even hinting that they lacked a § 1983 cause of action. See, e.g., First Vagabonds Church of God v. City of Orlando, 638 F.3d 756, 758 (11th Cir. 2011) (en banc) (Orlando Food Not Bombs); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1031 (9th Cir. 2006) (Santa Monica Food Not Bombs); Rounds v. Or. State Bd. of Higher Educ., 166 F.3d 1032, 1034 (9th Cir. 1999) (Students for Legal government, an unincorporated association of University of Oregon students); Citizens Against Tax Waste v. Westerville City Sch., 985 F.2d 255, 256–57 (6th Cir. 1993) (Citizens Against Tax Waste, an "unincorporated association of property owners in the Westerville City School District"); Marcavage v. City of New York, 918 F. Supp. 2d

266, 267 (S.D.N.Y. 2013) (Repent America, an unincorporated association dedicated to Christian evangelism); Occupy Fresno v. Cnty. of Fresno, 835 F. Supp. 2d 849, 853 (E.D. Cal. 2011) (Occupy Fresno, an unincorporated association of individuals who wished to assemble in a park); Good News Emp. Ass'n v. Hicks, No. C-03-3542 VRW, 2005 WL 351743, at *1 (N.D. Cal. Feb. 14, 2005), aff'd, 223 F. App'x 734 (9th Cir. 2007) (unincorporated association organized to promote a faith-based concept of "Natural Family and Marriage"); Nat'l Ass'n of Alzheimer's Victims & Friends v. Pa. Dep't of Pub. Welfare, No. CIV.A. 88-2426, 1988 WL 29338, at *1 (E.D. Pa. Mar. 23, 1988) (National Association of Alzheimer's Victims & Friends, an "unincorporated association founded for the purpose of providing a mutual care and support group for persons suffering from Alzheimer's disease and their families and concerned friends"); Republican Coll. Council of Pa. v. Winner, 357 F. Supp. 739, 740 (E.D. Pa. 1973) (Republican College Council of Pennsylvania). The same is true of a historically significant set of § 1983 plaintiffs, the unincorporated local chapters of the NAACP. See N.A.A.C.P. v. Brackett, 130 F. App'x 648 (4th Cir. 2005).

This body of practice is not a body of holdings and, of course, cannot alter the meaning of the word "person" as used in the statute. But when combined with the ordinary meaning of the text, persuasive interpretations from other courts, and the body of law informing Congress's amendments to § 1983 -- all of which indicate that unincorporated associations are "persons" -- it at least underscores the need for compelling evidence before we adopt the City's contrary interpretation. See Nasrallah v. Barr, —— U.S. ——, 140 S. Ct. 1683, 1697–98, 207 L.Ed.2d 111, (2020) (Thomas, J., dissenting) (protesting that when "presented with two competing statutory interpretations[,] one of which ma[de] sense of" the statute "without upending settled practice, and one of which significantly undermine[d the statute] by removing a vast swath of claims from its reach," the Supreme Court majority should have "justif[ied]" its choice of the latter interpretation and "candidly confront[ed] its implications"); Fowler v. U.S. Parole Comm'n, 94 F.3d 835, 840 (3d Cir. 1996) (While "a practice bottomed upon an erroneous interpretation of the law is not legitimized merely by repetition," "general acceptance of a practice must be considered in any reasoned [statutory interpretation] analysis.").

The Tenth Circuit, which holds that unincorporated associations cannot sue under § 1983, stands alone against the trend of treating unincorporated associations as "persons." See Lippoldt, 468 F.3d at 1216 (holding that Operation Save America, an unincorporated association devoted to anti-abortion advocacy, was not a "person" within the meaning of § 1983); see also Tate v. Univ. Med. Ctr. of So. Nev., No. 2:09-CV-01748-LDG (NJK), 2013 WL 1249590, at *11 (D. Nev. Mar. 26, 2013) (stating, in a single sentence devoid of analysis, that an unincorporated association was not a "person" subject to suit under § 1983), rev'd on other grounds, 617 F. App'x 724 (9th Cir. 2015). The Tenth Circuit's otherwise thorough discussion of the legislative history of the 1871 Civil Rights Act, the background law in 1871, and the 1871 Dictionary Act did not account for the fact that Congress re-enacted the word "person" in § 1983 twice after intervening developments in federal law clarified that unincorporated associations were "persons."

At bottom, in enacting § 1983, Congress "intended to give a broad remedy for violations of federally protected civil rights." Monell, 436 U.S. at 685, 98 S.Ct. 2018. And the Supreme Court has instructed us that "Congress intended § [1983] to be broadly construed." Id. at 686, 98 S.Ct. 2018. "[A]ny plan to restrict the scope of § 1983 comes with a heavy burden of justification -- a burden that is both constitutional and historical." Harry A. Blackmun, Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or

Fade Away?, 60 N.Y.U. L. Rev. 1, 28 (1985). Absent some indication from the Supreme Court that unincorporated associations are not "persons," we decline the City's invitation to upset longstanding practice recognizing that unincorporated associations are "persons" that may sue under § 1983. See id. at 3 (warning "that any restriction of what has become a major symbol of federal protection of basic rights [should] not be made in irresponsible haste" and that absent strong historical evidence, the scope and "underlying principles of § 1983 liability should be secure"). We hold that FLFNB is a person that may bring suit under § 1983.

…

C.

The third, and last, of the threshold issues concerns Article III standing. The City argues that all of the Plaintiffs lack standing to assert damages claims based on the Ordinance and the Park Rule because these regulations, by the City's account, were not enforced against any of the Plaintiffs. According to the City, the Plaintiffs cannot prove a concrete injury connected to the Ordinance or the Park Rule. Like the district court before us, we remain unpersuaded. Both the Individual Plaintiffs and FLFNB have standing to bring damages claims against the City based on its enforcement of the Ordinance and the Park Rule. They also have standing to bring claims for declaratory and injunctive relief against the Park Rule.

…

1. Individual Plaintiffs. The City applied the Ordinance and the Park Rule to the Individual Plaintiffs insofar as they each participated in a November 7, 2014 FLFNB food-sharing event in Stranahan Park that the police broke up under their authority drawn from the Ordinance and the Park Rule. Plaintiff Nathan Pim, testifying on behalf of FLFNB, explained that the police "stopped" the event "short." We have already concluded that the Individual Plaintiffs were engaging in constitutionally protected expression, and the City forced them to stop and disperse. Undeniably, the Ordinance and the Park Rule injured them by directly interfering with and barring their protected expression. "[E]very violation [of a right] imports damage."

In this way, the Individual Plaintiffs sustained an injury in fact sufficient to confer standing that does not depend on the arrests of their FLFNB colleagues at the same demonstrations. What's more, those arrests provide an additional basis for standing, even though the Individual Plaintiffs were not personally arrested or cited. "[S]tanding exists at the summary judgment stage when the plaintiff has submitted evidence indicating 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution.' "

Each Individual Plaintiff has declared under penalty of perjury that he or she will continue to participate in FLFNB's protected food-sharing demonstrations in Stranahan Park, and there is no dispute that this conduct is arguably proscribed by the Park Rule (and was proscribed by the Ordinance when it was in effect). Of course, the threat of prosecution must be "genuine," not "imaginary" or "speculative," Leverett v. City of Pinellas Park, 775 F.2d 1536, 1538 (11th Cir. 1985), but the Individual Plaintiffs easily meet this requirement. Each directly witnessed the police arrest and/or cite their co-demonstrators or others under the Ordinance and the Park Rule. Citations issued to the Individual Plaintiffs' fellow demonstrators referenced both the Ordinance and the Park Rule. These arrests and citations of the Individual Plaintiffs' "companion[s]" render the threat of enforcement "non-chimerical."

2. FLFNB. FLFNB does not claim that it has associational standing to sue on behalf of its members; rather it claims "standing in its own right." Havens Realty Corp. v. Coleman, 455 U.S. 363, 378, 102 S.Ct. 1114, 71 L.Ed.2d 214

(1982). An advocacy organization like FLFNB suffers injury in fact when the defendant's conduct "perceptibly impair[s] [the organization's] ability" to carry out its mission, including by causing "drain on the organization's resources."

It is undeniable, as the district court found, that the City's enforcement of the Ordinance and the Park Rule "impair[ed]" FLFNB's "ability to engage in its projects" -- food-sharing demonstrations to criticize society's allocation of resources between food and war -- in a number of ways. Most directly, the police shut down an FLFNB food-sharing demonstration on November 7, 2014. This blocked FLFNB from holding its traditional post-meal organizational meeting in Stranahan Park and cut short an exercise of its chief means of advocacy. Moreover, the challenged regulations caused FLFNB to expend resources in the form of volunteer time, including efforts to collect bail money and organize legal representation for its members who were arrested under the Ordinance and the Park Rule. The threat of arrest also has practically hindered would-be volunteers from participating in FLFNB demonstrations. Thus, for example, FLFNB had to stop accepting high school volunteers because it did not want to risk subjecting them to criminal liability. These injuries will continue, because FLFNB continues to hold demonstrations under the threat of Park Rule enforcement.

FLFNB volunteers who would have normally worked on preparing for food-sharing demonstrations had to divert their energies to advocacy activities such as attending City meetings and organizing protests against the Ordinance, as well as arranging for transportation and supplies for these events. FLFNB's Rule 30(b)(6) representative unambiguously testified that this "drew away time and resources from free time we would be spending on preparing for ... feedings."

Nor, as the City suggests, does the fact that FLFNB is an informal organization with no formative documents, formal leadership offices, or written proof of membership. The City has not offered any authority to suggest that an unincorporated association's informal structure somehow renders it incapable of sustaining actual and concrete injury. To the contrary, unincorporated associations by their nature lack a charter and often lack formal organizational structures. On this record as a whole, FLFNB's relaxed organizational style does not denude it of standing.

III.

B.

Finally, we come to the merits of the Plaintiffs' as-applied challenge to the Park Rule. Our review of the district court's summary judgment holding that the Park Rule was constitutional is de novo. FLFNB I, 901 F.3d at 1239. We draw all reasonable inferences in the light most favorable to the Plaintiffs, the non-moving parties. Id.

But first, we pause to clarify what is not up for debate in this appeal. In FLFNB I, a panel of this Court held that FLFNB's food-sharing demonstrations in Stranahan Park are expressive conduct protected by the First Amendment. Id. at 1245. This holding binds us under both the law of the case doctrine and our Court's prior precedent rule, Andrews v. Biggers, 996 F.3d 1235, 1236 (11th Cir. 2021). The sole remaining question for us, then, is whether the Park Rule's regulation of this protected conduct passes First Amendment scrutiny.

To answer this question, we must first decide whether the Park Rule is content neutral or content based, for a content-neutral regulation of expressive conduct is subject to intermediate scrutiny, while a regulation based on the content of the expression must withstand the additional rigors of strict scrutiny. See Texas v. Johnson, 491 U.S. 397, 403–04, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); Burk v. Augusta-Richmond Cnty., 365 F.3d 1247, 1255 (11th Cir. 2004). As we explain, the Park Rule

is content neutral. So, we only apply intermediate scrutiny. Specifically, we apply the United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), test for content-neutral regulations of expressive conduct and ask whether the Park Rule "is narrowly drawn to further a substantial governmental interest ... unrelated to the suppression of free speech." Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (citing O'Brien, 391 U.S. at 377, 88 S.Ct. 1673).

Alternatively, we evaluate the Park Rule as a time, place, and manner restriction on expressive conduct. This sort of law also must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 293, 104 S.Ct. 3065. These standards substantially overlap and yield the same result in this case. Either way, the Park Rule violates the First Amendment as applied to the Plaintiffs' food-sharing events.

1. Content Neutrality. Johnson instructs us that a regulation of expressive conduct is content neutral if the justification for the regulation is unrelated to the suppression of free expression. 491 U.S. at 403, 109 S.Ct. 2533. Even a content-neutral purpose, however, cannot save a regulation that " 'on its face' draws distinctions based on the message a speaker conveys." Reed v. Town of Gilbert, 576 U.S. 155, 163–64, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015).

The Park Rule does not draw content-based distinctions on its face:

> Parks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City. As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

The Rule applies not just to food sharing events but also to a host of other social services, including the provision of clothing, shelter, and medical care. These services usually do not involve expressive conduct. Even most social-service food sharing events will not be expressive. See FLFNB I, 901 F.3d at 1242 (holding that FLFNB's food sharing was protected expressive conduct only after a close examination of the specific context surrounding the events). That the Park Rule regulates a range of activity, most of which has no expressive content at all, suggests its application does not vary based on any message conveyed. The Rule does not single out messages which relate to food or the importance of sharing food with the homeless.

Instead, the Park Rule's application to food sharing (and other services) turns on whether the services are provided "in order to meet [the recipients'] physical needs." This distinction does not depend on the content of the message associated with any food sharing that happens to be expressive. The Park Rule (at least in the City's view) applies to FLFNB's sharing of low-cost food with the homeless in order to communicate a message about the societal allocation of resources between food and the military, but it would also apply to an organization that shared low-cost food with the homeless in order to communicate that the City's homeless shelters serve food that lacks vital nutrients. It would likewise apply to an organization that shared low-cost food with struggling veterans in order to emphasize the debt our society owes for their sacrifice, and so on. Indeed, it would apply to organizations that share food with those in need to communicate any number of messages. Simply put, the Rule does not "draw[ ] distinctions based on [any] message" food-sharers convey. Reed, 576 U.S. at 163, 135 S.Ct. 2218.

The Plaintiffs rely on Reed's allusion to the possibility that some facial distinctions might be content based because they define

"regulated speech by its function or purpose" to argue that the Park Rule's social-service-purpose distinction is content based. Id. at 163–64, 135 S.Ct. 2218. But we have characterized this language in Reed as "dicta." Harbourside Place, LLC v. Town of Jupiter, 958 F.3d 1308, 1319 (11th Cir. 2020). In any event, as just described, the purpose on which the regulatory definition turns -- sharing food to provide for physical welfare -- is not one that draws a distinction based on the content of any expression. See Recycle for Change v. City of Oakland, 856 F.3d 666, 671 (9th Cir. 2017) (holding, after Reed, that a regulation that applied to unattended donation boxes that collected personal items "for the purpose of distributing, reusing, or recycling those items" did not turn on "communicative content"); Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks, 864 F.3d 905, 915 (8th Cir. 2017) (regulation that applied to photography for commercial purposes, but not non-commercial purposes, was not content based under Reed). To be sure, it seems likely that most expressive food sharings subject to the Park Rule's regulation will involve some sort of message related to the importance of sharing food with those in need. "But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." McCullen v. Coakley, 573 U.S. 464, 480, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014).

Likewise, the City's justifications for the Park Rule do not relate to content. "A regulation that serves purposes unrelated to the content of expression is deemed [content] neutral, even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The City enacted the Park Rule, and the Ordinance designed to facilitate its enforcement, in order to address a series of problems associated with large group food events in public parks, including loitering and crowds, trash build-up, noise, and food safety issues, as well as to ensure that similar uses of public property did not concentrate in one area. Citizens had complained about some of these problems in connection with food-sharing events. In January 2014, the City Commission held a workshop on homelessness in the community where stakeholders debated public food distribution and related topics. More generally, the Ordinance states that its purpose is "to regulate social service facilities in order to promote the health, safety, morals and general welfare of the residents of the City of Fort Lauderdale." (This statement illuminates the Park Rule's purpose as well, since the City enacted the Ordinance so that it could resume enforcement of the Park Rule.)

These concerns, which boil down to an interest in maintaining public parks and other property in a pleasant, accessible condition, are not related to the suppression of the Plaintiffs' (or any other party's) expression, so they are content neutral. See First Vagabonds Church of God, 638 F.3d at 762 ("[T]he interest of the City in managing parks and spreading large group feedings to a larger number of [locations] is unrelated to the suppression of speech."); see also McCullen, 573 U.S. at 480–81, 134 S.Ct. 2518 (public safety, the need to protect security, and regulation of congestion are content-neutral concerns); Ward, 491 U.S. at 797, 109 S.Ct. 2746 ("The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation.").

One could phrase the City's motives in terms that are perhaps less flattering. The district court said the City was concerned "that food sharing as a social service attracts people who act in ways inimical to" keeping parks safe, clean and enjoyable; the Plaintiffs put a finer point on it and accuse the city of "deter[ring] homeless and hungry people from parks because of how they might act." Fort Lauderdale's elected officials seem to have decided that sharing food with large groups of homeless people in public parks causes problems that

make those parks less useful to the broader public. But even accepting these descriptions does not alter the First Amendment analysis, which at this stage asks only whether the City's desire to prevent groups of homeless people from gathering in public parks is a goal related to the content of the Plaintiffs' or any other party's expression. The First Amendment does not permit us to go further and comment upon whether this objective is virtuous public policy. We hold simply that the Park Rule is not related to expressive conduct; it has nothing to do with the Plaintiffs' critique of society's allocation of scarce resources between welfare and defense spending.

The Plaintiffs are wrong to say that the City's concern with the behavior of the crowds that gather at FLFNB expressive food-sharing events is a justification related to "[l]isteners' reaction to speech," which they correctly point out would not be "a content-neutral basis for regulation." Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Forsyth and related cases stand for the principle that a city may not regulate speech because it "cause[s] offense or ma[kes] listeners uncomfortable," McCullen, 573 U.S. at 481, 134 S.Ct. 2518, or because it might elicit a violent reaction or difficult-to-manage counterprotests, Forsyth Cnty., 505 U.S. at 134, 112 S.Ct. 2395. The City is concerned not that FLFNB's expression will offend or cause violence, but that it will cause the gathering of crowds -- participants in the meals, rather than a bystander audience -- and associated logistical problems such as the accumulation of trash. Addressing the practical problems crowds pose is a content-neutral concern. See McCullen, 573 U.S. at 481, 134 S.Ct. 2518 ("Whether or not a single person reacts to abortion protestors' chants or petitioners' counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks."); cf. Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1317–18 (11th Cir. 2000) (a regulation that distinguished between events based on whether they would require municipal services to "accommodate ... large public gatherings" was "justified without reference to the content of the regulated speech") (emphasis omitted).

2. Intermediate Scrutiny. Since the Park Rule is a content-neutral regulation of expressive conduct, it is subject only to intermediate scrutiny, not the more demanding requirements of strict scrutiny. Specifically, under United States v. O'Brien, the Park Rule may regulate the Plaintiffs' expressive food sharing only so long as food sharing "itself may constitutionally be regulated" (no one has suggested it may not) and the Park Rule "is narrowly drawn to further a substantial governmental interest" that is "is unrelated to the suppression of free speech." Clark, 468 U.S. at 294, 104 S.Ct. 3065 (1984) (citing O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

The City does have a "substantial interest in ensuring the ability of [its] citizens to enjoy whatever benefits the city parks have to offer." Ward, 491 U.S. at 797, 109 S.Ct. 2746. More specifically, the Park Rule seeks to further the City's "substantial interest in managing park property and spreading the burden of large group feedings throughout a greater area." First Vagabonds Church of God, 638 F.3d at 762. As we have explained, the regulations are concerned with avoiding concentration of similar park uses and with sanitation and other logistical problems that crowded food distribution events cause -- substantial government interests that are unrelated to the suppression of free speech.

However, the Park Rule is not narrowly tailored to the City's interest in park maintenance. Under intermediate scrutiny, the regulation " 'need not be the least restrictive or least inclusive means' of serving the government's interests." McCullen, 573 U.S. at 486, 134 S.Ct. 2518 (citation omitted). Rather, "the requirement of narrow tailoring is satisfied 'so long as

the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation,' " and "the means chosen are not substantially broader than necessary to achieve the government's interest." Ward, 491 U.S. at 799–800, 109 S.Ct. 2746 (citation omitted and alterations accepted).

Fatally, the Park Rule imposes a permitting requirement without implementing any standards to guide City officials' discretion over whether to grant a permit. The Rule bans social-service food sharings in City Parks "unless authorized pursuant to a written agreement with City." That's it. Under the terms of the Rule, a City official may deny a request for permission to hold an expressive food sharing event in the Park because he disagrees with the demonstration's message, because he doesn't feel like completing the necessary paperwork, because he has a practice of rejecting all applications submitted on Tuesdays, or for no reason at all. In a word, the complete lack of any standards allows for arbitrary enforcement and even for discrimination based on viewpoint.

Generally, subjecting protected expression to an official's "unbridled discretion" presents "too great" a "danger of censorship and of abridgment of our precious First Amendment freedoms." Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). "[D]istaste for [such] censorship -- reflecting the natural distaste of a free people -- is deep-written in our law." Id. It comes as no surprise, then, that "a long line" of Supreme Court decisions makes it abundantly clear that a regulation which "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (quoting Staub v. City of Baxley, 355 U.S. 313, 322, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958)).

The facts of Shuttlesworth illustrate the point. A Birmingham, Alabama ordinance empowered the city commission to deny parade permits whenever they thought it necessary for "public welfare," "decency," "morals," or "convenience." Id. at 148–50, 89 S.Ct. 935. In 1963, city officials used this ordinance to arrest and prosecute participants in a peaceful civil rights march held without a license, including Rev. Fred Shuttlesworth. Id. But the Supreme Court invalidated Shuttlesworth's conviction. Id. at 159, 89 S.Ct. 935. The risk that the ambiguity in the licensing regime would permit officials to target individuals, like Shuttlesworth, on the basis of their disfavored expression was too great for the First Amendment to bear.

The reasoning of these prior restraint cases controls the as-applied narrow tailoring inquiry we conduct in this case: "[e]xcessive discretion over permitting decisions is constitutionally suspect because it creates the opportunity for undetectable censorship and signals a lack of narrow tailoring." Burk, 365 F.3d at 1256. The Park rule does not even supply malleable standards like those found in Shuttlesworth; it doesn't provide any standards at all. As applied to the Plaintiffs' protected expression, the Park Rule fails First Amendment scrutiny.

Moreover, the Park Rule's sweeping grant of discretion to City permitting officials is not necessary to further the City's interests in crowd control and park conservation. The government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." McCullen, 573 U.S. at 486, 134 S.Ct. 2518 (citations omitted). Of course, the mere availability of less restrictive alternatives will not cause a regulation to fail narrow tailoring scrutiny, and we may not "replace the City as the manager of its parks." First Vagabonds Church of God, 638 F.3d at 762 (citation omitted and alterations accepted). But an abundance

of targeted alternatives may indicate that a regulation is broader than necessary. See McCullen, 573 U.S. at 490–94, 134 S.Ct. 2518 (relying in part on available alternatives to conclude that a regulation of speech near abortion clinics burdened more speech than necessary).

The Park Rule amounts to an outright ban on public food sharing in all of Fort Lauderdale's parks; any exception is subject only to the standardless whims of City permitting officials. For a model of a narrower regulation targeting more or less the same interests, the City need only have looked 218 miles to the northwest. In First Vagabonds Church of God, we upheld an Orlando regulation that permitted public food distribution without a license in sixty-six parks. 638 F.3d at 761. For the group of forty-two parks in the central downtown district near City Hall, each organization was entitled to two licenses per year. Id. And the Orlando ordinance applied only to events likely to attract twenty-five or more people. Id. at 759.

Fort Lauderdale offers no reason it could not have similarly narrowed the Park Rule's permission requirement or tailored it in some other way. Thus, for example, in addition to adding "narrowly drawn, reasonable and definite standards" to guide officials' permitting discretion, Forsyth Cnty., 505 U.S. at 133, 112 S.Ct. 2395 (citation omitted), the City could have required permission only for events likely to attract groups exceeding a certain size. Or it could have required City permission only for certain parks. Central to the City's conclusion that public food distribution causes problems in parks is a collection of seven citizen and organizational complaints about food-sharing events. Six of these are specific to the downtown Fort Lauderdale area. The City could have required permission only in downtown parks or designated limited areas within parks for sharing food. See McCullen, 573 U.S. at 493, 134 S.Ct. 2518 (evidence of disruptive demonstrations at a single Boston clinic did not justify a statewide regulation of demonstrations at abortion clinics); see Clark, 468 U.S. at 295, 104 S.Ct. 3065 (rejecting challenge to a limited ban on camping in Washington, D.C.'s Lafayette Park as applied to an anti-homelessness demonstration; the Park Service allowed camping in designated areas in other parks); Smith v. City of Fort Lauderdale, 177 F.3d 954, 956–57 (11th Cir. 1999) (upholding ban on begging that applied only to a five-mile "designated, limited beach area" and did not ban begging in "many other public fora"). The City also might have allowed groups like FLFNB a limited annual number of food distribution events in Stranahan Park as of right. Again, we do not presume to tell the City exactly how it should manage its parks; all this is only to say that the Park Rule's utterly standardless permission requirement is "substantially broader than necessary to achieve" the City's interest in maintaining its parks. Ward, 491 U.S. at 782–83, 109 S.Ct. 2746. The Park Rule therefore cannot qualify as a valid regulation of the Plaintiffs' expressive conduct.

Alternatively, we evaluate the Park Rule under Clark's standard for time place, and manner restrictions. A content-neutral law regulating the time, place, and manner of expression in a public forum must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 293, 104 S.Ct. 3065. Stranahan Park is "an undisputed public forum." FLFNB I, 901 F.3d at 1238. We underscore that parks "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." McCullen, 573 U.S. at 476, 134 S.Ct. 2518 (quotation omitted); United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (Public parks are "historically associated with the free exercise of expressive activities."); Hague, 307 U.S. at 515, 59 S.Ct. 954 (opinion of Roberts, J.) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for

purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."). "[T]he government's ability to permissibly restrict expressive conduct" in Stranahan Park is therefore "very limited." Grace, 461 U.S. at 177, 103 S.Ct. 1702. But the government nevertheless "may enforce reasonable time, place, and manner regulations" on expression in the park. See id.

As a practical matter, there is little difference between this standard and the O'Brien test we have just discussed, and, in any event, they yield the same result in this case. Clark, 468 U.S. at 298, 104 S.Ct. 3065 (observing that the O'Brien standard "is little, if any, different from the standard applied to time, place, or manner restrictions"); see First Vagabonds Church of God, 638 F.3d at 761–62 (analyzing a similar ordinance under both standards). Both require that the regulation be narrowly tailored to serve a significant government interest. Clark, 468 U.S. at 293, 298, 104 S.Ct. 3065. Just as it does under O'Brien, the Park Rule's grant of standardless discretion to the City's permitting officials causes it to fail time, place, and manner scrutiny: "[a] government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' " Forsyth Cnty., 505 U.S. at 130–31, 112 S.Ct. 2395 (quoting Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)); Burk, 365 F.3d at 1256 ("[T]ime, place, and manner regulations must contain narrowly drawn, reasonable and definite standards, to guide the official's decision and render it subject to effective judicial review.") (internal quotation marks and citations omitted). Since the Park Rule fails because it is not narrowly tailored, we need not address whether it leaves open ample alternative channels for the communication of the Plaintiffs' message.

The long and short of it is that the Park Rule as applied to the Plaintiffs' expressive food sharing activities violates the First Amendment. Accordingly, we **REVERSE** the district court's summary judgment order and **REMAND** for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HULL, Circuit Judge, with whom LAGOA, Circuit Judge, joins, concurring:

I concur in full in the panel opinion. I write separately to emphasize that this is the second appeal in this case and that our panel is bound by this Court's holding as to whether the plaintiff FLFNB's food-sharing conduct is sufficiently expressive to warrant First Amendment protection. See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018).

In that prior appeal, this Court held that, "on this record," the nature of the plaintiff FLFNB's weekly food-sharing activity in a public park, "combined with the factual context and environment in which it was undertaken," led to the conclusion that FLFNB's food sharing conduct "express[es] an idea through [that] activity," conveys "some sort of message" to a reasonable observer, and constitutes "a form of protected expression" under the First Amendment. Id. at 1240–45 (quotation marks omitted). This holding relied on a well-developed factual record about the plaintiff FLFNB's many years of food-sharing events (1) that are held in the City's Stranahan Park, a public forum where the homeless congregate, and (2) that are accompanied by FLFNB's banners and distribution of literature. Id. As the panel opinion points out, "most social-service food sharing events will not be expressive." Here, however, we are bound by the holding in the prior appeal that was based on a particular and extensive list of factual circumstances.

Aaron Leibowitz, Miami Beach police begin arresting homeless people under stricter 'camping' ban, Miami Herald, Dec. 19, 2023

Miami Beach police made a spate of arrests of homeless people in the days before Art Basel, enforcing for the first time a city law that officials revised in October to crack down on sleeping outdoors. Police arrested 20 people for "camping" in the city between Nov. 30 and Dec. 7, according to jail booking records and police reports reviewed by the Miami Herald. Most of the people arrested were lying on the sand under blankets or on top of beach chairs, police reports show. The camping charges they faced were coupled with charges of entering a park after hours, as the beach is closed to the public from 10 p.m. to 5 a.m. All of the arrests took place in South Beach. The police reports note that officers had been assigned to a detail to enforce the city law about entering the beach after hours, a response to "numerous complaints from residents and city officials [about] criminal activity occurring during the non-operational hours of the beach." A spokesperson for the Miami Beach police, Christopher Bess, told the Herald the enforcement was "based on residential needs and wants." He said the timing was unrelated to the influx of tourists visiting for Art Week.

Jose Montesino takes a nap in Lummus Park in South Beach on Jan. 10, 2019.

The arrests represent a new level of enforcement of the city's camping ban, which has been on the books for years but previously required police to provide a warning to give people an opportunity to relocate. Booking records show Miami Beach police charged just 75 people between 2015 and when it was updated in October.

The updated ordinance no longer requires a warning, but does say people must be offered a shelter bed before they can be arrested. If a person who is camping "volunteers that he or she has no home or other permanent shelter, he or she must be given an opportunity to enter a homeless shelter or similar facility, if available," the ordinance says. "If no such facility is available, an arrest may not be made."

Convictions for violations of the ordinance can result in a prison term of up to 60 days and a $500 fine.

IS THE ORDINANCE BEING FOLLOWED?

Police reports from the recent arrests say that, in some cases, officers asked people whether they wanted to receive "homeless outreach services" from the city or if they "wanted help seeking permanent shelter."

In other cases, officers said they asked if people wanted "assistance to get access to a homeless shelter."

It wasn't clear from the reports whether police provided details about available shelter beds. The reports also do not say whether police warned people they could be arrested if they declined a shelter placement.

The Miami Herald has requested body-worn camera footage from several of the arrests.

Miami Beach does not have any shelters. The city pays for use of more than 50 shelter beds at facilities in the City of Miami.

Bess, the police spokesperson, said the department also has three shelter beds reserved for its use.

Stephen Schnably, a University of Miami law professor who worked on the landmark Pottinger case that addressed homelessness in the City of Miami, reviewed the arrest reports and said they leave questions about whether the ordinance is being properly enforced.

"It's not at all clear that there's an offer of immediate housing," Schnably said. "Do [officers] say, 'You're violating this ordinance and you can be arrested for it, however, we have shelter, are you interested in that?'"

Bess said Tuesday that the department is working to respond to questions the Herald submitted Friday about the arrest reports. The Herald also asked how many people have accepted a shelter bed to avoid arrest.

Every officer was required to watch a 15-minute training video prepared by the city attorney's office before police began enforcing the revised ordinance, Bess said.

"Any questions they had were answered accordingly," he said.

"It doesn't accomplish anything about ending homelessness, and it just makes it harder for those individuals to ultimately find jobs and housing because it's more of an arrest record," said Schnably.

Advocates note there are many reasons why people may be resistant to go to a homeless shelter, including safety concerns, limits on how long people can stay, policies about abstaining from drug and alcohol use, curfews, and restrictions on bringing pets or certain personal belongings.

Some people have had bad past experiences in shelters that shape their views, said Valerie Navarrete, a Miami Beach real-estate agent who advocates for the city's homeless population through a nonprofit, Favela Miami.

"These people need to be treated with respect," Navarrete said. While she said she doesn't take a stance on the camping ordinance, "it's very important to remember that they are people."

In police reports, officers described how some people expressed their hesitancy to accept shelter. In one report, police said a woman told them, "I do not want to be around those type of people" in a shelter facility.

One man told officers, "I am homeless, not helpless," according to a police report.

The Herald has requested a copy of the training video.

CRIMINALIZATION OR ENCOURAGEMENT?

The updated ordinance reflects concerns from residents and elected officials about increased visibility of homeless people and a desire to take a "tough on crime" approach.

City officials modeled the change after an Orlando ordinance that bans sleeping outdoors on public property in most cases and was upheld in 2000 by the Atlanta-based U.S. Court of Appeals for the 11th Circuit.

"This is absolutely not about criminalizing the homeless," Commissioner Alex Fernandez said at the October meeting. "This is about making the homeless community accept services ... If this helps us encourage them, then we have to do this."

Miami Beach had an unsheltered homeless population of 152 in an overnight count in August by the Miami-Dade County Homeless Trust, down from 235 in January and 167 from the previous August.

The ordinance change sparked resistance from local homeless advocates, who have said it

unfairly criminalizes a vulnerable population and effectively makes it illegal to be unhoused in the city.

Court records show most of the people arrested were released without having to post bail. Most of the cases remain pending.

One man who was charged with camping and entering a park after hours has remained in jail since his Nov. 29 arrest after his bond was set at $1,000, jail records show. Police say they found him shortly before midnight Nov. 29 lying in a sleeping bag on a lifeguard tower near 13th Street, and arrested him after he "refused police assistance." Many of the cases are being charged by Miami Beach's municipal prosecution team rather than the Miami-Dade State Attorney's Office. The municipal team handles criminal cases that involve only city ordinance violations and no state or federal crimes.

Court records show judges have in some instances withheld adjudication of the camping charge, a form of probation that does not go on a person's record. Judges have also imposed "stay away orders" that restrict people from returning to particular locations.

Mitch Perry, *GOP lawmaker touts a 'carrot and stick' approach to dealing with the homeless in FL*, Florida Phoenix, Jan. 26, 2024

Clay County GOP Rep. Sam Garrison says he's advocating for a bill to address the homeless situation in Florida because he doesn't want the state to become like California.

"We're going to do a different model," he told a committee in the Florida House on Thursday. "It's a model that has both carrot and stick. We're going to provide the resources necessary for the COC's [Continuums of Care] in the communities to do the best for their communities. The best for their citizens. But we're also going to have a pretty hard line to say we are not going to allow the public space that we all enjoy that's essential for a thriving community be lost. We're just not going to do it. "

Speaking in support of the measure was one of Tallahassee's most influential lobbyists, Ron Book, who has served as chairman of the Miami-Dade County Homeless Trust for the past 25 years. Book mentioned that homelessness in Miami-Dade is remarkably lower than in other major urban areas around the country and says it's because his organization follows a plan that focuses on getting the homeless off the streets.

"We discourage encampments," he told lawmakers. "While other governments seem to think it's a good thing to do, we're supposed to make it harder for people to survive on the streets so that the continuums can bring them in off the streets and get them services and get them care and get them housed."

The veteran lobbyist testified in support of the proposal (HB 1365) that would prohibit any city or county in Florida from authorizing or permitting public sleeping or camping on public property, public buildings or public rights-of-way without a lawfully temporary permit.

According to the most recent "point in time" count conducted almost exactly a year ago in Florida, there were approximately 15,706 individuals who were unsheltered, which is defined as people sleeping in cars, park benches, abandoned buildings, or other places not meant for human habitation. That was a 34% increase from the year before, according to the Florida's Council on Homelessness' most recent annual report.

That same report said that overall, there were 30,839 homeless individuals in Florida last year, an increase from 25,959 in 2022, and an overall 9% increase since 2019. It also showed that 4,668 are children under the age of 18, and 8,646 are individuals over the age of 55.

Also under Garrison's bill, cities and counties would be allowed to continue to provide public spaces for the homeless, but the regulations would seem to make that a tough sell for most local governments. They must include the following: access to clean running water and bathroom facilities; 24-hour security; a ban on drug and alcohol use for all users and access to substance abuse and mental health treatment resources; and it may not be in a location where it "adversely and materially affects the value or security of existing residential or commercial properties."

The proposal was criticized in committee by homeless advocates, who say it does nothing to address the root causes of homelessness. In fact, they contend that it will only exacerbate the problem.

"The bill places an impossible mandate on local governments, burdening them with undue financial responsibilities without offering a long-time solution for those experiencing homelessness," said Jackson Oberlink with the group Florida Rising. "It does not address the housing crisis, and instead of providing housing, it criminalizes those who have no alternative but to sleep outdoors."

Tim Adams, who told the committee that he's been homeless in the past, said the measure would make it illegal to sleep outdoors. "If sleeping is a crime, then basically you're saying that being human is a crime," he said. "I think that's wrong, and I highly oppose anything that tries to criminalize being a human."

Similar bills have approved in recent years in Texas, Tennessee and Missouri, and all have been pushed as model legislation by the Texas-based Cicero Institute, a conservative think tank. Unlike some of those proposals, however, the Florida bill does not include any criminal penalties. That's why South Florida Democratic Rep. Mike Gottlieb said he supported it. "I'm hoping that there's no nefarious intent in the bill," he said.

The bill, however, does allow individuals to pursue civil penalties against a municipality if they are found to be in violation of the law.

A similar proposal filed by Lee County Senate Republican Jonathan Martin (SB 1530) will get its first committee hearing in that chamber next Monday.

In regard to the homeless situation in California that Garrison said he didn't want Florida to become, the Golden State had 171,521 people experiencing homelessness in 2022, according to the National Alliance to End Homelessness.

United States District Court
Central District of California
Western Division

JAMES TYSON, *et al.*,

Plaintiffs,

v.

CITY OF SAN BERNARDINO,

Defendant.

EDCV 23-01539 TJH (KKx)

Order and Preliminary Injunction

The Court has considered Plaintiffs' motion for a preliminary injunction [dkt. # 13] and motion for leave to file supplemental evidence in support of their motion for a preliminary injunction [dkt. # 57], together with the moving and opposing papers.

Plaintiffs Noel Harner, Lenka John, and James Tyson were experiencing homelessness in May, 2023, and June, 2023, when they were evicted, and their personal property was seized, by the City of San Bernardino ["the City"] from encampments at Perris Hill Park and Meadowbrook Park in the City. Harner, John, and Tyson have mobility related disabilities that cause them to use wheelchairs. Plaintiff SoCal Trash Army is a volunteer-run, non-profit, unincorporated association that focuses on, *inter alia*, people experiencing homelessness in the Inland Empire.

On November 8, 2023, Plaintiffs filed their First Amended Complaint alleging,

inter alia, that the City improperly seizes and destroys personal property belonging to people experiencing homelessness, and that the City fails to provide reasonable accommodations to people with disabilities who are experiencing homelessness during the cleanup and removal of homeless encampments. This case was not filed as a class action.

All Plaintiffs alleged claims against the City for: (1) Discrimination, in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ["ADA"]; (2) Failure to provide reasonable accommodations, in violation of the ADA; (3) Violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 794; (4) Unreasonable search and seizure, in violation of the Fourth Amendment to the United States Constitution and Article I, § 13 of the California Constitution; and (5) Violation of due process guaranteed by the Fifth Amendment to the United States Constitution and Article I, § 7 of the California Constitution. Additionally, Plaintiffs Harner, John, and Tyson alleged a claim against the City for deliberate indifference, in violation of the ADA, and Plaintiffs Tyson and John alleged a claim against the City for improperly destroying personal property that belongs to people experiencing homelessness, in violation of Cal. Civ. Code § 2080, *et seq.*, and Cal. Gov't Code § 815.6.

The individual Plaintiffs' claims for unreasonable seizure and due process are premised on the broader fact that they are experiencing homelessness, and not specifically because they have disabilities. Likewise, SoCal Trash Army's claims for unreasonable seizure and due process are based on the fact that they work with people experiencing homelessness.

An organization can assert an ADA and/or Rehabilitation Act claim if it can demonstrate: (1) Frustration of its organizational mission; and (2) Diversion of its resources to combat the particular conduct in question. *See Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1154 (9th Cir. 2019). SoCal Trash Army was founded in July, 2020, to clean up trash around the City. Thereafter, it expanded its mission to include work with people experiencing homelessness. In November, 2020,

it held its first event focused on food distribution. Then, in January, 2021, SoCal Trash Army began providing, on a regular basis, food to people experiencing homelessness. Shortly thereafter, SoCal Trash Army learned that the City was destroying personal property that belonged to people experiencing homelessness, and was failing to provide reasonable accommodations to people with disabilities who were, also, experiencing homelessness and were evicted from encampments. SoCal Trash Army, then, began replacing personal property that was destroyed by the City, and began assisting people who were not able to move themselves or their personal property after being evicted from encampments. Thus, for purposes of the instant motion, SoCal Trash Army has established that it has standing to assert its ADA and Rehabilitation Act claims, here.

In September, 2022, the City implemented its Citywide Policy on Encampment Cleanups ["the Policy"]. This case was filed because, allegedly, the City is not complying with the Policy.

The Policy mandates that the personal property of people experiencing homelessness must not be treated differently than the property of other members of the public, and that Public Works personnel are not permitted to destroy or dispose of property belonging to people experiencing homelessness except in accordance with the Policy. The Policy requires Public Works personnel to post, at least 72 hours before a cleanup, a Notice of Cleanup stating the date and a three hour window during which the cleanup will start at each targeted encampment. The Policy distinguishes between attended and unattended property. The Policy defines unattended property as personal property left at the site following the 72-hour notice period, where the property owner is not present when City personnel arrive at a cleanup.

At the end of the 72-hour notice period, the Policy requires Public Works personnel to, *inter alia*: (1) Tag unattended property with a 24-Hour Notice of Intent to Store, which states that the City may seize and store the property if it is not removed within the following 24 hours; (2) Post a Notice of Storage with the date and time that

the property was seized, the case number, the phone number that the owner can call to obtain more information and to arrange retrieval of the seized property, and the time during which the property can be retrieved free of charge and without identification; and (3) Store the seized unattended property for 90 days.

The Policy, further, requires the City to provide reasonable accommodations in the form of additional time and/or resources to people experiencing homelessness who are unable to relocate during the cleanup of their encampment.

Since June, 2022, the City's Public Works Department has engaged Burrtec Industries, Inc. ["Burrtec"], a private waste management company under contract with the City, to clean up and remove homeless encampments within the City.

Since September, 2022, the City and/or Burrtec have, allegedly, cleaned up and evicted the occupants of over 2,000 encampments, and intend to continue those cleanups and evictions. Further, the alleged Policy violations during those cleanups have, allegedly, hindered SoCal Trash Army's work distributing food to people experiencing homelessness.

Plaintiffs, now, move for a preliminary injunction.

Requested Preliminary Injunction

Plaintiffs seek a preliminary injunction that enjoins the City and its contractors from removing individuals experiencing homelessness, and their attended and unattended personal property, from encampments within the City until the City submits, and the Court approves, a plan that:

(1) Requires the City to post adequate pre-seizure and post-seizure notices, and to implement lawful storage and documentation practices so that seized items are properly tagged and stored for post-seizure retrieval; and

(2) Requires the City to provide – in connection with park closures, encampment clearing, and related property seizure, disposal, and/or destruction – reasonable accommodations to people with disabilities who are, also, experiencing homelessness, including:

(A) A process that provides for the investigation of reasonable accommodation requests;

(B) Modifications to the City's programs and activities;

(C) Training for City employees and contractors who interact with people with disabilities; and

(D) A self-evaluation of the City's programs and activities within one year.

Standard for Injunctive Relief

Generally, to obtain a preliminary injunction, Plaintiffs must establish that: (1) They are likely to succeed on the merits; (2) They are likely to suffer irreparable harm in the absence of a preliminary injunction; (3) The balance of equities tips in their favor; and (4) An injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Injunctive relief is an extraordinary remedy that may be awarded only upon a clear showing that Plaintiffs are entitled to relief. *Winter*, 555 U.S. at 22.

Likelihood of Success on the Merits

1. Unreasonable Seizure of Personal Property

Plaintiffs seek an injunction to prohibit, *inter alia*, the illegal seizure of property. The Fourth Amendment's prohibition against unreasonable seizures of property applies to the City through the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

The Fourth Amendment prohibits the unreasonable seizure of personal property, even if the property is located in a public area. *See Recchia v. City of L.A. Dep't of Animal Servs.*, 889 F.3d 553, 558 (9th Cir. 2018). The destruction of personal property is a seizure. *United States v. Jacobsen*, 466 U.S. 109, 12425 (1984). Further, because a warrantless seizure is *per se* unreasonable, the City bears the burden of showing that a warrantless seizure falls within an exception to the Fourth Amendment's warrant requirement. *See Garcia v. City of L.A.*, 11 F.4th 1113, 1118

(9th Cir. 2021). In *Lavan v. City of L.A.*, the Ninth Circuit Court of Appeals concluded that a municipality's immediate destruction of personal property that belonged to people experiencing homelessness is an unreasonable seizure in violation of the Fourth Amendment. 693 F.3d 1022, 1031 (9th Cir. 2012).

Because private contractors engaged by a municipality are subject to the same Fourth Amendment prohibitions that limit the actions of the municipality, the Court will collectively consider the actions of the City and Burrtec. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

The City acknowledged, here, that its encampment clean ups were done pursuant to neither a warrant nor a warrant exception. In recognition of *Lavan*, the City did not argue that it is reasonable, under the Fourth Amendment, to immediately destroy publicly stored personal property that belongs to people experiencing homelessness. Instead, the City's opposition was premised upon on its asserted practice of not immediately destroying personal property at clean up locations.

In support of the instant motion, Plaintiffs submitted twenty-two declarations from people who witnessed the City's recent encampment clearings. Some of the declarants described instances where the City seized and, then, immediately destroyed personal property that belonged to people experiencing homelessness, including some people who had disabilities.

As an example, Plaintiff John declared that, on May 18, 2023, a City employee informed her that she needed to vacate Meadowbrook Park. She, further, declared that, because she is disabled and relies on a wheelchair and service dog, she could not carry away all of her personal property; that she took two backpacks and a small suitcase with her and planned to return for the rest of her property; and that as she was leaving Meadowbrook Park, she saw a clean up crew throw the rest of her personal property, including her walker, a first-aid kit, a suitcase, and her medical records, into a trash truck.

As another example, Plaintiff Tyson declared that, in early June, 2023, a clean

up crew seized and discarded – without prior notice – his personal property, including, *inter alia*, clothes and hygiene supplies. In sum, Tyson declared that the City seized and immediately destroyed his personal property on five or six different occasions.

Plaintiffs, also, submitted a declaration from Kristen Malaby, the founder of SoCal Trash Army, who declared that SoCal Trash Army replaced hundreds of tents, tarps, and items of clothing that belonged to people experiencing homelessness in the City but were destroyed by the City during encampment clearings.

Declarations may form the basis for a preliminary injunction, unless the facts set forth in them consist largely of general assertions that are substantially controverted by counter-declarations. *See K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1089–90 (9th Cir. 1972). When considering declarations, the Court can give more or less weight to each declaration based on the declarant's personal knowledge and credibility. *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).

In opposition, the City submitted eight declarations from its employees to challenge the veracity of the declarations submitted by Plaintiffs. The Court takes note that the City did not submit any declarations from Burrtec employees.

To challenge the veracity of the declarations of John and Tyson, the City submitted a declaration from David Miller, a City Public Works supervisor. Miller declared that the City does not discard personal property that belongs to people experiencing homelessness during encampment clean ups, and that the City discards only trash. However, Miller did not declare that he was present at all of the clean ups identified in the declarations submitted by Plaintiffs, or at all of the 2,406 encampment clean ups conducted by the City and/or Burrtec between September, 2022, and June 30, 2023. Consequently, the Court does not give great weight to Miller's declaration regarding what actually happened at clean ups that he did not specifically declare that he personally supervised from beginning to end. *See Flynt Distributing Co., Inc.*, 734 F.2d at 1394.

After considering all of the declarations submitted by the parties, here, Plaintiffs'

declarations clearly established a *prima facie* case that the City and Burrtec, as the City's agent, seized and immediately destroyed personal property that belonged to people experiencing homelessness, including Plaintiffs John and Tyson. The Court finds that Plaintiffs' declarations were not substantially controverted by the declarations submitted by the City. *See K-2 Ski Co.*, 467 F.2d at 1089–90; *Flynt Distributing Co.*, Inc., 734 F.2d at 1394.

Thus, Plaintiffs have established a strong likelihood of success on the merits for their Fourth Amendment unreasonable seizure claim. *See Winter*, 555 U.S. at 20. Consequently, at this juncture, the Court need not, also, consider Plaintiffs' unreasonable seizure claim in the context of Article I, § 13 of the California Constitution, Cal. Civ. Code § 2080, *et seq.*, or Cal. Gov't Code § 815.6.

2. Due Process

Plaintiffs, here, seek, *inter alia*, an injunction to prohibit the illegal taking of property without due process. The Fourteenth Amendment to the United States Constitution prohibits a municipality from depriving a person of life, liberty, or property without due process; any significant taking of property by a municipality falls within the purview of the Fourteenth Amendment. *See Fuentes v. Shevin*, 407 U.S. 67, 86 (1972).

In *Lavan*, the Ninth Circuit set forth the due process rights of people experiencing homelessness related to the seizure of personal property. 693 F.3d at 1031–33. Specifically, due process requires the City to provide notice and an opportunity to be heard before ***and*** after it seizes personal property that belongs to people experiencing homelessness. *See Lavan*, 693 F.3d at 1033.

The City, here, did not dispute the due process rights of people experiencing homelessness. Instead, it argued that the Policy provides sufficient due process and that it acted in accordance with the Policy.

Based on the declarations submitted by Plaintiffs, there were at least several instances where the City failed to provide people experiencing homelessness with an

opportunity to be heard before the City seized their personal property. Further, the Policy, on its face, does not provide for an opportunity for people experiencing homelessness to be heard post-seizure.

Thus, Plaintiffs have established a likelihood of success on the merits for their due process claim based on the Fourteenth Amendment. *See Winter*, 555 U.S. at 22. Consequently, at this juncture, the Court need not, also, consider Plaintiffs' due process claim in the context of Article I, § 7 of the California Constitution, Cal. Civ. Code § 2080, *et seq.*, or Cal. Gov't Code § 815.6.

3. ADA and Rehabilitation Act

To assert a claim against the City under § 504 of the Rehabilitation Act, Plaintiffs must, first, show that the City received federal financial assistance. *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001). To meet that burden, Plaintiffs submitted the City's adopted budget for the 2023 - 2024 fiscal year, which shows the receipt of federal funds from the Corona Virus State and Local Fiscal Recovery Fund, the Community Development Block Grant, the Emergency Solutions Grant, and the HOME Investment Partnership Program.

The ADA prohibits municipalities from discriminating against qualified individuals on account of their disabilities. 42 U.S.C. § 12132. The ADA requires the City to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless [it] can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *McGary v. City of Portland*, 386 F.3d 1259, 1265–66 (9th Cir. 2004). The failure of the City to provide such reasonable accommodations may constitute discrimination under Title II of the ADA and § 504 of the Rehabilitation Act. *See Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002).

Because Title II of the ADA was modeled after § 504 of the Rehabilitation Act, and their elements do not differ in any relevant respect, the Court can, and will, address those two claims together. *See Zukle v. Regents of Univ. of Cal.*, 166 F.3d

1041, 1045 (9th Cir. 1999).

To establish that the City violated Title II of the ADA and § 504 of the Rehabilitation Act, Plaintiffs, here, must satisfy the following four elements: (1) They have disabilities; (2) They were otherwise qualified to participate in or receive the benefit of the City's services, programs, or activities; (3) They were excluded from participation in, or denied the benefits of, the City's services, programs, or activities, or were otherwise discriminated against by the City; and (4) The exclusion, denial of benefits, or discrimination was by reason of their disabilities. *See Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002); *Duvall*, 260 F.3d at 1135–36.

Plaintiffs Harner, John, and Tyson appear to be qualified individuals with disabilities. Harner, John, and Tyson have mobility related disabilities that cause them to use wheelchairs. All of the individual Plaintiffs are qualified and entitled to receive the benefits of the City's programs, activities, and services. *See McGary*, 386 F.3d at 1269–70. Thus, Plaintiffs satisfied the first and second elements of their ADA and Rehabilitation Act claims.

Plaintiffs can satisfy the third element by showing that they were denied a reasonable accommodation needed to enjoy meaningful access to the benefits of the City's services. *See A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1204 (9th Cir. 2016). Generally, a person with disabilities must, first, make a request for a reasonable accommodation. *See Duvall*, 260 F.3d at 1139. A reasonable accommodation may, also, be required, without a request, if the accommodation was: (1) Obvious, or should have been obvious, to a public entity; or (2) Required by a statute or regulation. *See Duvall*.

The City's Policy does not set forth a process by which a person experiencing homelessness can make a request for a reasonable accommodation. Regardless, the City acknowledged that the American Civil Liberties Union, which represents Plaintiffs, here, provided Plaintiffs Harner, John, and Tyson with forms to request reasonable accommodations during the clean ups at Perris Hill Park and Meadowbrook

Park. Those Plaintiffs declared that they submitted requests for reasonable accommodations to the City but that the City never responded.

After a person submits a request for a reasonable accommodation based on a disability, or if the accommodation was obvious or required by a statute or regulation, the City is ***mandated*** to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation for the situation. *See Duvall*. For a fact-specific investigation to be adequate, the City must have gathered sufficient information from the person with disabilities who made the accommodation request, as well as from qualified experts, so that it was able to determine whether the requested accommodation was reasonable. *See Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999). When evaluating whether a requested accommodation is reasonable, the City is obligated to consider the particular needs of the person who made the request. *See Duvall*, 260 F.3d at 1139–40. Further, the City could not have summarily concluded, without undertaking the required investigation, that a requested accommodation was neither reasonable nor feasible. *See Duvall*.

The declarations submitted by Plaintiffs describe several instances where the City failed to provide reasonable accommodations to people experiencing homelessness who were, also, disabled. By way of example, John and Tyson both declared that the City did not provide them with the requested assistance to pack and transport their personal property during the cleanup of Meadowbrook Park. Further, Harner declared that the City did not respond to her request to be relocated to a location where she could be with her service dog. Regardless of whether the City received requests, because Plaintiffs Harner, John, and Tyson have mobility related disabilities and use wheelchairs, it should have been obvious to the City that they needed reasonable accommodations to relocate. *See Duvall*, 260 F.3d at 1139.

Consequently, the Court finds that Plaintiffs have established that the City failed to provide people with disabilities, including Harner, John, and Tyson, with reasonable accommodations during the clean up and removal of homeless encampments in the

City. *See Duvall*.

Plaintiffs can satisfy the fourth element of their ADA and Rehabilitation Act claims by showing that the City's denial of access to benefits or services was based on the fact, or perception, that they have disabilities. *See Weinreich v. L.A. Cnty. Metro. Transp. Auth.*, 114 F.3d 976, 979 (9th Cir. 1997).

To show that the discrimination was based on the fact, or perception, of Plaintiffs' disabilities, they may show that a facially neutral and consistently enforced policy burdened them in a manner different from, and greater than, non-disabled people experiencing homelessness. *See McGary*, 386 F.3d at 1265. To prevent undue burdens on people with disabilities, the ADA imposes an affirmative duty to provide special or preferred treatment as a reasonable accommodation. *McGary*, 386 F.3d at 1266.

Here, Harner, John, and Tyson declared that the City's actions burdened them in a manner different from, and greater than, people without disabilities. *See McGary*, 386 F.3d at 1265. Harner declared that, after the City evicted her from Perris Hill Park, she moved to the side of Perris Hill Park Road where there is no sidewalk. To get out of the dirt, Harner declared that she relies on a friend to push her wheelchair, or she crawls out and pulls her wheelchair behind her, to get to the sidewalk across the street. John declared that, after the City destroyed her walker, she struggles to move in situations where she cannot use her wheelchair. Finally, Tyson declared that, after the City seized his personal property from the parking lot near Meadowbrook Park, he moved to the adjacent ravine, and to get down to the ravine he has to throw his wheelchair down to the ravine and then slide down on his body.

Consequently, the Court finds that Plaintiffs have established a *prima facie* case that the City discriminates against people with disabilities, including Harner, John, and Tyson, based on the fact, or perception, of their disabilities. *See Weinreich*, 114 F.3d at 979.

Thus, Plaintiffs have established a likelihood of success on the merits for their

ADA and Rehabilitation Act claims. *See Winter*, 555 U.S. at 22.

Irreparable Harm

Generally, Plaintiffs must show that irreparable harm will continue in the absence of a preliminary injunction. *See Winter*, 555 U.S. at 2021. Plaintiffs seek an injunction based on both their constitutional and statutory claims, here.

A preliminarily established constitutional violation, as is the situation, here, constitutes irreparable harm in support of the issuance of a preliminary injunction. *See Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 140, 1412 (9th Cir. 1991).

In support of a preliminary injunction based on their ADA and Rehabilitation Act claims, Plaintiffs Harner, John, and Tyson declared that they submitted requests for reasonable accommodations to the City but that the City never responded. Further, Harner and Tyson declared that they are currently experiencing homelessness, and live in locations that are not wheelchair accessible after the City evicted them from Perris Hill Park and Meadowbrook Park. Because the City has plans to continue cleaning up and evicting the occupants of homeless encampments, Harner and Tyson are immediately threatened by additional discrimination based on the City's failure to provide reasonable accommodations. Consequently, if a preliminary injunction is not issued, Harner and Tyson are likely to continue to suffer irreparable harm before a decision on the merits is rendered. *See Herb Reed Enters., LLC v. Fla. Entm't Mgmt.*, 736 F.3d 1239, 1249 (9th Cir. 2013).

Accordingly, Plaintiffs have demonstrated that irreparable harm will continue in the absence of a preliminary injunction. *See Winter*, 555 U.S. at 2021.

Balance of Equities and the Public Interest

When considering a motion for a preliminary injunction, the Court must balance the equities by identifying the harm that an injunction may cause to the Defendant and weighing that against the risk of continuing injury to the Plaintiffs. *See Armstrong v. Mazurek*, 94 F.3d 566, 568 (9th Cir. 1996).

The Court must, also, consider whether the public interest would be furthered by the issuance of a preliminary injunction. *See Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc.*, 725 F.3d 940 (9th Cir. 2013). Because a municipality's actions are, presumably, in the public's interest, the balance of equities analysis merges into the public interest analysis. *See Drakes Bay Oyster Co.*, 747 F.3d 1073, 1092 (2014).

Here, the City argued that a preliminary injunction would hamper its efforts to regulate public spaces. Thus, the Court must balance the City's interest in keeping public spaces clean against the constitutional rights of individuals experiencing homelessness to retain their personal belongings and their right to reasonable accommodations if they, also, have disabilities. However, the Court cannot give weight to the Policy, as it has preliminarily found the Policy to be unconstitutional and violative of the ADA. *See Garcia*, 481 F. Supp. 3d at 1050–51.

Further, the Court is, and should be, cognizant of the fact that people experiencing homelessness are members of the community, and their interests, too, must be included in assessing the public interest. *See Le Van Hung v. Schaff*, No. 19-cv-10436-CRB, 2019 WL 1779584 at 7 (N.D. Cal. 2019). Indeed, "[o]ur society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges." *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983).

In sum, the balance of equities, here, tips in the favor of Plaintiffs and the issuance of a preliminary injunction. Likewise, the public interest favors the issuance of a preliminary injunction.

Waiver of Bond

Usually, a bond is a condition precedent to the issuance of a preliminary injunction. Fed. R. Civ. P. 65(c). However, the Court may waive the bond when the Plaintiffs are unable to afford its cost or when there is little, or no, harm to the party being enjoined. *See Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003);

Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999).

Plaintiffs failed to provide the Court with evidence of their current financial conditions, so the Court cannot consider whether any of them can afford the cost of a bond, though the Court presumes that the individual Plaintiffs who are currently experiencing homelessness cannot afford the cost of a bond. Regardless, the Court finds, here, that the City will not be harmed by the injunction, and that its lack of harm justifies the waiver of the bond requirement, as it did in *Lavan v. City of Los Angeles*, No. 11-cv-2874-PSG, 2011 WL 1533070 at 6 (C.D. Cal. 2011), where a similar injunction was issued.

Preliminary Injunction

Plaintiffs have established their entitlement to a preliminary injunction that enjoins the City, its contractors and agents, from removing individuals experiencing homelessness and/or their attended and/or unattended personal property from encampments within the City pending a final resolution of this case or further order of the Court.

The Court will consider vacating the preliminary injunction if the City crafts and presents a lawful revised Policy regarding homeless encampment clean up operations, and if that revised Policy is approved by the Court.

Plaintiffs' Request for Leave to File Supplemental Evidence

After Plaintiffs filed their motion for a preliminary injunction, they moved, pursuant to Fed. R. Civ. Proc. 65(a), for leave to file supplemental evidence in support of their motion for a preliminary injunction. The motion for leave to file supplemental evidence is, now, moot.

Accordingly,

It is Ordered that Plaintiffs' motion for a preliminary injunction be, and hereby is, **Granted**.

It is further Ordered that, pending a final resolution of this case or further order of the Court, the City of San Bernardino, and its employees, agents and contractors, be, and hereby are, **Preliminarily Enjoined**, forthwith, from conducting any operations involving or related to the removal of unhoused people and/or their attended and/or unattended personal property from parks and other publicly accessible locations in the City; the Court will consider vacating this Preliminary Injunction if the City crafts and presents a lawful revised Policy regarding homeless encampment clean up operations and that revised Policy is approved by the Court.

It is Further Ordered that the City shall, forthwith, deliver a copy of this Order and Preliminary Injunction to Burrtec and any other contractors and agents it may have.

It is Further Ordered that the bond for this Preliminary Injunction be, and hereby is, Waived.

It is further Ordered that this Order will serve as the findings of fact and conclusions of law in support of the issuance of this Preliminary Injunction.

It is Further Ordered that Plaintiffs' motion for leave to file supplemental evidence in support of their motion for a preliminary injunction be, and hereby is, Denied as moot.

Date: January 12, 2024

Terry J. Hatter, Jr.
Senior United States District Judge

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May 23, 2022

Honorable Deborah Kaplan
Deputy Chief Administrative Judge
for the New York City Courts
Supreme Court, New York County, Civil Term
New York, New York 10007

Re: *Callahan v. Carey,* Index No. 42582/1979
Letter application for modification of provision of Final Judgment on Consent, dated August 26, 1981

Dear Justice Kaplan:

On behalf of Defendant The City of New York[1] ("City Defendant") and pursuant to the requirements of a post-judgment Order in the above-referenced matter, dated October 15, 1984 ("Post-Judgment Order") (annexed as Appendix 1), I am writing to seek the permission of this Court to move for relief from, and modification of, a provision of the Final Judgment on Consent, dated August 26, 1981 ("Judgment") (annexed as Appendix 2). Given the antiquity of this matter, commenced nearly 44 years ago, I provide the following background and context for the Court's benefit.

Plaintiffs commenced this action on October 2, 1979, challenging the adequacy of shelter then offered by the City Defendant to homeless men in New York City. With the issuance of the Judgment, the parties – Plaintiffs, the City Defendant, and New York State

[1] The City of New York was sued herein as Edward I. Koch, as Mayor of the City of New York; James A. Krauskopf, as Commissioner of the New York City Human Resources Administration; and Calvin Reid, as Director of the Shelter Care Center for Men.

defendant officials[2] – agreed to numerous substantive terms regarding the provision of shelter to homeless men and to specified standards applicable thereto.[3] Pursuant to Paragraph 19 of the Judgment, this Court retained jurisdiction "for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, modification, or termination of this entire judgment or of any appliable provisions thereof . . . ."

By the subsequent Order, dated October 15, 1984, this Court set forth the following process for any such application made under Paragraph 19 of the Judgment:

> [H]enceforth no motions are to be made except with the permission of the court. Such permission is to be sought by letter from counsel addressed to the court briefly describing the relief needed and setting forth proposals for the submission of proof and argument. Responses from opposing counsel are also to be made by letter addressed to the court and should be received by the court within two or three days thereafter. Should the party seeking leave to make a motion wish to reply, such will be received by the court if delivered to chambers within a day or two after delivery of the responding letter. In a written order the court will then determine whether to entertain the proposed motion and, if so, schedule its submission.

Order at 1. The City Defendant submits this pre-motion letter for modification and relief as authorized by Paragraph 19 of the Judgment and in accordance with the process outlined in the Order, as set forth above.

For the purposes of the instant application, the substantive provision of the Judgment from which the City Defendant seeks relief is Paragraph 1, providing as follows:

> 1. The City defendants shall provide shelter and board to each homeless man who applies for it provided that (a) the man meets the need standard to qualify for the home relief program established in New York State; or (b) the man by reason of physical, mental or social dysfunction is in need of temporary shelter.

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[2] The Defendant State officials named in the caption were Hugh L. Carey, as Governor of the State of New York; and Barbara Blum, as Commissioner of the New York State Department of Social Services.

[3] The *Callahan* obligations for homeless men were subsequently extended to homeless women in a subsequent action. *Eldredge v. Koch,* 118 Misc. 2d 163 (Sup. Ct. N.Y. City, 1983), *rev'd in part on other grounds,* 98 A.D.2d 675 (1st Dep't 1983).

Callahan Judgment, Para. 1. The City Defendant requests an opportunity to move to amend Paragraph 1 as follows:

- Change "Paragraph 1" to "Paragraph 1(a)," and, within that sub-paragraph, replace "each homeless man" with "homeless single adults," consistent with *Eldridge*, *supra*; and

- Add a new Paragraph 1(b), providing for the staying of both Paragraph 1 obligations to homeless single adults, as well as similar (but not equivalent) obligations to adult families.[4]

The resulting provision would read as follows:

> 1(a) The City defendants shall provide shelter and board to each homeless ~~man~~ single adult who applies for it provided that (a) ~~the man~~ such single adult meets the need standard to qualify for the home relief program established in New York State; or (b) ~~the man~~ such single adult by reason of physical, mental or social dysfunction is in need of temporary shelter.
>
> 1(b) The obligations to provide shelter to both homeless adults and to adult families shall be stayed when the City of New York, acting through the New York City Department of Homeless Services ("DHS"), lacks the resources and capacity to establish and maintain sufficient shelter sites, staffing, and security to provide safe and appropriate shelter.

Should the City Defendant be permitted to move for the above-described relief, it will provide affidavits from high-ranking City officials establishing the following facts:

> (1) Starting in April 2022, the City Defendant, through DHS, began experiencing an unprecedented increase in the number of single adults, adult families, and families with children seeking emergency shelter. The main driver of this increase was an influx of asylum-seekers arriving here from the southern border of the United States, in large part orchestrated by out-of-State actors seeking to score political points by exporting the responsibility and attendant fiscal burdens of caring for this population out of their state and, by political calculation, to the City of New York. These asylum-

[4] City Defendant, by this application, seeks no relief regarding its obligations to families with children. The provision of shelter to families with children has its roots in a judgment in a separate case, *Boston v. City of New York,* Index No. 402295/08 (Sup. Ct., N.Y. Cty. Dec. 12, 2008).

seekers arrived without housing and, in many cases, without any resources to care for themselves.

(2) Since the Spring of 2022, tens of thousands of asylum-seekers have arrived in the City and been provided a temporary place to stay in various City locations. By October of 2022, more than 17,000 asylum-seekers had entered the City's DHS shelter system. Last Summer, the State of Texas and the City of El Paso began chartering buses of migrants to various major cities, with by far the majority of this population sent to New York City. While El Paso has provided the City with scheduling and other basic information regarding the buses and their passengers, the State of Texas has refused any outreach by the City to coordinate this process. Consequently busloads of asylum-seekers arrive at the Port Authority Bus Terminal at unpredictable hours.

(3) By May 15, 2023, more than 65,000 asylum-seekers had arrived in the City, and currently, more than 44,000 asylum-seekers remain in locations provided by the City, with more arriving every day.

(4) This ongoing flood of asylum-seekers arriving in New York City from the southern border represents a crisis of national, indeed international dimension; yet, the challenges and fiscal burden of this national crisis have fallen almost exclusively upon the City. As the country's by-default backstop for international and national policy failures, as well as inter- and intra-state political maneuvering, all entirely outside of its control, the City is now facing an unprecedented demand on its shelter capacity. These unprecedented demands on the City's shelter resources confront the City Defendant with challenges never contemplated, foreseeable, or indeed even remotely imagined by any signatory to the *Callahan* Judgment.

(5) Notwithstanding that the influx of asylum-seekers from the border has been orchestrated in large measure by out-of-State actors without regard for the City's ability to provide care, the City has responded, to date, with compassionate concern for the welfare of migrant individuals and families who have endured unimaginable hardships before arriving here.

(6) The City has made extraordinary efforts to meet the needs of these tens of thousands of asylum-seekers, including the establishment of numerous DHS emergency shelters; the declaration of a state of emergency by Mayor Adams on October 7, 2022 (Emergency Executive Order Number 224)

(annexed as Appendix 3)[5]; the corresponding direction to city agencies to establish Humanitarian Emergency Response and Relief Centers to provide, among other things, immediate respite and sleeping accommodations to asylum-seeking individuals and families; and the recent urgent response by the New York City Office of Emergency Management to open Emergency Respite Centers. However, even as these emergency measures are undertaken, stretching the City's fiscal and personnel resources to the breaking point, waves upon waves of asylum-seekers continue to arrive, with those numbers only now increasing upon the expiration of the Title 42 Order.[6]

(7) Including both asylum-seekers and the City's "resident homeless" population, the City Defendant is currently providing shelter for over 93,000 individuals, over 81,000 of whom are being provided for by DHS. This represents an over 75 % increase in the DHS shelter population in a single year and far exceeds the City's previous highest-ever-recorded population of 61,000 individuals.

(8) While the City is endeavoring to enlist other localities within New York State to share the shelter burdens imposed almost exclusively upon the City by out-of-State actors, those efforts are meeting with local resistance including executive orders and related legal challenges that, even if of questionable merit, effectively hamstring the City's efforts at modest burden-sharing at a time when the City has reached the extended outer limits of its shelter capacity, both in terms of sites and staffing.

(9) The dire extremity of this crisis does not represent a failure of will or commitment on the City's part to asylum-seeking individuals and families seeking refuge from the peril and hardship in their countries of origin; rather it results precisely from that commitment: the City has done far more than many other – if not all – other jurisdictions in the United States for this desperate population. The unfortunate reality is that the City has extended itself further than its resources will allow, placing in jeopardy the City's obligations to manage its fisc in order to maintain critical infrastructure and services and provide for the well-being of all of its citizens.

---

[5] Emergency Executive Order Number 224 has been extended by subsequent executive orders.

[6] Pursuant to sections 362 and 365 of the Public Health Services Act (42 U.S.C. §§ 362, 365) and the implementing regulation at 32 C.F.R. § 71.40, the Director of the United States Center for Disease Control ("CDC") issued the *Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists* (the "Title 42 Order").

Based upon the above summary, on behalf of the City Defendant, I respectfully request that Your Honor assign this 44-year-old matter to a newly-assigned justice for consideration of City Defendant's request for leave to move for partial relief from the Judgment. I thank Your Honor for your consideration of this application.

Very truly yours,

Jonathan Pines
Assistant Corporation Counsel

Copies (by email) to:

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APPENDIX 1

Callahan 1984 Order

SUPREME COURT : STATE OF NEW YORK
TRIAL TERM : PART 23

ROBERT CALLAHAN, et al.,

Plaintiffs

- against -

HUGH L. CAREY, as Governor of the State of New York, et al.,

Defendants

Index No. 42582/79
10/15/87

WALLACH, RICHARD W., J.:

The parties are advised that henceforth no motions are to be made except with the permission of the court. Such permission is to be sought by letter from counsel addressed to the court briefly describing the relief needed and setting forth proposals for the submission of proof and argument. Responses from opposing counsel are also to be made by letter addressed to the court, and should be received by the court within two or three days thereafter. Should the party seeking leave to make a motion wish to reply, such will be received by the court if delivered to chambers within a day or two after delivery of the responding letter. In a written order the court will then determine whether to entertain the proposed motion, and, if so, schedule its submission.

Service of all papers herein is to be made in the same manner as delivery is effected upon the court.

In the event that there is a need for immediate, temporary relief pending the submission and decision of a motion, this too is to be sought by letter, clearly alerting that immediate, temporary relief is being sought and covering any affidavits or other evidentiary materials necessary to warrant the granting of immediate, temporary relief. Upon receipt thereof, the other sides should hold themselves ready to appear in chambers within 48 hours for argument on the question of whether immediate, temporary relief should be granted, bringing with them any evidentiary materials they deem appropriate for purposes of opposition. They may also bring with them a responding letter opposing submission of the proposed motion. The conference in chambers will be set up by way of telephone communications with chambers.

In the event the question of immediate, temporary relief is not resolved consensually in chambers, the court, by oral order dictated into the record, will decide whether to grant such relief; if so, the court will schedule the submission of formal proof and argument; if not, whether the proposed motion should be entertained at all will remain

an open question to be decided by the court in a subsequent written order.

Defendants are requested to respond forthwith to the letter dated October 15, 1984 from Mr. Hayes to the court.

The foregoing constitutes an order of the court made sua sponte pursuant to its inherent power of control over its own calendar and the disposition of business before it.

Dated: October 15, 1984

J.S.C.

APPENDIX 2

Callahan Order

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

ROBERT CALLAHAN, CLAYTON W. FOX, THOMAS DAMIAN ROIG, JAMES HAYES, JAMES SPELLMAN and PAUL E. TOOLE, on their own behalves and on behalf of all others similarly situated, Plaintiffs, -against- HUGH L. CAREY, as Governor of the State of New York, BARBARA BLUM, as Commissioner of the New York State Department of Social Services, EDWARD I. KOCH, as Mayor of the City of New York, JAMES A. KRAUSKOPF, as Commissioner of the New York City Human Resources Administration, and CALVIN REID, as Director of the Shelter Care Center for Men, Defendants.	Index No.: 42582/79 FINAL JUDGMENT BY CONSENT

Plaintiffs Robert Callahan, Clayton Fox and Thomas Roig, having brought this action on October 2, 1979 challenging the sufficiency and quality of shelter for homeless men in New York City, and plaintiffs Callahan, Fox, Roig, James Hayes, James Spellman and Paul Toole, having filed their Amended Complaint on March 31, 1980, and defendants Hugh L. Carey, as Governor of the State of New York, and Barbara Blum, as Commissioner of the State of New York Department

of Social Services (the "State defendants"), having filed their Amended Answer on January 19, 1981 therein denying the material allegations of the Amended Complaint, and defendants Edward Koch, as Mayor of the City of New York, Stanley Brezenoff, as Administrator of the New York City Human Resources Administration, and Calvin Reid, as director of the Shelter Care Center for Men (the "Men's Shelter") (the "City defendants"), having filed their Amended Answer on January 19, 1981 therein denying the material allegations of the Amended Complaint, and plaintiffs and defendants by their respective attorneys, having consented to the entry of this Final Judgment without any final adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence or admission by any party hereto with respect to any such issue:

NOW, therefore, without final adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence or admission by any party hereto with respect to any issue, and upon consent of all parties, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

Provision of Shelter

1. The City defendants shall provide shelter and board to each homeless man who applies for it provided

that (a) the man meets the need standard to qualify for the home relief program established in New York State; or (b) the man by reason of physical, mental or social dysfunction is in need of temporary shelter.

Shelter Standards

2. The City defendants shall provide shelter at facilities operated in accordance with the standards set forth in this paragraph as soon as practicable and not later than September 1, 1981. The term "shelter facility" refers to the Kaener Building, Camp LaGuardia, the Men's Shelter and any other facility used by the City defendants to shelter homeless men. This paragraph does not apply to the Bowery lodging houses (Palace, Kenton, Union, Sunshine, Delevan and Stevenson) presently used by the City defendants to shelter homeless men (the "hotels"); if the City defendants choose to shelter homeless men in any additional Bowery lodging house, they will advise counsel for the plaintiffs and a good faith effort shall be made by plaintiffs and the City defendants to agree to operating standards for such facilities.

(a) Each resident shall receive a bed of a minimum of 30 inches in width, substantially constructed, in good repair and equipped with clean springs.

(b) Each bed shall be equipped with both a clean, comfortable, well-constructed mattress standard in size for the bed and a clean, comfortable pillow of average size.

(c) Each resident shall receive two clean sheets, a clean blanket, a clean pillow case, a clean towel, soap and toilet tissue. A complete change of bed linens and towels will be made for each new resident and at least once a week and more often as needed on an individual basis.

(d) Each resident shall receive a lockable storage unit.

(e) Laundry services shall be available to each resident not less than twice a week.

(f) A staff attendant to resident ratio of at least 2 per cent shall be maintained in each shelter facility at all times.

(g) A staff attendant trained in first aid shall be on duty in each shelter facility at all times.

(h) A minimum of ten hours per week of group recreation shall be available for each resident at each shelter facility.

(i) Residents shall be permitted to leave and to return to shelter facilities at reasonable hours and without hindrance.

(j) Residents of shelter facilities shall be provided transportation (public or private) to enable them to return to the site where they applied for shelter.

(k) Residents of shelter facilities shall be permitted to leave the facility by 7:00 a.m. if they so desire.

(l) Residents shall be permitted to receive and send mail and other correspondence without interception or interference.

(m) The City defendants shall make a good faith effort to provide pay telephones for use by the residents at each shelter facility. The City defendants shall bear any reasonable cost for the installation and maintenance of such telephones.

3. The capacity of shelter facilities shall be determined as follows:

(a) The capacity of newly constructed shelter facilities shall comply with the standards set forth in Appendix A, except

in cases of emergency need as defined in Appendix B.

(b) The City defendants shall disclose to plaintiffs' counsel any plan to convert an existing structure to a shelter facility and the intended capacity for that facility at least 30 days in advance of the implementation or execution of any such conversion plan. A reasonable capacity for each such facility shall be established. The standards set forth in Appendix A shall be used as guidelines in determining whether the planned capacity of the City defendants is reasonable.

(c) Effective December 31, 1981, the capacity of the Keener Building shall not exceed 416 except in cases of emergency need as defined in Appendix B, in which case the maximum number of men who may be sheltered in the Keener Building is 450. Between the date of entry of this judgment and December 31, 1981, the capacity of the Keener Building shall not exceed 450.

(d) The capacity of Camp LaGuardia shall comply — by construction of new dormitory buildings — with the standards set forth in Appendix A,

except in cases of emergency need as defined in Appendix B, as soon as practicable and not later than December 31, 1982, except that the individual rooms in the "Main Building" may be used as sleeping rooms for one person each. The construction start of such new dormitory buildings shall occur no later than March 1, 1982.

Bowery Lodging Houses

4. Hotels presently used by the City defendants shall meet the following standards at the time of entry of this judgment and the City defendants shall maintain such standards thereafter:

(a) Each resident shall receive a bed, a clean mattress, two clean sheets, one clean blanket, one clean pillow and one clean pillow case. A complete change of bed linens (sheets and pillow case) shall be made for each new resident and at least once a week and more often as needed on an individual basis.

(b) Each resident shall be supplied with a clean towel, soap and toilet tissue. A clean towel shall be provided to each new resident and towels shall be changed at least once a week and more often as needed on an individual basis.

(c) There shall be two trained security guards in the Palace Hotel between the hours of 8:00 p.m. and 4:00 a.m. and one trained security guard between the hours of 4:00 p.m. and 8:00 p.m., and 4:00 a.m. to 8:00 a.m. There shall be one trained security guard in the Kenton Hotel between the hours of 4:00 p.m. and 8:00 a.m. These security guards shall file with the City defendants incident reports on any incidents of violence or attempted violence occurring in the hotels.

(d) Showers shall be available at the Men's Shelter beginning at 7 a.m. and signs advising hotel residents of that fact shall be posted at the front desk in each hotel and at the door of each bathroom in each hotel. Persons showering at the Men's Shelter shall be provided adequate supervision (including safeguarding of personal property), a clean towel, soap and, if requested, a delousing agent.

(e) A lockable storage unit of adequate size to store personal property shall be available either at the Men's Shelter or at the hotels for each man sheltered by the City defendants at hotels.

(f) Heat shall be maintained in accordance with New York City guidelines for rental residences.

(g) Cleanliness shall be maintained throughout the hotels at all times.

Intake Centers

5. The City defendants shall accept applications for shelter at the Men's Shelter, 8 East Third Street, New York, New York and at 529 Eighth Avenue, New York, New York (the "central intake centers"). Applications for shelter shall be accepted at all times at the Men's Shelter, and applications for shelter shall be accepted at 529 Eighth Avenue between the hours of 5:00 p.m. and 1:00 a.m., seven days per week. The City defendants shall provide direct transportation to shelter facilities from the central intake centers to all homeless men for whom the City defendants must provide shelter pursuant to paragraph 1, supra. The 529 Eighth Avenue intake center, shall be opened as a central intake center not later than September 1, 1981.

6. The City defendants shall operate additional satellite intake centers on a 24-hour basis Monday through Friday at the following locations:

(a) Harlem Hospital Center, 506 Lenox Avenue, New York, New York;

(b) Kings County Hospital Center, 451 Clarkson Avenue, Brooklyn, New York;

(c) Lincoln Hospital, 234 East 149th Street, Bronx, New York; and

(d) Queens Hospital Center, 82-68 164th Street, Jamaica, New York.

Men seeking shelter at the satellite intake centers shall be provided adequate fare for public transportation and clear written directions to either (i) a shelter facility, or (ii) a central intake center -- according to the preference of the persons seeking shelter. The City defendants shall provide direct transportation from the satellite intake centers to a shelter facility to all men who appear so physically or mentally disabled that they are unable to reach a shelter facility by public transportation. Satellite intake centers shall be opened not later than September 1, 1981. It is understood that the above satellite intake centers shall be operated in conjunction with borough crisis centers. In the event that the borough crisis center program is terminated, the City defendants may, in their discretion, reduce the hours of operation of the satellite intake centers to between 5 p.m. and 1 a.m.

7. The City defendants shall accept applications for shelter at shelter facilities providing that such applicants have applied for and have been found eligible for

shelter by the City defendants within six months of the time of application at a shelter facility. Shelter facilities shall also provide shelter for one night to any person who has not previously applied for shelter who seeks shelter at a shelter facility after 8:00 p.m.

Community Participation

8. Each shelter facility, central intake center and satellite intake center, shall utilize the services of available community members to the maximum reasonable extent. These persons are not City employees or volunteers in a City sponsored program within the meaning of section 50(k) of the General Municipal Law and such persons shall execute statements to this effect.

Information

9. The City defendants shall provide applicants for shelter with clear written information concerning other public assistance benefits to which they may be entitled at the time applicants apply for shelter.

Compliance Monitoring

10. Defendant Krauskopf shall appoint qualified employees with no administrative responsibility for providing shelter to monitor defendants' shelter care program for men with respect to compliance with this decree. These employees shall visit each shelter facility, central intake center, satellite intake center and hotel at least twice a month and will submit to defendant Krauskopf a written report at least

twice a month describing compliance or lack thereof with each provision of this decree. These reports shall be made available to plaintiffs' counsel upon reasonable notice.

11. Plaintiffs' representatives shall have full access to all shelter facilities, central intake centers and satellite intake centers, and plaintiffs' counsel shall be provided access to any records relevant to the enforcement and monitoring of this decree.

12. Defendant Krauskopf shall deliver by hand each day to plaintiffs' counsel a statement listing:

(a) the number of men who applied for shelter at each central intake center and at each satellite intake center;

(b) the number of men who were provided shelter at each shelter facility or hotel;

(c) the number of men who were denied shelter at each shelter facility, central intake center and satellite intake center and the reason for each such denial;

(d) the number of men who were accepted for shelter at each central intake center and satellite intake center who did not reach a shelter facility; and

(e) the number of men who were provided direct transportation from each satellite intake center to a shelter facility.

13. It is the intention of defendant Krauskopf to conduct daily inspections of the Palace Hotel and to deliver reports of such inspections each day to plaintiffs. It is also the intention of defendant Krauskopf to conduct inspections of the other hotels used by defendants to shelter homeless men not less than three times per week and to deliver reports of such inspections not less than three times a week to plaintiffs' counsel. A sample of the inspection report form to be used is attached hereto as Exhibit C.

No Waivers

14. Nothing in this judgment permits any person, not-for-profit corporation, charitable organization, or governmental entity or subdivision to operate a shelter, as defined in New York Code of Rules and Regulations, Title 18, § 485.2(c), in violation of the requirements of the New York Social Services Law, Title 18, of the New York Code of Rules and Regulations, or any other applicable law.

15. Nothing in this judgment should operate or be construed as res judicata or collateral estoppel so as to foreclose any signatory party from any claim or defense in any subsequent administrative or judicial proceeding.

16. Nothing in this judgment shall be deemed to authorize or to prevent the operation by the New York City Human Resources Administration of the Keener Building on

Ward's Island as a shelter or shelter facility after October 15, 1981, except in accord with a valid contract or agreement among the New York State Department of Social Services, the New York State Office of Mental Health and the New York City Human Resources Agency and with an operating certificate issued by the New York State Department of Social Services.

17. The Commissioner of the New York State Department of Social Services agrees to reimburse the New York City Human Resources Agency for the operation of a shelter facility or shelter facilities referred to in this judgment pursuant to New York Social Services Law § 153, except if such shelter facility fails to comply with the requirements for shelters contained in the New York Social Services Law or the New York Code of Rules and Regulations, Title 18; provided that nothing in this judgment can or does obligate the Legislature of the State of New York to appropriate funds.

18. Nothing in this judgment shall prevent, limit or otherwise interfere with the authority of the Commissioner of the New York State Department of Social Services to enforce and carry out her duties under the New York Social Services Law, Title 18, of the New York Code of Rules and Regulations, or any other applicable law.

Continuing Jurisdiction

19. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, modification, or termination of this entire judgment or of any applicable provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

Dated: New York, New York
August 26, 1981

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By: _____
Amy Juvilet
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Attorney for the State Defendants

So ordered:

_____
J.S.C.

Appendix A

Space Requirements for Shelters for Adults

(1) Every facility shall have space for dining and leisure activities.

(2) Sleeping areas shall not be considered as dining or leisure areas.

(3) Space provided for dining shall be:

(i) at least 120 square feet in facilities with a certified bed capacity of less than 10 beds;

(ii) at least 12 square feet for each additional certified bed.

(4) Space provided for leisure areas shall be:

(i) at least 120 square feet in facilities with a certified bed capacity of less than 10 beds.

(ii) at least 12 square feet per bed in facilities with a certified bed capacity of 10 or more beds.

(5) When not in use, dining space may be used, with written approval from the New York State Department of Social Services ("Department"), as leisure space.

(6) An operator may request Department approval of a waiver to reduce the square footage requirements for dining and leisure space.

A waiver shall be granted only upon demonstration by the operator that the food service and the program needs of residents can be met.

(7) Baths and Toilet Facilities

There shall be a minimum of one toilet and one lavatory for each six residents and a minimum of one tub or shower for each ten residents.

(8) Sleeping Rooms

(i) in single occupancy sleeping rooms, a minimum of 80 square feet per resident shall be provided;

(ii) in sleeping rooms for two or more residents, a minimum of 60 square feet per resident shall be provided;

(iii) a minimum of 3 feet, which is included in the per resident minima, shall be maintained between beds and for aisles;

(iv) partitions separating sleeping areas from other areas shall be ceiling high and smoke tight;

(v) all bedrooms shall be:

(a) above grade level;

(b) adequately lighted;

(c) adequately ventilated;

(vi) light and ventilation for bedrooms shall be by means of windows in an outside wall;

(vii) bedrooms shall open directly into exit corridors;

(viii) bedrooms may not be used as a passageway, corridor or access to other bedrooms.

(9) Adequate storage space for cleaning supplies and equipment shall be provided.

Appendix B

Short term emergency shelter may be provided to a number of persons in excess of the capacity of the facility provided that all of the following conditions are met:

(1) Snow emergencies, excessive cold or other similar circumstances create an emergency need for additional shelter space;

(2) The operator is able to meet the food and shelter needs of all persons in residence;

(3) The facility remains in compliance with applicable local building, fire protection and health and sanitation codes;

(4) The operator advises plaintiffs' counsel of the maximum number of persons to be cared for during an emergency situation in any facility as soon as possible after an emergency situation develops;

(5) The operator provides shelter to additional persons no more than 30 days in any calendar year; and

(6) The operator maintains records which document adherence to these conditions.

APPENDIX 3

Emergency Executive Order No. 224

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

EMERGENCY EXECUTIVE ORDER NO. 224

October 7, 2022

WHEREAS, over the past several months, thousands of asylum seekers have been arriving in New York City, from the Southern border, without having any immediate plans for shelter; and

WHEREAS, as of October 5, 2022, the asylum seekers who have entered the City's shelter system operated by the Department of Homeless Services (DHS Shelter System") include approximately 17,429 individuals, comprised of 2,896 families with children; 6,014 adults; and 734 adult families; and

WHEREAS, to date, the City has opened 42 DHS shelters in response to this influx of asylum seekers;

WHEREAS, the state of Texas, and the city of El Paso, have pledged to continue sending asylum seekers on buses to New York City, and

WHEREAS, Texas has not provided notice to New York City, and has indicated that it will continue not providing notice to New York City, regarding how many busloads of people will be arriving, or the dates and times of their arrival; and

WHEREAS, many of the buses arrive at the Port Authority Bus Terminal unannounced and unscheduled, in the early morning or late night hours; and

WHEREAS, many of the asylum seekers are coping with the effects of trauma and exhaustion, as well as other physical and mental health concerns; and

WHEREAS, the stress on the asylum seekers has been compounded by the additional days of travel to New York City, during which time it has been reported that many have been afforded limited food and water, and limited opportunities to leave the bus; and

WHEREAS, the DHS Shelter System is nearing its highest ever recorded population of over 61,000 individuals and is not designed to serve the influx of asylum seekers arriving to New York City from the Southern border;

WHEREAS, if asylum seekers continue to enter the City at the current rate, the total population within the DHS Shelter System will exceed 100,000 individuals next year;

NOW, THEREFORE, pursuant to the powers vested in me by the laws of the State of New York and the City of New York, including but not limited to the New York Executive Law, the New York City Charter and the Administrative Code of the City of New York, and the common law authority to protect the public in the event of an emergency:

Section 1. State of Emergency. A state of emergency is hereby declared to exist within the City of New York based on the arrival of thousands of individuals and families seeking asylum.

§2. Humanitarian Emergency Response and Relief Centers.

a. I hereby direct New York City Emergency Management (NYCEM) to coordinate with the New York City Health and Hospitals Corporation (H+H), the Department of Information Technology and Telecommunications, also known as the Office of Technology and Innovation (OTI), the Department of Design and Construction (DDC), the Mayor's Office of Immigrant Affairs, and other agencies as appropriate, to establish and operate temporary humanitarian relief centers to be known as "Humanitarian Emergency Response and Relief Centers" ("HERRCs") that will provide assistance for arriving asylum seekers, helping them by immediately offering respite, food, medical care, case work services, and assistance in accessing a range of settlement options, including through connections to family and friends inside and outside of New York City, in addition to, if needed, direct referrals to alternative emergency supports.

b. I hereby authorize the Deputy Mayor of Health and Human Services to enter into a memorandum of understanding with H+H concerning the establishment and operation of the HERRCs, which shall, among other things, provide for the establishment of policies and procedures for the operation of the HERRCs, provide for the confidentiality of information collected from the persons served in the HERRCs, and provide restrictions on disclosure of information about an individual's immigration status consistent with the policies set forth in Executive Order 34 (dated May 13, 2003) and Executive Order 41 (dated September 17, 2003).

§ 3. Cooperation of all agencies.

I hereby direct all agency heads, including but not limited to the Mayor's Office of Immigrant Affairs, the New York City Emergency Management, the Department of Health and Mental Hygiene, the Mayor's Community Affairs Unit, the Fire Department, the Police Department, the Sheriff's Office, the Chief Privacy Officer, and the Departments of Buildings, Housing Preservation and Development, Sanitation, Social Services, Homeless Services, Environmental Protection, and Parks and Recreation, to take all appropriate and necessary steps to preserve health and public safety during this humanitarian crisis.

I hereby direct all agency heads, including but not limited to the Mayor's Office of Immigrant Affairs, the New York City Emergency Management, the Department of Health and Mental Hygiene, the Mayor's Community Affairs Unit, the Fire Department, the Police Department, the Sheriff's Office, the Chief Privacy Officer, and the Departments of Buildings, Housing Preservation and Development, Sanitation, Social Services, Homeless Services, Environmental Protection, and Parks and Recreation, to take all appropriate and necessary steps to preserve health and public safety during this humanitarian crisis.

§ 4. Suspension of laws and rules.

a. I hereby direct that the following laws and rules related to the Uniform Land Use Review Procedure, and other procedures applicable to the City planning and land use review processes, to the extent they would apply to the siting, construction and operations of the HERRCs, impose limitations on the amount of time permitted for the holding of public hearings, the certification of applications, the submission of recommendations, any required or necessary voting, the taking of final actions, and the issuance of determinations, are suspended, and that any such time limitations are tolled for the duration of the State of Emergency: sections 195, 197-d, 203 , and 3020 and subdivisions (b) through (h) of section 197-c of the Charter, sections 25-303, 25-306, 25-308, 25-309, 25-310 and 25-313 of the Administrative Code, and sections 1-05.5 and 1-07.5 of Title 2 and sections 2-02 through 2-07 of Title 62 of the Rules of the City of New York.

b. I hereby direct that section 14-140 of the Administrative Code and section 12-10 of Title 38 of the Rules of the City of New York are suspended, to the extent they impact the disposition of personal property at the HERRCs.

§ 5. Effective date. The State of Emergency declared in section 1 of this Order shall remain in effect for 30 days and may be extended. The remaining provisions of this Order shall take effect immediately and shall remain in effect for five (5) days unless they are terminated or modified at an earlier date.

Eric Adams

Eric Adams
Mayor

The New York Times https://www.nytimes.com/2023/05/10/nyregion/nyc-right-to-shelter-migrants.html

Adams Weakens Right-to-Shelter Rules, Anticipating Migrant Surge

Saying New York City had "reached our limit," the Adams administration said it would loosen regulations that have protected homeless families seeking shelter.


By Emma G. Fitzsimmons and Andy Newman

May 10, 2023

New York City is temporarily suspending some of the rules related to its longstanding guarantee of shelter to anyone who needs it as officials struggle to find housing for migrants arriving from the southern border.

Under an executive order, the city is suspending rules that require families to be placed in private rooms with bathrooms and kitchens, not in group settings, and that set a nightly deadline for newly arriving families to be placed in shelters.

A spokesman for Mayor Eric Adams confirmed the decision on Wednesday night, saying that the city had "reached our limit" and ended up having to place newly arrived migrants in gyms last week.

"This is not a decision taken lightly," the spokesman, Fabien Levy, said in a statement, "and we will make every effort to get asylum seekers into shelter as quickly as possible, as we have done since Day 1."

Republican governors of border states have been sending buses of asylum seekers to New York and other Democrat-led cities since last spring, but the city's decision came as a federal pandemic-era rule that allowed the government to eject thousands of migrants, known as Title 42, is set to expire Thursday night. City officials have said they expect as many as 1,000 people a day to come after the rule is lifted.

Already people have been crossing into the United States from Mexico in anticipation of the change.

New York City has opened eight humanitarian relief centers as city officials have moved to help more than 61,000 migrants who have arrived over the last year.

New York is the only major city in the country that provides “right to shelter,” the result of a legal agreement that requires the city to provide a bed to anyone who needs one under certain conditions.

“We all hope that they never have to take any actions that would be in violation of these rules that they’re suspending,” said Joshua Goldfein, a staff lawyer for the Legal Aid Society, which represents the nonprofit that is the court-appointed monitor for the shelter system, the Coalition for the Homeless.

Under the nightly-deadline rule, homeless families with children who arrive at a shelter-system office by 10 p.m. must be given beds in a shelter the same night. Last July, as the number of migrants was accelerating, some families spent the night in chairs at the main office in the Bronx; it was the first time the nightly deadline had been violated since at least 2014.

“We know that they are working hard to avoid putting people in harm’s way,” Mr. Goldfein said, “but we have learned over and over again that putting families with children in congregate settings or leaving them in city offices for days on end is dangerous and harmful to children and their families.”

The city is also suspending protections for families who have been in emergency shelter hotels for more than 30 days, which officials say make it impossible to evict them without taking them to housing court.

Mr. Goldfein pushed back against that suspension, saying, “They want the ability to turn off their key cards and lock them out,” as the city did earlier this year to families who had been staying in a Lower Manhattan hotel since being displaced by Hurricane Ida in 2021.

As of Tuesday, there were 78,763 people in the city’s main shelter system, a record that has been broken nearly every day since October. Nearly half of them are migrants, the city says, spread among 120 emergency shelters and the eight larger centers.

Mr. Adams has said that housing the migrants is costing the city billions of dollars, warning last month that the city is "being destroyed" by the crisis and criticizing President Biden for his handling of the situation.

Still, the city is mandated by the longstanding legal settlement to observe the right to shelter, and Mr. Adams is likely to face criticism over his decision to reduce some of the protections. The right to shelter, rooted in court cases launched in 1979, is one reason New York City doesn't have the same level of street homelessness as some cities in California and elsewhere.

Mr. Levy, the mayoral spokesman, said that the city was doing the best it could under difficult circumstances, "but without more support from our federal and state partners, we are concerned the worst may be yet to come."

Raúl Vilchis contributed reporting.

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A version of this article appears in print on , Section A, Page 16 of the New York edition with the headline: Officials Loosen Shelter Rules As City Runs Short of Housing

The New York Times https://www.nytimes.com/2023/05/23/nyregion/right-to-shelter-nyc.html

New York City Asks for Relief From Its Right-to-Shelter Mandate

City officials say that the arrival of 65,000 asylum seekers has presented the city "with challenges never contemplated, foreseeable or indeed even remotely imagined."

By Jeffery C. Mays

May 23, 2023

Mayor Eric Adams asked a judge for permission on Tuesday to relieve New York City of its unique and longstanding obligation to provide shelter for anyone who asks, asserting that the immense influx of asylum seekers has overwhelmed its ability to accommodate all those in need.

"Given that we're unable to provide care for an unlimited number of people and are already overextended, it is in the best interest of everyone, including those seeking to come to the United States, to be upfront that New York City cannot single-handedly provide care to everyone crossing our border," Mr. Adams said in a statement. "Being dishonest about this will only result in our system collapsing, and we need our government partners to know the truth and do their share."

In a letter to Deborah Kaplan, the deputy chief administrative judge for New York City Courts, the city's lawyers asked for changes to the 1981 consent decree that set New York's requirement to provide shelter for anyone who applies for it.

The city asked that the wording be changed to allow it to deny shelter to homeless adults and adult families if it "lacks the resources and capacity to establish and maintain sufficient shelter sites, staffing, and security to provide safe and appropriate shelter."

The city did not request relief from its obligations to provide shelter to families with children.

Mr. Adams said that he was not seeking to permanently end the right to shelter. But he said that the 1981 consent decree, issued in the Callahan v. Carey case, could not have anticipated "a mass influx of individuals entering our system — more than doubling our census count in slightly over a year."

The letter to Judge Kaplan underscored that theme, saying that the "unprecedented demands on the city's shelter resources confront the city defendant with challenges never contemplated, foreseeable or indeed, even remotely imagined."

City officials say more than 70,000 migrants have arrived since the spring and more than 40,000 are in the city's care. There are more than 81,000 people in the city's main shelter system.

The city has struggled to find places to house migrants, opening more than 150 sites to house the newcomers, including 140 hotels. Migrants have also been housed in a cruise ship terminal in Brooklyn and in tents on Randall's Island. A plan to place migrants in school gyms was quickly reversed last week after protests.

Mr. Adams says the city will spend as much as $4.3 billion through June 2024 to feed and house the asylum seekers. It has spent more than $1 billion so far. Camille Joseph Varlack, Mr. Adams's chief of staff, said during an interview Tuesday on NY1 that the city wanted to sit down with all of the parties in the consent decree and "revisit all of it," in light of the record number of people under the city's care during an "unprecedented humanitarian crisis."

This is the second time the Adams administration has sought relief from the right-to-shelter mandate. Earlier this month, the mayor issued an executive order that suspended rules requiring families to be placed in private rooms with bathrooms

and kitchens, not in group settings, and that set a nightly deadline for newly arriving families to be placed in shelters.

The Legal Aid Society, which filed the litigation that led to the right to shelter, and the Coalition for the Homeless issued a joint statement strongly opposing the city's move. The groups argued that the changes would hurt homeless New Yorkers as much as asylum seekers.

"The administration's request to suspend the long-established state constitutional right that protects our clients from the elements is not who we are as a city," the groups said. "New Yorkers do not want to see anyone, including asylum seekers, relegated to the streets. We will vigorously oppose any motion from this administration that seeks to undo these fundamental protections that have long defined our city."

Brad Lander, the city comptroller, said the Adams administration was not doing enough to relieve the pressure on the shelter system by moving people more quickly into permanent housing. Mr. Adams opposes legislation from the City Council that would eliminate a rule requiring people to be in shelter for 90 days before becoming eligible for city-funded housing vouchers.

"Attempting to rollback the Right to Shelter while lobbying against legislation that will help get more homeless New Yorkers into their own apartments is wrong," said Christine Quinn, the former City Council speaker and chief executive of WIN, a network of shelters for women and children that has housed more than 270 migrant families. "It is both bad policy and bad politics, and New Yorkers will not stand for it."

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A version of this article appears in print on , Section A, Page 20 of the New York edition with the headline: Adams Seeks To Reduce City's Role As a Shelter

Mayor Adams' Statement on New York City's Right to Shelter Law

May 23, 2023

NEW YORK – New York City Mayor Eric Adams today released the following statement after the New York City Department of Law filed an application for modification of provision of final judgment following a 1984 consent decree in *Callahan v. Carey* related to the city's Right to Shelter law:

"From the start, let us be clear, that we are in no way seeking to end the right to shelter. Today's action will allow us to get clarity from the court and preserve the right to shelter for the tens of thousands in our care — both previously unhoused individuals and asylum seekers. Given that we're unable to provide care for an unlimited number of people and are already overextended, it is in the best interest of everyone, including those seeking to come to the United States, to be upfront that New York City cannot single-handedly provide care to everyone crossing our border. Being dishonest about this will only result in our system collapsing, and we need our government partners to know the truth and do their share.

"For more than a year, New York City has — largely on its own — provided shelter, food, clothing, and more to over 70,000 migrants who have arrived in our city. We now have more asylum seekers in our care than New Yorkers experiencing homelessness when we came into office. When the original Callahan consent decree came down almost 40 years ago, no one could have contemplated, foresaw, or even remotely imagined a mass influx of individuals entering our system — more than doubling our census count in slightly over a year. Our city has done more to support asylum seekers than any other city in the nation, but the unfortunate reality is that the city has extended itself further than its resources will allow."

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Media Contact

Greg B. Smith & Gwynne Hogan, Adams Admin Takes Second Shot at Suspending 'Right to Shelter' in New Court Filing, The City, Oct. 3, 2023

Mayor Eric Adams on Tuesday asked a court to temporarily suspend the city's decades-old practice of offering shelter to any adult who asks, proposing that the protocol deserves an emergency pause while the city grapples with the still-ongoing wave of asylum seekers who have arrived in New York for more than a year.

HELP ran an intake system for single women entering the homeless shelter system, Oct. 3, 2023.

In a letter to Manhattan State Supreme Court, Assistant Corporation Counsel Daniel Perez asserted that if the court grants the city's request to suspend the 1980s court decree guaranteeing a right to shelter, "The City will simply have the same obligations as all other jurisdictions throughout New York State. And the City will have significantly more flexibility in its response to the present crisis."

The city's application outlines the conditions under which the right to shelter would be suspended: The governor or the mayor would have to declare a state of emergency, and the average number of single adults in city shelters would have to be 50% greater than the daily average over the past two years.

The modification, if approved by a judge, would mark the first major change to a practice that's been on the books since 1981 when the city agreed to settle a lawsuit filed by the Legal Aid Society to provide shelter to any adult who requested it.

The so-called right to shelter codified in the case, Callahan v. Carey, has emerged as a flashpoint after thousands of migrants first began flooding the city's shelter system in the spring of 2022, initially mostly from South and Central America and now from all over the world.

As of Tuesday, Mayor Adams said the total number of asylum seekers who've arrived in New York since the diaspora began has topped 122,000. The mayor has warned that the ongoing wave, which now amounts to about 3,000 new arrivals a week, will "destroy" the city if the federal government doesn't intervene to stem the flow and arrange for a more equitable distribution of migrants around the nation.

Adams' Department of Law argued that the right-to-shelter commitment agreed to 42 years ago is "outmoded and cumbersome" and "has unnecessarily deprived policy makers of much-needed flexibility" to confront a crisis that could not have been imagined in 1981.

Shortly after his Department of Law filed this request, Mayor Adams issued a statement emphasizing that the Callahan decree "was never intended to apply to the extraordinary circumstances our city faces today."

Now estimating the projected cost for city taxpayers to address this crisis at $12 billion over three years, he asserted, "It is abundantly clear that the status quo cannot continue." More conservative estimates from the city comptroller's office put the amount closer to $5.3 billion.

The filing by Perez took a different approach from the administration's previous approach.

Last year the Adams administration asked the court for a broad waiver to the right to shelter requirement to allow the city to determine whether it could provide shelter based on the resources it had at its disposal.

That motion reopened the decades-old case but was never resolved. Last week Adams announced he intended to file a new modification request, and the judge assigned to the case, Manhattan Supreme Court Justice Erika Edwards, ordered him to do so by Tuesday. She then recused herself from the case, stating that she wanted to avoid potential conflict because "it may appear" that she has an unspecified "motive to favor one party over another." A new judge has yet to be appointed to the case.

The Legal Aid Society and the Coalition for the Homeless issued a joint statement calling the city's move "the most significant and damaging attempt to retreat on its legal and moral obligation." They warned if granted by a judge, the move would allow the city to "end the Right to Shelter as we know it."

"The City would have the ability to declare an emergency, and effectively end the Right to Shelter for thousands of New Yorkers — including working poor individuals who rely on the shelter system and, alarmingly, individuals who rely on disability benefits," they said. "This abhorrent and unnecessary maneuver is a betrayal of the City's commitment towards ensuring that no one is relegated to living — or dying — on the streets of our city."

In his statement accompanying the request, Mayor Adams stated the modification "is not seeking to terminate" the agreement reached under the Callahan consent decree.

'Close the Borders'

The city's latest request comes as the number of people staying in shelters continues to climb to historic heights. As of Sept. 24, a record 115,200 people were staying in city shelters including 61,400 migrants, spread out all across the five boroughs in 210 emergency shelters.

In recent months, city officials have ramped up steps to try to discourage people from staying in shelters, including reducing the amount of time adult migrants could stay down to 60 days, then down to just 30 days, before they have to return to the intake center to seek another cot.

Adams and his top staff have resorted to increasingly alarmist rhetoric to describe the situation. Adams has said repeatedly migrants were "destroying" New York City and over the weekend, Chief Advisor Ingrid Lewis-Martin urged President Joe Biden to "close the borders."

"Until you close the borders you need to come up with a full on decompression strategy where you can take all of our migrants and move them throughout our 50 states," she said in an interview on Pix11. "The right to shelter was intended for our indigenous homeless population, so we argue that we should not have to shelter all of these immigrants."

At a press conference Tuesday, Adams walked back her remarks.

"We believe the borders should remain open. That's the official position of this city," he said.

While the city has taken steps to attempt to dissuade adult migrants from staying in shelters, the vast majority of migrants in city care are in

families with children. The latest tallies released to the City Council in August indicated that of nearly 60,000 migrants in city facilities, 44,148 were parents and children.

But thus far the city has refrained from issuing 60-day or 30-day notices to families with children, though officials have been mulling this as an option, THE CITY reported.

At Tuesday's press briefing Deputy Mayor Anne Williams-Isom said more than 400 people were waiting at the Roosevelt Hotel for a place to sleep and city officials said they expected more lines to form outside the migrant arrival center there in the coming days, as they had over the summer. Adams, who has announced plans to travel to Mexico, Ecuador and from Bogotá in Colombia to the Darién Gap to further dissuade migrants traveling to New York City, issued an ominous warning.

"New Yorkers are going to start to see visibly what being out of room means," he said, refusing to provide specifics. "We are out of room. We're getting ready to take a real shift in this whole crisis."

Emma Whitford, NYC Mayor's Latest Bid to Suspend Adult Shelter Rights Cools in Court, City Limits, Oct. 19, 2023

Mayor Eric Adams' administration is not proceeding with a formal request to suspend the right to a shelter bed for single adults in New York City—at least for now.

In a Manhattan courtroom on Thursday, following 90 minutes of closed-door discussions, New York State Supreme Court Judge Gerald Lebovits said attorneys for the city, state and homeless advocates will instead continue meeting in private, with an eye toward a possible settlement.

"The parties have agreed that for now there should not be a war of legal papers," Judge Lebovits said. "That for now, the solution is to try to settle the matter if possible and to solve any problem that may exist."

The news was welcome to the Legal Aid Society, which has been locked in negotiations for months on behalf of Coalition for the Homeless. Talks started in the late spring, after Mayor Adams first sought relief from the 1981 consent decree in Callahan v. Carey, a lawsuit that established the right to shelter for single men.

"We are very grateful that the court and the parties agreed that we should continue to discuss how to solve the problem," said Josh Goldfein of Legal Aid. "No one wants to see people on the streets of New York exposed to the elements."

New York City is uniquely obligated to provide a shelter bed to anyone in need, at least temporarily—part of a set of rules that grew from the Callahan decree and subsequent court decisions.

But the Adams Administration has argued that an influx of recently-arrived immigrants since early 2022 has pushed New York City's shelter system beyond capacity. There are now 118,000 people staying in city shelters—over 64,000 of whom are asylum seekers—compared to about 60,500 in January 2022, according to City Hall.

Advocates had condemned Adams' latest proposal to suspend shelter rights as extreme, arguing that it would result in people being turned out to the streets ahead of the cold winter months.

In an Oct. 11 letter to the court, Legal Aid included graphic images of frostbite sustained by a person who slept outside in freezing temperatures in Massachusetts, that had been submitted previously in the decades-old case.

Gov. Kathy Hochul, meanwhile, endorsed the mayor's proposal in a court filing, calling it a "measured and appropriate modification."

The request is distinct from city policies limiting stays to one or two months for recently-arrived immigrants in certain shelters—including, as of recently, for families with children.

While advocates say the time limits are unfairly disruptive, Legal Aid so far has not challenged them in court, saying shelter rights aren't violated so long as everyone has the option to land a new shelter bed once their time is up.

Reached by email, a spokesperson for Mayor Adams said the administration's latest petition to modify Callahan remains pending while the parties go into mediation.

"As we have said before, the Callahan decree—entered over 40 years ago, when the shelter population was a fraction of its current size—was never intended to apply to the extraordinary circumstances our city faces today as more than an average of 10,000 migrants continue to enter our city every month seeking shelter," they said.

A spokesperson for the governor's office reiterated support of the mayor's proposal for Callahan relief, and expressed hope for a "timely, appropriate resolution" through mediation.*

Before dismissing the parties Thursday, Judge Lebovits previewed private talks starting next week, in the "robing room" adjacent to his bench.

"The proper path forward is to discuss logistics and nuts and bolts confidentially in the robing room and that's what the court and the parties will be doing a lot of beginning next week," he said. "The public will not be able to attend."

Thursday marked Judge Lebovits' first appearance in Callahan. He stepped into the case after Judge Erika Edwards recused herself in September, citing concerns about perceived impartiality. A state supreme court judge since 2015, Lebovits first took the bench in New York City Housing Court, from 2001 to 2010.

Sateesh Nori, a clinical adjunct professor at NYU Law School, appeared before Judge Lebovits while working as a tenant lawyer at Legal Aid. He also co-authored a law journal article with the judge in 2009 called "Section 8: New York's Legal Landscape."

"He will take it very seriously and he's very knowledgeable about the issues," Nori said of Judge Lebovits' new role in the Callahan case. "He's a scholar of housing law and legal practice."

Asked what a judge with Lebovits' background might bring to a case about shelter rights, Goldfein of Legal Aid said housing court judges are used to negotiating resolutions between parties without getting into protracted litigation.

"Any judge comes to the courtroom with their own life experience," he said. "Certainly housing court is a forum where most cases are resolved and we are grateful that Justice Lebovits wants to use those skills to try to see if this case can also be resolved."

Gynne Hogan, New York's 'Right to Shelter' No Longer Exists for Thousands of Migrants, The City, Dec. 18, 2023

After 42 years, New York City's "right to shelter," which was supposed to guarantee a bed to anyone who sought one the same day, has functionally ended.

Mayor Eric Adams has warned for months this moment was approaching, and even went to court this past spring to try to have the city released from the consent decree it entered into decades ago.

Migrants wait in line outside the St. Brigid shelter reticketing site in the East Village. Dec. 13. 2023.

But the end of the right to shelter for adult migrants didn't come by way of a press release or a court order. Instead, it happened quietly.

For months, as the number of migrants arriving in New York climbed, city workers raced to open more and more shelters in increasingly ad hoc settings to accommodate them. Now that era has come to an end, with the Adams administration letting the chips, and the people, fall where they may.

That new reality is on stark display outside an East Village "reticketing center," where every morning for the past few weeks, hundreds of people — mostly men — have queued in the frigid pre-dawn hours in a line that snakes around the block.

The building, the former St. Brigid's Catholic School on East 7th Street, is now the centralized intake point for adult migrants who've run out their time in shelters — since the city has begun to put that on a clock — and are seeking a bed for another 30 days.

Those seeking a place to sleep are given a wristband with a number and a date scribbled in sharpie, indicating how many people are before them in line. The number of those waiting for cots, spread out across a network of emergency shelters across the city, is likely in the thousands, and it now takes more than a week to secure one.

Dozens of migrants told THE CITY over the past two weeks that they have been waiting more than seven days to get a shelter cot, with many spending their nights on the streets, in trains or they're directed to an increasingly overcrowded waiting room in The Bronx near Crotona Park overseen by the city's Office of Emergency Management.

As the number of those waiting for beds grew this week, and temperatures slumped below freezing, the city opened additional satellite waiting rooms, where migrants are not always allowed to lie down on the floor, have limited access to food, and nowhere to bathe.

"Why is the government letting us sleep in the streets? With this cold, it's really ugly," said 19-year-old Bryan Arriaga, from Mexico, who described being turned away from a mobbed shelter intake office on Dec. 7.

He then spent a night on the floor of a city waiting room in The Bronx and another few nights sleeping in a public restroom in Jamaica, Queens.

Migrant Bryan Arriaga waited in line outside the East Village shelter re-ticketing center, Dec. 13, 2023.

On Dec. 12, he returned to the East Village, along with hundreds of others in much the same situation. Perched on a park bench across from the throngs of people surrounding the intake site, he debated his next move.

"I want a place to sleep, a place to bathe, a place to lie down, sleep like eight hours," he said. "I'm really stressed, I'm sad."

The collapse of the city's right to shelter protections currently impacts adult migrants, who are now allotted just 30-days in a shelter before they have to seek a new placement and brave the line of hundreds at the intake center. While Adams has said repeatedly that the goal is never to have families with children sleeping on the streets, new restrictions are coming for thousands of migrant families with children too who account for a vast majority of migrants in shelters.

Thousands of 60-day eviction notices were scheduled to begin expiring in the weeks after Christmas, part of the city's multipronged efforts to deter more migrants from coming to New York and to encourage those in shelters here to leave.

City Hall didn't return a request for comment on the functional end to the city's right to shelter and the situation for thousands of migrants awaiting shelter.

'You're Killing Us'

At the East Village reticketing site, meals of sandwiches and fruit are provided for those who make it inside. While a lucky few get assigned a new cot each day, hundreds more are shooed away each night when the facility closes at 7 p.m., directed to a series of waiting rooms across the city with chairs, but no cots.

The main overnight waiting room where migrants have been sent each night The Bronx, an hour and a half commute away from the East Village site. Migrants told THE CITY it's increasingly cramped, smelly and dirty, with no shower on site. The only things available to eat there are crackers and tuna.

Migrants take shelter in the Bathgate waiting room in the Bronx, Dec. 11, 2023.

Some have abandoned the nightly schlep to The Bronx altogether. Nearly every night for the past two weeks, a group of migrants have set up camp outside the East Village site, a group that dwindles to under a dozen when temperatures dip particularly low, and has grown to as many as four dozen on warmer nights.

One evening last week, a group of them fortified shelters made of cardboard boxes, salvaged plastic tarps, and wooden slats from discarded bed-frames while trading tips on how to brave the cold. Some said they had too much luggage to carry halfway across the city, others said they preferred the sidewalk to the overcrowded waiting rooms.

"I'm wearing two pairs of gloves, three pairs of pants and four jackets," said Yaleiza Goyo, 55, from Venezuela, who said she'd spent four of the past five sleeping on the sidewalk outside the reticketing center. "I have to fight it out, because what else am I going to do?"

On Sunday night it rained, and city workers sent those sleeping outside to a NYPD gym in Gramercy Park but there, Goyo said, they were barred from laying on the floor and had to spend the rest of the night sitting up in folding chairs.

"You're killing us. How can you sleep sitting up? But it was raining. We had to stay," she said. As she put the finishing touches on the cardboard hut where she would spend another night, she chuckled. "You have to laugh at life, so as not to cry."

Goyo was one of an increasing number of women camping outdoors. Another Venezuelan migrant, 38-year-old Nailett Aponte, said she'd spent the past week waiting for a cot, sleeping outdoors on most nights.

"They don't have beds for couples. They don't have beds for single women. There's nothing," she said in Spanish.

Aponte later told THE CITY, she finally got a cot assignment on Wednesday, seven days since she began her wait for one.

Migrants who spoke with THE CITY said they'd lost jobs in restaurants and construction while waiting. They'd skipped appointments, scheduled weeks in advance, to get their NYC ID cards, a vital piece of identification, and feared they would end up without the paperwork — mailed by the federal government to their former shelters — that would allow them to work legally.

The days they'd spent trying to secure another cot, had likely set them back weeks in their effort towards being able to support themselves and move out of shelters for good.

"I should be working, not smoking cigarettes and drinking coffee outside here," said Krist Benitez, in Spanish, who said he'd lost work as a dishwasher in the days he'd been sleeping outside waiting for a shelter cot. Clasping a folder of paperwork, he said both his city ID and his Occupational Safety and Health Administration certification, needed to work most construction gigs, were set to be shipped to his old shelter, and he had no idea if he'd be able to get his hands on them.

"I don't understand it," he said.

Still countless others have already given up on the waiting. The lucky ones found a room to rent, or a couch to crash on. Others have accepted free tickets out of the city and are trying out life in other cities and states. Countless more have slipped into precarious living situations on the streets and subways. While city officials say only 20 percent of people evicted from shelters are returning for another placement, they have no data on where all the other people go.

One Venezuelan migrant, David, who declined to share his full name, said after his 30 days in shelters ran out, he'd given up on seeking another placement, having heard through the grapevine about the chaotic reticketing center.

In the days since, he's been sleeping in a friend's van.

"It's difficult," he told THE CITY in Spanish. "I'll stay here until I can find a room."

'New Yorkers Are Pissed'

The chaos over the past two weeks is the culmination of more than a year over which more than 140,000 migrants have made their way to New York City, many drawn by the city's right to shelter, that up until recently had meant they could count on some roof over their heads while they got on their feet.

For months, Mayor Adams has argued the city's "right to shelter" is an antiquated rule that was more than New Yorkers could afford to maintain on behalf of an unprecedented number of new arrivals.

When the 1981 legal consent decree establishing it was hammered out, it applied only to adult men and the city had to provide just 125 beds for homeless New Yorkers. Now there are more than 122,100 people living in shelters, including 65,000 migrants, a larger population than Hartford, Connecticut.

At a press conference in October, Adams put it bluntly:

> "There's two schools of thought in the city right now. One school of thought states you can come from anywhere on the globe and come to New York and we are responsible, on taxpayers limited resources, to take care of you for as long as you want: Food, shelter, clothing, washing your sheets, everything, medical care, psychological care for as long as you want. And it's on New York City taxpayer's dime," he said. "And there's another school of thought: that we disagree."

Other mayors, including Rudy Giulani and Michael Bloomberg, have tried to walk back the requirements of the 1981 Callahan decree, none successfully. In 2009, When shelter waiting rooms overflowed with men and women sleeping on the floors in 2009, the Legal Aid Society and the Coalition for the Homeless took the city to court, and a judge forced the city to open up hundreds more beds to homeless New Yorkers.

Over the past year, as tens of thousands of migrants made their way to New York, the rules laid out in the decree have been breached countless times. Longstanding protections under the decree — requiring beds to be spaced three feet apart, for example — were abandoned months ago. Over the summer the protections briefly collapsed altogether, with hundreds of migrants sleeping on the sidewalk for a week straight during a heat wave.

And for months Adams has been teasing an unspecified next phase where the city would identify large outdoor spaces, where migrants would get individual tents, and some kind of access to bathrooms and showers, in the absence of meaningful federal funds to federal immigration policy.

That next phase is here, albeit not in the form hinted at by the mayor. It started when the Adams administration quietly opened the East Village "reticketing sight" in October, and for the first time the city began explicitly telling migrants they were not guaranteed a cot, though they could get a plane ticket to any state or country. For several weeks, the number of cots freed up across shelters was enough to accommodate those seeking another 30-day stay within a reasonable amount of time.

But that tedious equilibrium collapsed over the Thanksgiving holiday, when the city saw another unexpected wave of migrant adults coming from the southern border. The city has been short hundreds of cots for adults every day since.

It's a moment Diane Enobabor, founder of the Black and Arab Migrant Solidarity Alliance, calls "organized abandonment." Some will wait it out, some will leave, untold others will fall through the cracks.

"Some will die. I don't think we should be shy about that," Enobabor said. "Some will die."

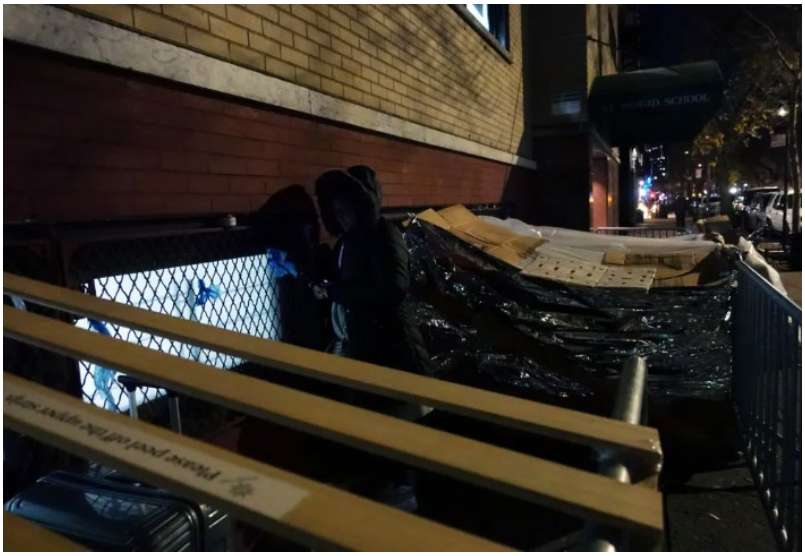
Attorney Joshua Goldfein with the Legal Aid Society, which represents Coalition for the Homeless, said while it may be currently impossible to secure a cot in a timely manner, it doesn't mean New Yorkers right to one is gone. Goldfein said he is in regular touch with city officials, pressuring them to uphold the rules.

"There is a court order and it is on the books and it remains in effect," he said. "I don't think anyone would deny that they are not in compliance. So the question is what is gonna be the remedy for that?"

'I Don't Have Deportation Powers'

While Adams has faced increasingly loud criticism from the progressive left, polls indicate he's not out of step with most New Yorkers, who are increasingly souring on the situation. The mayor has blamed the cost of migrant care for a surprise round of big mid-year budget cuts that would affect services including police, fire, sanitation, schools and libraries.

For the billions the city has spent on the crisis, the federal government has offered to reimburse just $159 million, though federal immigration policies that allow people to cross the border to seek asylum also prevent them from working legally for months.



Migrants sleep in makeshift shelters overnight outside the St. Brigid re-ticketing site in the East Village, Dec. 11, 2023.

While Adams has a record low approval rating, according to a Quinnipiac poll from early earlier this month, 62% of New Yorkers agreed with his assessment that migrants could destroy New York City — even as 66% of the respondents said they disapproved of how the mayor was handling the new arrivals.

Responding to the poll numbers at a press briefing Tuesday, Adams said people he talks to "are pissed off" and that he shared their anger:

"Why are you allowing the buses in, Eric? Why aren't you stopping them from coming in?," he said people ask him. His response: "I don't have deportation powers. I don't have the power to turn buses around. … And all I have the power to do is to balance the budget."

'No One Told Me the Truth'

Jesus Lopez, an 18-year-old from Venezuela, said he'd crossed the border alone around a month ago, and first got a free bus from Texas to Chicago, where he spent three weeks sleeping on the floor of a police precinct. From there he heard from other migrants things would be easier for him in New York, but when he arrived by bus he was lost, and wandered around the streets for about a week without a jacket, sleeping on the subways and any warm spot he could find.

Eventually, someone on a train told him about the main migrant intake center at Roosevelt Hotel in Midtown.

While city officials have said adults just arriving in New York get top priority for

placements there, ahead of those who've already had their 30-days in shelters, Lopez said he was turned away and directed to the reticketing site, where he joined thousands of others seeking a 30-day stint. For the better part of the past week, Lopez said, he spent days in and out of the East Village waiting room, and nights in the waiting room in The Bronx, hardly sleeping or eating, and not showering at all.

His teeth rattled in the subzero temperatures Tuesday night, as he got some air outside the overcrowded overnight waiting room in The Bronx. Lopez said his time in New York had, thus far, been better than his experience in Chicago, but the ordeal was jarring just the same.

"No one told me the truth. I'm shocked," he said in Spanish, adding he'd been given the number 3,752 in line for a cot. "I don't know what to think. I'm speechless."