Case No. 19-10957-E

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

DAVID PEERY, et al.,
individually and as class representative,

*Appellants/Plaintiffs*,

vs.

CITY OF MIAMI

*Appellee/Defendant*.

On Appeal from the United States District Court
for the Southern District of Florida

# APPELLANTS' CORRECTED OPENING BRIEF

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and the rules of this Court, Appellants hereby submit the Certificate of Interested Persons and Corporate Disclosure Statement:

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## STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs request oral argument. This appeal is from the district court's termination of a 1998 consent decree that has narrowly protected the constitutional rights of homeless persons in Miami for 20 years, while leaving the City of Miami with full discretion to decide how to best address homelessness. The City negotiated the Consent Decree in the face of Judge C. Clyde Atkins' 1992 ruling, reaffirmed in 1995, that Miami was systematically violating the constitutional rights of its involuntarily homeless residents by harassing and arresting them, and summarily seizing and destroying their property.

While granting the City's Motion to Terminate, the district court denied Plaintiffs' Motion to Enforce and to Hold the City in Contempt. It found that the City, under a new administration, had changed its ways and would respect the rights of Plaintiffs not to be punished through arrest, harassment, or property destruction just for being homeless. But this was contradicted by the testimony of some 30 homeless persons that in the six months preceding the current litigation, the City had (1) summarily seized and destroyed their and other homeless persons' property, (2) forced them from the public places where they were sleeping, sitting, or congregating, and (3) arrested them for engaging in life-sustaining misdemeanor conduct, contrary to the express terms of the Consent Decree. The district court supported its ruling by misallocating the burden of proof and misinterpreting the

consent decree to, *inter alia*, (1) effectively require homeless persons to carry their personal property with them at all times (or have it treated as abandoned if found in public), (2) not govern harassment of homeless persons that falls short of arrest, and (3) dispense with the required contemporaneous warning to stop and offer of shelter before sidewalk obstruction arrests.

This 30-year litigation has a substantial and nuanced history; the factual and legal issues are complex; and the consequences of this court's decision for a vulnerable and powerless population are dire. Oral argument will greatly assist this court in deciding this important case.

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**UNITED STATES CODE**

## STATEMENT OF JURISDICTION

The district court's jurisdiction was conferred by 28 U.S.C. § 1331 (federal question), and 42 U.S.C. § 1983 (violation of civil rights). This court's jurisdiction is conferred by 28 U.S.C. § 1291. The district court's Memorandum Opinion was rendered on February 15, 2019. The Notice of Appeal was timely filed on March 13, 2019.

## STATEMENT OF THE ISSUES

1. Whether the district court erred in denying the Plaintiffs' Motion to Enforce and Hold the City in Contempt by misinterpreting critical aspects of the Consent Decree to:

   a. Permit City officials to discard any property of homeless individuals in an area deemed unsanitary;

   b. Impose a duty on homeless persons to carry ID, medicine, eyeglasses, and other belongings the Consent Decree recognizes as critically important, on pain of seizure and destruction of those belongings by the City;

   c. Allow the City to discard homeless individuals' property as abandoned, even if another person present expressly tells City workers it belongs to someone;

d. Prohibit only arrests of homeless persons and not other harassment and misconduct short of arrest, notwithstanding the City's commitment in the Consent Decree to "prevent arrests and harassment" and "protect the constitutional rights of homeless persons";

e. Treat the existence of an internal police investigation to preclude or substitute for the court enforcement for which the Consent Decree expressly provides; and

f. Dispense with the requirement of a contemporaneous warning prior to arrest for obstructing the sidewalk, and in failing to find a violation.

2. Whether the district court erred in granting the City's Motion to Terminate by:

a. Granting termination in the face of a pattern of recent and systematic violations of the Consent Decree that precludes termination as a matter of law;

b. Misallocating the burden of proof, wrongly placing the burden on Plaintiffs to show that the City had not substantially complied with the Consent Decree; and

c. Granting termination in the face of undisputed evidence that the City lacked consistent procedures for handling the property of homeless

individuals in a manner consistent with the Consent Decree and the Constitution.

## STATEMENT OF THE CASE

### I. Course of Proceedings and Disposition Below

#### A. Litigation leading up to the *Pottinger* Consent Decree

In 1988, Plaintiffs, involuntarily homeless persons residing in the City of Miami, sued the City under 42 U.S.C. § 1983 for constitutional violations arising from the City's policy and practice of harassing and arresting them based on their homeless status, and summarily seizing and destroying their personal property. The district court certified the case as a class action lawsuit. ***Pottinger v. City of Miami,*** 720 F. Supp. 955 (S. D. Fla. 1989).

Following a bifurcated trial on liability, the district court held that the City had systematically violated Plaintiffs' constitutional rights, and imposed injunctive relief. DE 277; ***Pottinger v. City of Miami***, 810 F. Supp. 1551 (S.D. Fla. 1992). It concluded that the City had used arrests and harassment "for the ulterior purpose of driving homeless from public areas," *id.* at 1566, and had unlawfully destroyed personal belongings of homeless persons in violation of its own written policy for gathering, inventorying, and storing personal property found in public. *Id.* at 1555-56, 1572-73. It found that the City's "interest in having clean parks and streets" did not outweigh "the more immediate interest of the plaintiffs in not having their

personal belongings destroyed," including "items such as clothes and medicine," the loss of which "threatens the already precarious existence of homeless individuals by posing health and safety hazards . . .." *Id.* at 1573.

The City appealed. Upon this court's remand to clarify the injunctive relief and determine if "the facts of this case have materially changed," DE 336; ***Pottinger v. City of Miami***, 40 F.3d 1155, 1156 (11th Cir. 1994), the district court, following an additional evidentiary hearing, DE 351-354, and briefing, DE 347, 348, 357, 358, found that "[t]hough improvement in the overall situation is occurring via the [Dade County Homeless] Trust," "the salient facts of this case have not changed substantially . . .," and reaffirmed and clarified its initial order. DE 360.

The City appealed again. This court directed the parties to submit to Eleventh Circuit mediation. ***Pottinger v. City of Miami***, 76 F.3d 1154 (11th Cir. 1996).

Following twenty months of mediation, DE 371, 373, 375, 379, 380, the parties entered into a Settlement Agreement. DE 382. In 1998, following a fairness hearing, the district court adopted the Settlement Agreement as a Consent Decree. DE 398.

### B. The *Pottinger* Consent Decree

The Consent Decree spelled out a detailed protocol to inhibit the City's long-standing practice of using arrests and police harassment against Plaintiffs to force them out of its public spaces. Before police could arrest any homeless person for ten

listed "life sustaining conduct" misdemeanors, DE 382: 9-10 (Section VII.14.C.3), they had to warn the homeless person to stop and offer shelter as an alternative to arrest. DE 382: 7-12 (Section VII.14.A-D).

The Consent Decree also required the City to "respect the personal property of all homeless people," prohibiting its officials and workers from "destroy[ing] any personal property known to belong to a homeless person, or readily recognizable as property of a homeless person . . . except as permissible by law . . . or if the property is contaminated or otherwise poses a health hazard . . .." DE 382: 12, 12-13 (Section VII.14.F). Miami Police Departmental Order 11 was promulgated to effectuate these provisions. DE 382: 33-38.

In 2013, the City moved to modify the Consent Decree. DE 464, 477, 485. Following two lengthy days of mediation, the Plaintiffs[1] agreed to narrow the list of protected life sustaining conduct misdemeanors. DE 525-1. The district court accepted the parties' compromises and incorporated their Addendum to the Settlement Agreement into the Consent Decree. DE 544.

### C. 2018-19 litigation over the Consent Decree

In near simultaneous 2018 filings, the City filed its Motion to Terminate, DE 566, while the Plaintiffs filed their Motion to Enforce and for Contempt. DE 568.

[1] Carole Patman and David Peery were added as class representatives. DE 528, 529.

The City asserted that its "demonstrated commitment to respecting homeless persons' rights" constituted the type of changed circumstances that warranted termination, DE 566: 2, and that it had "remedied" the constitutional violations giving rise to the Consent Decree. DE 566: 7-10. It argued that because it had instituted police officer training, a protocol for interacting with homeless persons, and procedures for "safeguarding their personal possessions in a constitutional manner," "there is no longer a need for this Court's continued oversight." DE 566: 11.

In their motion, Plaintiffs requested enforcement and contempt based on the proffered declarations of some two dozen homeless persons detailing incidents of harassment and property seizure and destruction during the preceding six months, and photographs and video imagery of these violations. DE 568: 1-19, 23.

The district court issued an order limiting and expediting discovery, requesting the presentation of specified evidence, and limiting the scope of the scheduled evidentiary hearing. DE 576: 1-5. It held an evidentiary hearing on September 24, 25, and 26, DE 673, 674, 675; October 24 and 25, DE 691, 676; and November 1, 2018, DE 677, and heard oral argument on the motions on January 3, 2019, DE 689.

**D. The district court's order**

On February 15, 2019, the district court issued its Memorandum Opinion

denying the Plaintiffs' Motion to Enforce, and granting the City's Motion to Terminate. DE 682: 1-39. The court identified "[t]he dispute in this case [a]s simply the impact that terminating the *Pottinger* Agreement will have on the constitutional rights of the homeless to be free from harassment, arrests and the unlawful taking of property." DE 682: 4. It noted that the Consent Decree had forced an "amazing collaboration" between the City and "different [homelessness] stakeholders" through which the City "has endeavored to eradicate homelessness . . .." DE 682: 1.

The court found that the Consent Decree "was primarily devised to prevent the police from arresting homeless in certain circumstances and from unlawfully taking their property," that "it has achieved that end," and that the City was "unlikely to revert to those [unconstitutional] policies . . .." DE 682: 7. It cited changes in policing, including the advent of police body cameras, DE 682: 8, interactive simulators and police vehicle computers for training, as well as record keeping and disciplinary procedures (required by the Consent Decree) as bulwarks against police misconduct. DE 682: 8-9. It also cited public and private funding, outreach by the City's "Green Shirts" to bring homeless persons into "the continuum of care," and homeless shelters and services (funded and operated predominantly by other public and private entities), as further protection from the City's lengthy history of homeless abuse. DE 682: 9-12.

Consistent with Plaintiffs' allegations and evidence, the court found that the

City began systematic clean-up efforts in 2018 to address "health and sanitation concerns from the homeless encampments" in certain parts of Miami. DE 682: 18-19. This plan entailed relocating homeless persons in these areas to available shelters and preventing their return. *Id.* Regarding their property, the court found that the City abided by unwritten procedures for handling property temporarily left in public places, including "posting notices at least seven days prior to the clean-up," inventorying and storing "anything important – such as identification cards or medications," and "discard[ing] contaminated property." DE 682: 16-17, 20. The court found that the City "outreach workers leave a notice for property they take to storage or discard" based on "a few examples where the handwritten notes were placed on a fence . . . provid[ing] an address where the City took the unattended personal property." *Id*. at 20.

The court noted that "over thirty homeless individuals" testified, and "[t]he manner that the City handled personal property during the clean-ups [wa]s vehemently contested . . .." DE 682: 21. These witnesses, whose testimony the court credited, DE 675: 141, stated that they saw City workers take their own or others' property and, after kicking it around, threw it into trucks, even belongings left neatly by the side of the fence or in a manner that did not obstruct the sidewalks. *Id.* at 22. Several testified that their requests to retrieve their property or that of others, including items such as identifications, medicine, eye glasses, cellular phones,

personal notes from family members, and photographs were denied. DE 682: 22-23. Some of the discarded items included backpacks, bags, or suitcases positioned out of the way. *Id.*

The court recounted the evidence concerning a partially videotaped "clean-up" incident during which Wilbur Cauley's property, including "a personal bag" that was "up against a fence, neatly bundled," was "kicked . . . [and then] moved . . . from its position . . . into a pile with other property. . . . When Mr. Cauley returned to the scene [from a nearby store] and saw his property in the pile, the City worker did not allow Mr. Cauley to retrieve his property." DE 682: 23-24.

Although the court found "there is no excuse for the taking of identification cards, medicine, eye glasses, cellular phones, or photos, as they, by themselves, do not present a health hazard," DE 682: 23, it ruled that due to "[t]he dilemma [of] what to do with those items that are comingled with backpacks, mattresses, sheets, food, etc. that clearly pose health and security concerns," homeless persons may never leave these items unattended or in the care of others. *Id.* Instead, they must "keep th[em]with them when they are on the move." *Id.* Regarding the Cauley incident, the court effectively excused the City's violation of its unwritten procedures because "it would have been eminently difficult to discern contaminated property from sanitary property in this area." DE 682: 24.

The court noted the "Plaintiffs' focus on orders to homeless individuals to

'move on' by members of the City of Miami Police Department," but found that these "do not violate *Pottinger*." DE 682: 24. It explained that the tactics the City used to alert Plaintiffs to street cleanings, startling them as early as 5:00 to 6:00 a.m. with loud buzzers, bright lights, and orders to get up and move by loudspeaker, DE 675: 12, 22, 42, 76; DE 676: 9, were not "intended to harass the homeless" but merely to facilitate the clean-ups. DE 682: 24. The court recounted the testimony of four homeless persons who police made "get up and move," *id.* at 24-25, but found that the Decree "did not specifically prevent officers from asking the homeless to temporarily relocate." *Id.* at 25.

In its Conclusions of Law, the district court observed that the burden is on the party seeking termination to demonstrate "substantial compliance," that it has complied "in good faith" with the "core purpose of the decree," and that the purpose of the litigation, "to the extent practicable," has been achieved. DE 682: 27. It defined "substantial compliance" as "something less than a strict and literal compliance," meaning that any deviation is "unintentional and so minor or trivial as not 'substantially to defeat the object which the parties intend to accomplish.'" DE 682: 32. It noted that "the dispute in this case centers on whether the City has substantially complied with the core purpose of the Pottinger Agreement, . . . [or whether] the City has <u>not</u> due to its actions in cleaning up homeless encampments that started in 2018." DE 682: 28.

The court declared that the "primary goal" of the Consent Decree was to prohibit the City's police from "arresting homeless individuals for engaging in life-sustaining misdemeanors," DE 682: 29, and concluded that this primary purpose "has been achieved." *Id.* The court recounted evidence of at least four Plaintiffs being ordered to "move on" without cause or offer of shelter, but concluded this did not negate a finding of substantial compliance. DE 682: 31-33. Regarding the Plaintiffs' testimony about numerous property seizures and destruction, the court concluded that the City, in conducting its "clean-ups," "exercised a valid governmental power in addressing the sanitation and public health concerns . . . in certain areas of the City." DE 682: 33-34. It described the discarding of "some medications, identifications, and personal notes" as "[u]nfortunate[]" and "sympathize[d] with that loss . . . ." DE 682: 35.

Turning to the Motion to Enforce, the court noted that Plaintiffs had the burden of proof by clear and convincing evidence. DE 682: 35. It divided Plaintiffs' complaints and evidence into three categories: (1) City police directives to homeless people to move; (2) taking and destroying homeless persons' personal property; and (3) arrests of two individuals for obstructing the sidewalk. DE 682: 36. It concluded that the Consent Decree's "general requirement that City police not harass the homeless . . . d[id] not prohibit the police from ordering homeless persons to move from their locations or from sounding loud noises to wake people before a clean-up

operation." *Id.* It further concluded that the Plaintiffs' evidence of four instances of police ordering homeless persons to move on outside the clean-up context "d[id] not establish a violation of the Decree's general statement that the police not harass the homeless." DE 682: 37.

The court recounted Plaintiffs' evidence that (1) City workers conducting "clean-ups" moved in quickly and allowed little time for homeless persons to collect their belongings; (2) property left in backpacks, positioned out of the way, was nevertheless taken; (3) other property "was kicked around, thrown into piles, and then loaded into trucks to be disposed;" and (4) City workers prevented homeless persons from retrieving and saving property of other homeless persons who had entrusted it to them to safeguard. DE 682: 38. It went on to excuse the seizure and destruction of personal belongings comingled with contaminated items because it would have been "difficult" to decipher and segregate. *Id.* Lastly, the court concluded the two arrests depicted in video imagery did not show a violation of the Consent Decree because there was no evidence of what preceded the arrests. *Id.* at 38-39.

Plaintiffs timely appealed the district court's ruling. DE 683.

## II. Statement of Facts

In 1992, the homeless population in Miami-Dade was about 8,000. DE 622-

1: 19.[2] There were very few shelter spaces and services for homeless individuals. ***Pottinger***, 810 F. Supp. at 1564. The vast majority of homeless individuals in Miami had no place to go, rendering their homelessness involuntary. *Id*. at. 1564-65.

Today, there remains a large gap between the number of homeless persons and available shelter beds: 631 in the City of Miami and 1100 in Miami-Dade County. DE 622-1: 1; DE 682:3. These persons still have no choice to live but in public. DE 622-1: 1; DE 674: 195.

As was so in the 1990s, *see* ***Pottinger***, 810 F. Supp. at 1567, the City continues to receive complaints from members of the public about homeless individuals, with pressure on elected officials to do something about it. It was in response to these complaints that the City of Miami developed a comprehensive plan in January 2018 to remove homeless people from specific areas or "hotpots" throughout the City. DE 601-65:1-2; DE 578-42E-1.

### A. The City's plan to clean up "hotspots"

The City Manager's Office designed and executed the plan, which entailed a

[2] In accordance with the procedure set by the district court, DE 576, Plaintiffs filed nine exhibit lists, DE 578, 583, 593, 596, 599, 601, 606, 613, 617. The exhibits were provided to the court by thumb drive and paper. Notice of Conventional and Manual Filing of Plaintiffs' Exhibits, DE 650. In this brief Plaintiffs' exhibits are referred to by the exhibit list's DE and the exhibit number on that list, with the specific page number following a colon (*e.g.*, DE 622-1: 19). Plaintiffs cite the City's exhibits by Defendant's Notice of Filing of Trial Exhibits, DE 657, followed by the exhibit number. *E.g.*, DE 657-95.

coordinated effort among several City departments, including the Department of Veterans Affairs and Homeless Services, the Police Department, the Neighborhood Enhancement Team ("NET"), and the Department of Solid Waste. DE 601-65: 2. The Veterans Affairs and Homeless Services Department worked with Police Commanders to identify the areas to be cleared - places where homeless people congregated - and set up a schedule to coordinate the police presence at the operations. DE 601-57: 2-3.

The plan targeted numerous areas in the downtown city core: Lot 16, under the I-95 underpass;[3] Overtown, under the I-395 overpass;[4] the old Macy's store on Flagler street;[5] NW 6th street near the Brightline rail station;[6] NW 17th Avenue near Camillus House;[7] and Government Center.[8]

The objective of the plan was to clear the "hotspots" so that the homeless would not return. DE 601-65: 2. To achieve its goal of permanent removal, the plan required the police to "periodically check to deter people from returning" and "to consistently monitor the sites after." DE 601-65: 1-2. Continuous police presence

[3] DE 675: 21, 38, 47, 59, 100, 167, 225, 251, 255, 260, 271; DE 691: 87; DE 676: 6, 16.

[4] DE 675: 87, 127, 172, 178, 189, 242, 260, 276.

[5] DE 675: 83, 94, 151, 207, 219, 265; DE 691: 83.

[6] DE 675: 107, 186, 200, 211.

[7] DE 675: 78, 118, 161.

[8] DE 675: 235.

was essential. The "Manager's instructions were very clear on that point." *Id.* According to the City's Director of Veterans Affairs and Homeless Services Sergio Torres, "in order to deter people from returning, it has to be communicated to homeless people some way that they're not wanted to stay there." DE 673: 266.

The Manager's plan to clear out the areas was the result of a "rethinking [of] the *Pottinger* agreement" and a rejection of the "old strategy" which was "not working." DE 601-55. Over time, the City began to view the Consent decree as limiting its ability to remove homeless people from downtown streets. DE 601-14: 2. On March 6, 2018, the City Manager directed the City Attorney to initiate legal proceedings to terminate the Consent Decree. DE 601-14.

The Miami City Commission backed the Manager's plan. At the April 12, 2018, City Commission meeting, commissioners expressed frustration with homeless encampments that had developed throughout the City. DE 578-42D: 37-40. Commissioner Gort stated, "the problem what's happening is a lot of people are using the *Pottinger* Agreement to commit criminal activities." *Id.* at 41. City Manager Gonzalez opined that the Consent Decree puts "the City of Miami . . . at a decided disadvantage." *Id.* at 167. He claimed that he had heard that other cities were dropping homeless people off in the City of Miami, and complained that the *Pottinger* Consent Decree "ties our hands." *Id.*

Commissioner Carrollo claimed the situation was "out of control." *Id.* at 41.

He said that he had received complaints from many private businesses about homeless people. *Id*. at 166. He concluded by stating, "What I am saying is, let's take action. If someone's going to say, 'no,' then let it be a federal judge." *Id*. at 167. The Commission instructed the City Attorney to draft a resolution instructing the City Attorney to return to the district court to attempt to end *Pottinger*. *Id*. at 105; DE 578-42E-1.

On April 26, 2018, the City Commission unanimously approved a resolution directing the City Attorney to seek termination or modification of the Consent Decree. DE 578-43C: 19.

**B. The execution of the plan**

**1. Seizure of property**

The City's "push" to clear out the various "hotspots" occurred between February and May 2018. DE 578-42E.

In executing the plan, City workers moved in quickly to gather up for disposal property which obviously belonged to homeless people - i.e., items which were neatly organized and stacked, and out of the way so they did not obstruct the sidewalk. DE 578-41A. During the operations, people's belongings were kicked around, thrown into piles, and then loaded into trucks to be carted away as trash. DE 675: 90.

Plaintiffs presented the testimony of thirty-six homeless people who

established forty-two separate incidents where the police and City workers either illegally seized their property or harassed them in violation of the Consent Decree. Thirty-four people testified that their property was taken. Of these, fourteen testified that they personally witnessed either their own or other people's property being seized by city workers.[9] Of these, three people testified that they witnessed their property taken twice.[10] Twenty homeless individuals testified that their property was taken when they were away from where they had left it and that it was gone when they returned.[11] The City conceded that the sheer number of witnesses and their consistent narrative showed that their property was, in fact, taken. DE 675: 141.

In the Lot 16 area, the operations began as early as 5:00 to 6:00 a.m. with the

[9] Rob Rhodes, DE 675: 21; Stephen Allen, *Id*. at 47; Eli Halter, *Id*. at 59; Donald White, *Id*. at 78; Terry Fluker, *Id*. at 83; Wilbur Cauley, *Id*. at 87; Willie Richardson, *Id*. at 100; Jackie Wright, *Id*. at 107; William Starling, *Id*. at 127; Cathedral Beauford, *Id*. at 251; Malik Saluki, *Id*. at 260; Roberto Ruiz, DE 676: 16; Ashley Self, DE 691: 83; Rafael Aguilar, *Id*. at 87.

[10] Malik Saluki, Roberto Ruiz and Rafael Aguilar.

[11] Guthrie Chibanguza, DE 675: 94; Richard Pryor, *Id*. at 118; Derrick Brown, *Id*. at 161; Herman Deveaux, *Id*. at 167; Maxie Daniels, *Id*. at 172; Jeffrey Stanley, *Id*. at 178; Wilbert Hill, *Id*. at 186; Michael Johnson, *Id*. at189; Barry Alston, *Id*. at 200; Dennis Sinclair, *Id*. at 207; Lew Johnson, *Id*. at 211; Brandon Massey, *Id*. at 219; Pablo Herrera, *Id*. at 225; Willie Grant, *Id*. at 235; Charles McCoy, *Id*. at 242; Leonel Frage, *Id*. at 255; Robert Sproulis, *Id*. at 265; Early Pierce, *Id*. at 271; Morris White, *Id*. at 276.

police arriving in squad cars next to where people were sleeping on the sidewalk. DE 675: 12. Homeless people were "startled awake and petrified." *Id*. City workers known as "green shirts" accompanied the police in pick-up trucks. The officers sounded loud buzzers, shined bright lights, and ordered the homeless by loudspeaker to leave the area because the sidewalks were going to be cleaned. *Id*. at 76; DE 691: 9. The police told people that they had to "move on," and that they could not stay at that location any longer. DE 675: 12, 42.

In only a few instances, signs were posted notifying people of the operations. Frequently, the police and City workers showed up on days different from the posted dates. *Id*. at 15. City officials presented inconsistent testimony as to whether advance notice was required, DE 677: 42, 65-66 ("always); DE 673: 263 (when "doing a large encampment"), and who was responsible for posting notice. DE 673: 216 (Miami Parking Authority or possibly Homeless Trust); DE 677: 42 (NET team).

On some occasions, a fleet of trucks appeared at the scene – a water pressure cleaning truck, pick-up trucks, and a street sweeper – and a team of City workers. DE 673: 216. In other instances, the operation was limited to the police, the "green shirts," and a pick-up truck. In the Lot 16 area, this routine was carried out twice a week for two months. DE 673: 15; 42; 214–215.

The initiation of the clean-up process was often sudden, hurried, and chaotic.

The police role in the clean-up operations was central and pervasive. DE 675: 13, 42, 135-136; DE 691:90. Police and City workers told homeless persons to take their things and get out "immediately." The time between the warning and the clean-up was typically a few minutes. As Willie Richardson testified, "Like if you don't pick up things in an amount of time, they throw it in the truck." DE 675: 101.

Every homeless person who lost property testified that he or she had left it in a backpack, bag, or suitcase positioned out of the way and in a manner easy to recognize as personal property of a homeless person.[12] Police Officer Galvez confirmed it was routine for homeless people to do this and common knowledge that such belongings were not abandoned. DE 675: 226-27. Property was taken even when one homeless individual asked another person to watch over it, a practice known to the police and City work crews. DE 673: 227.

During the operations, the police and City workers did not allow homeless people to retrieve and save the property of another from disposal. Eli Halter, a Marine veteran, testified that if you were not there, "[i]t [your property] went into the pickup, they threw it away in the back of the pickup truck." DE 675: 76. Others witnessed the same practice. *Id*. at 15 (Rhodes), 50 (Allen), 101 (Richardson), 169 (Deveaux), 253 (Beauford); DE 676: 18 (Ruiz).

[12] *See* footnotes 9 & 11 at p. 17 *supra*.

Individuals who witnessed their property being piled up or who saw it already in the back of a City truck pleaded to be allowed to retrieve it, but to no avail. Ashley Self returned to her spot near Macy's after using a nearby bathroom and discovered her bags in the back of a City truck. She cried and begged the City worker for their return but was denied and lost her possessions, including her medications for multiple sclerosis and asthma. "I knew those were my things – I could prove it because my ID was in there." DE 676: 65. Donald White, who suffers from congestive heart failure and has a prosthetic leg, returned from getting food and saw City workers throw his property into the back of a City truck. Although he protested, the City workers would not return his property, including medication. DE 675: 80-81. Others suffered a similar fate. DE 675: 253 (Beauford), 263-64 (Saluki), 83 (Fluker).

The City's practice of callously throwing away homeless people's property was proven by the video and photo evidence of the seizure of the property belonging to veteran Wilbur Cauley. On April 17, 2018, the City conducted a clean-up where Cauley was sleeping on the sidewalk in Overtown at NW 1st Court and 13th Street under the overpass.[13] City workers and the police arrived early that morning and

[13] The date and location of this incident are significant. The district court excused this summary seizure and destruction of Cauley's property because of a "public health crisis" in the area. DE 682: 23-24. But the "crisis" concerned conditions in

ordered people to move their things from under the overpass because they were going to clean the sidewalk. Cauley complied and moved his property from under the overpass and put it up the block and against a fence, neatly bundled. DE 578-41A (photo of Cauley's property). After moving his property, Cauley went to a nearby store. DE 675: 88-89.

While Cauley was briefly away, a City worker looked over the stacks of homeless people's property that had been moved from under the overpass and bundled against the fence, and then announced, "Okay, now we're going to throw this shit away." DE 676: 43. The city worker then moved and kicked the property, including Cauley's, into a pile in the gutter, with other property, including a contaminated mattress. DE 578-40A, 578-40B; DE 578-41A.

Cauley returned to the scene, saw his property, and tried to rescue his bag. The City worker grabbed Cauley by the arm and prevented him from retrieving his property. DE 578-40A. Cauley pleaded with the City worker but was not allowed to get his property, which was thrown into a garbage truck and hauled away. DE 675: 90. The video evidence of that incident also showed another woman crying and screaming as her belongings were put into the pile for disposal. DE 578-40A, 578-40B.

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September 2018, five to six months *after* the Cauley incident, and a location a full two city blocks away. DE 675: 88; DE 691: 16.

### 2. The City's failure to protect and inventory property of homeless individuals

Sergio Torres, the Director of the City's Department of Veterans Affairs and Homeless Services, testified that the City had no written criteria as to what constituted "abandoned" or "contaminated" property. DE 675: 261-262. As a result, City workers made completely discretionary, on-the-spot decisions. *Id*.

The City offered only two photographs of notes to support its claims that City workers left handwritten "notes" at the scene where they seized property to notify homeless people that their property had been taken. DE 682: 20. Homeless witnesses testified that they never saw any note left behind after the clean-up operations. DE 675: 19-20. The City offered no explanation for how such handwritten paper notes could be left without being quickly compromised by natural elements. The City admitted there was no log, record, or any inventory showing notes had been left or property had been taken and stored. DE 677: 67.

### 3. Harassment and orders to leave and not return

The police ordered homeless individuals not just to move out of the way during the clean-up operations, but also to leave the area entirely and to stay away. *See* Rhodes, DE 675: 12 ("get out, you can't stay in this location"), Allen, 49-50 ("they told us we had to move"); Aguilar, DE 691: 91 ("He said, you'd better get out of here before I arrest you, and so I got out of there."). As a result, many homeless people were forced to leave and permanently relocate at another location.

City officials knew that the clean-up operations and the follow-up patrols had the effect of forcible removal and relocation of the homeless. Special Assistant City Manager Vickers told the City Commission, "[t]he problem becomes they move from one place and you're dislocating them and you're putting them in another location." DE 578-42E-1. Nonetheless, the City pushed forward with the operations with the goal of permanently removing and deterring homeless people from returning to those targeted areas.

The City directed that after the clean-ups, the police were required to patrol the area to keep homeless people from returning. DE 601-65. Apart from the clean-ups, police also ordered homeless individuals to leave various areas and not return, without offering shelter. Homeless people who were sleeping on the sidewalk and not blocking or obstructing the sidewalk were told to "move on," and "you can't stay here anymore." Rafael Villalonga testified that he was sitting alone on the sidewalk one evening in the Lot 16 area when a police officer drove up and told him, "You cannot be here, you have to leave." DE 676: 10. He was not offered shelter. *Id.* at 8-9. Police told Guthrie Chibanguza he couldn't sit by the bus stop though he had a bus card. DE 675: 96. In the Lot 16 area, Richardson was told to get up and leave "quite a few times." *Id*. at 101-102.

Plaintiffs presented video evidence of a bicycle squad of Miami police officers

who approached Java Brooks[14] and surrounded her as she was about to go to sleep on the sidewalk near Macy's. One officer told her, "You need to get your stuff and . . . leave!" While she began to gather up her things, another officer told her emphatically, "You need to take your stuff, now, I'm not going to tell you anymore." DE 578-39. She, too, was not offered shelter.

Other clear examples of the police failure to follow the *Pottinger* protocol were the arrests of Chetwyn Archer and Tabitha Bass. The arresting officers' body-cam videos vividly show no offer of shelter prior to Archer's arrest for the life-sustaining conduct misdemeanor, obstruction of the sidewalk. Officer Gonzalez exited his cruiser, walked to where Archer was sleeping, and ordered him to get up. Archer complied and was immediately arrested. When Archer protested the arrest, the officer told him that the court "can throw it out tomorrow, that's up to them." DE 578-38.

Like Archer, Bass was not offered shelter prior to being arrested. The arresting officer arrived at the scene while Archer was being handcuffed. Officer Gonzalez directed her to arrest Bass for the same offense, obstruction of the sidewalk. Following his direction, this officer immediately went to Bass and told her she was under arrest without offering shelter. DE 578-37.

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[14] In the record, Brooks is sometimes referred to as "Houston" from which she changed her name shortly before the hearing. DE 675: 151.

#### 4. Opinion testimony regarding continuation of the Consent Decree

Several of the homelessness experts opined that the Consent Decree remains a vital component of the City's approach to homelessness and should remain in effect. DE 677: 16-18 (Dr. Pedro Jose Greer); DE 691: 10, 27, 36 (Judge Steve Leifman); DE 691: 70-71 (Lotus House Women's Shelter CEO Constance Collins). As Judge Leifman explained: "I don't think Pottinger should be terminated; been a Godsend in many ways." DE 691: 10. Homelessness is "not going to go away overnight. . . . Things change; we are not here forever. So you need to have the institutions in place to make sure that message stays with everyone that this is the right thing to do." DE 691: 36.

## III. The Standard of Review

A district court's decision whether to enforce a consent decree is reviewed for abuse of discretion, ***Resnick v. Uccello Immobilien GMBH, Inc***., 227 F.3d 1347, 1350 (11th Cir. 2000), as is its decision whether to terminate a consent decree. *E.g.*, ***Johnson v. Florida***, 348 F.3d 1334, 1341 (11th Cir. 2003). Factual determinations are reviewed for clear error. *E.g.*, ***Turner v. Orr***, 759 F.2d 817, 821 (11th Cir. 1985).

In reviewing the lower court's decision on the motions to enforce or to terminate, however, this court's review is *de novo* as to certain matters. "An error of law is an abuse of discretion *per se*." ***Resnick***, 227 F.3d at 1350 . A consent decree is to be interpreted under principles of contract law, and the appellate court's review

of the district court's interpretation of the decree is plenary. ***Pottinger v. City of Miami***, 805 F.3d 1293, 1298 (11th Cir. 2015). *See also* ***Turner***, 759 F.2d at 821 ("Construction of a consent judgment is thus a question of law subject to *de novo* review" on appeal).

Where a district court is faced with simultaneous motions to enforce and to terminate, the appellate court reviews *de novo* whether the court properly applied the differing burdens of proof as to each type of motion. ***Jeff D. v. Otter***, 643 F.3d 278, 285 (9th Cir. 2011).

## SUMMARY OF ARGUMENT

I. The district court erred in denying Plaintiffs' Motion to Enforce and Hold the City in Contempt by misinterpreting critical aspects of the Consent Decree. Regarding the Plaintiffs' property rights, it misconstrued the Decree to permit City officials to discard personal property not found to be contaminated simply because it is in an area deemed unsanitary. Next, it construed the Decree to impose a duty on homeless persons to carry their critical belongings with them at all times. Such a requirement – found nowhere in the Decree – would defeat the very purpose of the Decree to protect the vital property of persons who have nowhere else to store their belongings but in public. Additionally, the court misinterpreted the Decree to allow the City to treat property as abandoned even if it is left in the custody of a non-owner

(a practice that, as City workers know, is commonplace among homeless persons) who tells City employees it belongs to another homeless person.

The district court also misinterpreted the Consent Decree to not protect homeless persons against harassment short of arrest. The Decree, in clear language, guards against such misconduct. The court excused unconstitutional "move on" orders by police that are prohibited by the Decree and were identical to misconduct that fueled the filing of this lawsuit and was previously condemned by the district court. It further misinterpreted the Decree to allow police disciplinary proceedings to preclude or substitute for the specific court enforcement provision. Lastly, the court misconstrued the Decree's fundamental requirement that a homeless person be contemporaneously warned to cease life-sustaining misdemeanor conduct before arrest. As a result of these misinterpretations, the district court erred in denying the Plaintiffs' Motion to Enforce the Consent Decree and to Hold the City in Contempt.

II. The district court erred in granting the City's Motion to Terminate. The City's pattern of violations, established by abundant evidence at the hearing, in itself precludes a termination of the Consent Decree. Additionally, the district court misallocated the respective burdens of proof regarding the City's Motion to Terminate and the Plaintiffs' Motion to Enforce. Through its failure to resolve significant factual disputes raised by Plaintiffs' unrefuted evidence at the hearing, the court erroneously saddled Plaintiffs with the burden of showing the City's *lack*

of substantial compliance in relation to key issues, including (1) how the City mishandled personal property during its clean-up operations, (2) whether notes were left, and if left, in an effective manner to notify Plaintiffs of property seizures and storage, (3) whether videotaped instances of an unlawful police order to move on and of two arrests made without a required warning violated the Decree, and (4) whether the City had a record of substantial compliance over the years, given evidence of complaints Plaintiffs made to the City regarding violations over the last decade. Finally, the district court clearly misapplied the City's applicable burden of proof, in light of clear, uncontradicted evidence of the City's lack of consistent procedures for handling the Plaintiffs' personal property possessed and stored in public, thus demonstrating that it did not substantially comply with the Consent Decree's foundational requirement that it establish such procedures to protect the Plaintiffs' constitutional property rights. As a result of this misapplication of the respective burdens of proof, the district court erred in granting the City's Motion to Terminate.

## ARGUMENT

### I. The district court erred in denying the Plaintiffs' Motion to Enforce by misinterpreting critical aspects of the Consent Decree to excuse numerous clear violations.

#### A. The district court acknowledged that City officials repeatedly engaged in conduct that would violate the Consent Decree's property protections, but excused that conduct by misinterpreting critical aspects of the Consent Decree.

The Consent Decree contains several critical property protections for homeless individuals. First, "The CITY shall respect the personal property of all homeless people." DE 382: 12 (Section VII.14.F.1). Second, all City departments must "follow their own internal procedures for taking custody of personal property." *Id.* Third, and most importantly, the Decree prohibits the City from seizing and destroying homeless people's property:

> In no event shall any city official or worker destroy any personal property known to belong to a homeless person, or readily recognizable as property of a homeless person (i.e., bedding or clothing and other belongings organized or packaged together in a way indicating it has not been abandoned), except as permissible by law and in accordance with the department's operating procedures, or if the property is contaminated or otherwise poses a health hazard to CITY workers or to members of the public.

*Id.*

Despite these protections, numerous homeless witnesses testified that their property was seized and removed by City officials. Neither the City nor the district

court disputed these facts. But the district court, rather than find that these actions violated the Consent Decree, excused them by misinterpreting the Consent Decree.

### 1. The district court misinterpreted the Consent Decree to permit City officials to discard any property in an area deemed unsanitary.

The district court erred in concluding - unsupported by the actual text of the Consent Decree - that City officials are permitted to discard any property *in an area* they deemed unsanitary. *See* DE 682: 35 ("Unfortunately, some medications, identifications, and personal notes were necessarily discarded in the process and the Court sympathizes with that loss, but the Court cannot ignore that those items were commingled with food, soiled materials, and garbage creating a public health crisis. . . . Therefore, the Court concludes the City has substantially complied with the Consent Decree's property provisions, even though there were instances during the clean-ups where City workers mistakenly discarded valuable items due to the gravity of the unsanitary conditions."). To the contrary, the Consent Decree's protections are not lifted because the area around personal property is dirty.

Although the court did not cite to any portion of the Decree to support its conclusion, the relevant portion exempts property from its protections only if *it* "poses a health hazard to CITY workers or to members of the public." DE 382: 12, DE 525-1: 7 (Section VII.14.F.1). This clause unambiguously refers to the *property itself*, not the surrounding area. It quite reasonably allows City officials to discard

property belonging to a homeless person if *that property* poses a health hazard. But, the Decree does not allow City officials to confiscate non-hazardous property that happens to be in *an area* that poses a health hazard.[15] This interpretation is akin to allowing a city to bulldoze a house because the neighbor's property is unkempt. Contrary to the district court's conclusion, the Consent Decree requires an individualized determination of whether a piece of property poses a hazard, not merely an indiscriminate fiat that an entire block is contaminated.

The district court buttressed this conclusion with another misinterpretation: that City employees are entitled to discard an entire bag—without preserving valuable contents such as identifications and medications—if they think it may contain contaminated material. *See* DE 682: 38 ("Deciphering what is and is not contaminated inside a bag is difficult and going through a bag that possesses contaminated materials to fish out identifications and medications is not a requirement of the Consent Decree."). This construction contradicts not just the

[15] This misinterpretation was used to nullify a central piece of Plaintiffs' evidence: the videotape depicting the City's summary seizure and destruction of Wilbur Cauley's property on April 17, 2018. DE 578-40A. The video showed City officials kicking Cauley's neatly-stacked belongings into a trash heap, then hauling them into a garbage truck. *See also* DE 675: 88-89. The district court acknowledged that this occurred, but excused the City's egregious behavior by stating that the area where it occurred was a public health hazard. DE 682: 34. But the public health hazard referenced by the court was in a *different* location and did not develop until roughly September 2018 - five months *after* the incident with Cauley. DE 691: 16.

plain language of the Decree, but also the clear testimony of City officials that they *should* isolate such items from bags. *See* DE 673: 248-49; DE 677: 46. Not a single City witness testified that bags could be discarded simply because the area or bag was contaminated. Indeed, according to City official Rosemond, to "pick up and disregard, throw away ID, glasses, something of importance" would be "totally counter to the culture of the department." DE 677: 50-51.

Thus, while acknowledging that City officials in fact confiscated and discarded valuable items from homeless persons, the district court simply excused the City's behavior, claiming that "those items were unfortunately lost as part of a process of cleaning areas in desperate need of sanitation." DE 682: 38. Putting aside the fact that there was no evidence showing the discarded property of any witness was actually contaminated, the Consent Decree contains no exception for the City's general "sanitation" needs. *See* ***Pottinger***, 810 F.Supp. at 1573 ("City's interest in keeping its parks and public areas clear of unsightly and unsafe items" "is outweighed by the more immediate interest of the plaintiffs in not having their personal belongings destroyed"). It requires City workers to individually examine the property of homeless persons and preserve it unless that property itself is contaminated.

### 2. The district court misinterpreted the Consent Decree to impose a duty on homeless persons to always carry their critical belongings with them.

The district court correctly noted: "Almost all the homeless witnesses testified that they saw City workers take property." DE 682: 22. Further, the Consent Decree requires special protection for items such as "identification, medicines and eyeglasses and other small items of importance." DE 382: 13, DE 525-1: 7 (Section VII.14.F.2). Thus, the district court emphasized that "there is no excuse for the taking of identification cards, medicine, eye glasses, cellular phones, or photos, as they, by themselves, do not present a health hazard[,]" even though comingling such valuables with contaminated items posed a "dilemma." DE 382: 13, DE 525-1: 7 (Section VII.14.F.2.a). But rather than finding the City had violated the Decree's clear command to protect such property found in public, DE 382: 12-13, DE 525-1: 708 (Section VII.14.F), the district court rewrote it to require homeless people to carry their valuable belongings with them at all times: "The solution to this dilemma is that these individuals should never abandon their identifications, prescriptions, eye glasses, or phones that are so important. Rather, they should keep those items with them when they are on the move." DE 682: 23.

This requirement appears nowhere in the Consent Decree, and for good reason. The entire point of prohibiting the seizure of homeless people's property is that homeless people have nowhere else to store it. Requiring homeless persons -

many of whom leave their property for the day to work, eat, or use the public library - to keep their most valuable belongings with them defeats the very purpose of this provision. The district court thus misinterpreted this portion of the Decree by imposing requirements on Plaintiffs that do not exist. *See* ***Ernie Haire Ford, Inc. v. Ford Motor Co***., 260 F.3d 1285, 1290 (11th Cir. 2001) ("[I]t is well settled that when the terms of a voluntary contract are clear and unambiguous, ... the contracting parties are bound by those terms, and a court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties.") (quotation/citation omitted). It was only with this new requirement that the district court was able to conclude that City officials had not violated the Decree—despite the Court's acknowledgement that City officials indiscriminately seized and discarded property clearly belonging to homeless people.

**3. The district court misinterpreted the consent decree to allow the City to treat property as abandoned even if another person present expressly told City workers it belonged to someone.**

The district court also acknowledged abundant testimony that City officials confiscated property even when told by surrounding witnesses that it belonged to someone else. *See* DE 682: 38 ("Plaintiffs' witnesses also testified that City workers routinely did not allow homeless persons to retrieve and save the property of another homeless person from disposal."). But the district court excused this behavior by stating that "it would be unreasonable for City workers to decide their course of

action based on a non-owner's statement regarding abandoned property." *Id.* This determination is flatly contradicted by the text of Consent Decree, which prohibits the City from seizing property that is "readily recognizable as property of a homeless person (i.e., bedding or clothing and other belongings organized or packaged together in a way indicating it has not been abandoned)." DE 382: 12, DE 525-1: 7 (Section VII.14.F.1). There can no better evidence that a homeless person's property is not abandoned than the statement of a present witness affirming those very facts. The district court, therefore, rewrote the Consent Decree to allow police to *ignore* clear evidence that property was not abandoned.[16]

This practice was even more egregious because the City *knew* that homeless people routinely ask others to watch their property when they leave to work, eat, or find a restroom. City police officer Jose Galvez confirmed that it was routine for homeless people to put their property off to the side when they left, and common knowledge on the street that such belongings were not abandoned, but rather the personal possessions of homeless people. DE 673: 226-227. The district court's contrary approach was erroneous.

[16] The district court's approach also contradicts the law of abandonment, which is incorporated into the Consent Decree. Property entrusted to a third party is not abandoned; rather it creates a bailment relationship upon which other parties are entitled to rely. *See* ***Meeks ex rel. Estate of Meeks v. Fla. Power & Light Co.***, 816 So. 2d 1125, 1129 (Fla. 5th DCA 2002), *approved sub nom*. ***BellSouth Telecommunications, Inc. v. Meeks***, 863 So. 2d 287 (Fla. 2003).

The impact of the district court's misinterpretations of and revisions to the Consent Decree was to approve clear-cut Fourth Amendment violations. *See* ***Lavan v. City of Los Angeles***, 693 F.3d 1022, 1031 (9th Cir. 2012) (summary seizure of homeless individuals' property left on public property, even briefly, violates the Fourth and Fourteenth Amendments), *cert. denied*, 570 U.S. 918 (2013). *See also* ***Pottinger***, 810 F. Supp. at 1573 (holding that the seizure of property belonging to homeless people under the guise of street cleaning violated the Fourth Amendment).

### B. The district court misinterpreted the Consent Decree to prohibit arrests but not other harassment and misconduct short of arrest, which the Consent Decree plainly prohibits.

Unquestionably, a primary purpose of the Consent Decree was to prohibit arresting homeless persons based on their homeless status. But it is equally clear that the Consent Decree prohibited harassment of Plaintiffs short of arrest. As the district court acknowledged, the Plaintiffs' class was defined thirty years ago as "homeless persons . . . who have been, expect to be, or will be . . . *harassed, or otherwise interfered with* by members of the City of Miami Police Department for engaging in the ordinary and essential activities of daily living in public due to the lack of other adequate alternatives." DE 682: 29 n. 15 (quoting ***Pottinger***, 720 F. Supp. at 959) (emphasis added). Thus, the very purpose of the Consent Decree's Law Enforcement Protocol was to "guide Miami police officers in [*all* of] their interactions and contacts with homeless persons," not just ones regarding arrests.

DE 382: 7 (Section VII.13). Indeed, as the district court recognized, if a homeless person is not observed committing a crime, "City police *may not [even] approach* a homeless individual . . . unless . . . to offer [shelter or] services." DE 682: 5 (citing Consent Decree, DE 382: 7; DE 525-1: 2 (Section VII.14.A) (emphasis added)). Even an approach to offer such shelter or services is *prohibited unless* shelter or services "are currently available." *Id*. *See also* DE 382: 8; DE 525-1: 3 (Section VII.14.C.2). The Consent Decree also required the City to "expressly adopt[] a policy . . . to protect the constitutional rights of homeless persons, to prevent arrests *and* harassment of these people . . .." DE 382: 5 (Section VI.9) (emphasis added). Obviously, the summary seizure and destruction of homeless persons' property, another form of "harassment," was also specifically prohibited. DE 382: 12-13, DE 525-1: 7-8 (Section VII.14.F).

Holding the City in contempt in 1991 for repeated sweeps in which the City deliberately destroyed Plaintiffs' property, Judge Atkins found that police had unlawfully "awakened homeless persons sleeping under the I-395 overpass and routed them to Lummus and Bicentennial Parks." ***Pottinger***, 810 F. Supp. at 1556. In a subsequent incident, the court found that police arrived with front-end loaders and dump trucks, "asked homeless persons to take their property and leave immediately," and then "removed belongings of both absent and present class members," even threatening one man with arrest for obstructing justice when he

returned from a health clinic and tried to retrieve his property. *Id.* Thus, this harassing conduct short of arrest, including directing homeless persons to "move on" and not return, and summarily seizing and destroying their property, was a primary impetus for the lawsuit and was condemned by Judge Atkins in his 1992 judgement. It is thus not surprising that Plaintiffs negotiated a cessation of all harassment short of arrest in the Consent Decree.

The district court acknowledged Plaintiffs' robust testimony about police directing them to "move on" and not return, both in connection with the City's clean-up operations and outside this context, solely to clear several specific areas of all homeless persons. DE 682: 24-25, 31-32, 36-37.[17] This was consistent with the City's coordinated plan to remove all homeless persons from certain areas of the city, and "ensure that homeless individuals do not return to these locations" through "periodic[] check[s]" and "consistent[] monitor[ing]." DE 601-65:1-2. The court even found that "the intent was to clear the areas where the homeless spent the night before the arrival of vehicle and pedestrian traffic that is typical of most cities." DE 682: 24.

[17] See also videotape of Java Brooks being directed to move from area in downtown Miami, DE 578-39; testimony of Rafael Villalonga about being told to move from Lot 16 area, DE 676: 8-9; testimony of Guthrie Chibanguza about being ordered to leave a bus stop, DE 675: 96; and testimony of Willie Richardson about being made to get up and move. DE 675: 101-02.

Presented with unrefuted evidence of these "move on" orders, the court did not find that they had not occurred. Instead, it found that absent evidence that these homeless persons were "threatened with arrest" or "that arrests were made," DE 682: 25, there could be no violation of the Consent Decree. The Decree, the court held, did not "explicitly prohibit the police from ordering homeless persons to move from their locations or from sounding loud noises to wake people before a clean-up operation" DE 682: 36.[18] This was error, for several reasons. First, *every* police order comes with the implicit threat of arrest; thus, the district court's finding that no threats of arrest occurred is incorrect.

Moreover, reading the Consent Decree to permit the police to give "move on" orders is inconsistent with the language of the Decree, which requires the City "to protect the constitutional rights of homeless persons." DE 382: 5 (Section VI.9); DE 382: 5 (Section V.7) (police department must "respect the right of homeless people"). One of those fundamental rights is freedom of movement and the right to travel, which Judge Atkins specifically found to have been violated as part of a plan to drive homeless individuals out of certain areas. ***Pottinger***, 810 F. Supp. at 1578-81. He pointed to the Supreme Court's decisions holding anti-loitering statutes unconstitutional. *Id*. at 1579.

[18] There was repeated testimony that in conducting its clean-ups, the City was needlessly harassing. *See* pp. 18-19 *supra*.

The Consent Decree's protection against police "move on" orders is supported by abundant caselaw recognizing a constitutional right to remain in a public place unaccosted by the government. In ***Catron v. City of St. Petersburg***, 658 F.3d 1260 (11th Cir. 2011), this court struck down an anti-loitering ordinance that allowed police and other city agents to issue a "temporary trespass warning for specific city land – in effect, an exclusion from the property – on which the agent determined that the warning recipient had 'violate[d]' city or state law." *Id.* at 1264. Like the "move on" orders in the instant case, this court held that these trespass warnings "served instantly as some kind of restraining injunction." *Id.* at 1268. The warning also allowed a subsequent arrest if the recipient was ever found on the property within a designated period up to one year. *Id.* at 1265.

***Catron*** held that plaintiffs stated claims for due process violations by virtue of the city's use of "no trespass" orders to ban them from a specific park as well as all parks in the city notwithstanding the city's "substantial" interest "in discouraging unlawful activity and in maintaining a safe and orderly environment on its property . . .." *Id.* at 1267-68. *See also* ***Chicago v. Morales***, 527 U.S. 41, 53-55 (1999) (striking down an anti-loitering ordinance and recognizing liberty interest of individual remaining in a public place of one's choice); ***Bennet v. City of Eastpointe***, 410 F.3d 810, 815-16, 834 (6th Cir. 2005) (recognizing Fourth Amendment right to remain in public place).

***Catron*** is particularly relevant because the district court in the instant case asserted that the Consent Decree was unnecessary because Plaintiffs, like other citizens, always had the right to bring self-standing civil rights claims against any offending municipal actor, DE 682: 4, 32. But ***Catron*** recognized that such contingent and after-the-fact remedies are "beside the point. A challenge to a trespass *charge* [or the filing of a lawsuit] does not equal a challenge to the validity of a trespass *warning* [or a move-on order] especially of the warning [or move on order] at the outset . . .." 658 F.3d at 1268.

Accordingly, Plaintiffs' rights not to be "harassed" or interfered with in their freedom to wander or stroll, or conversely, to loiter or remain idle, and likewise to possess and maintain property in public, were clearly protected by the Fourth, Fifth, and Fourteenth Amendments. The misconduct of the City's police and other agents toward them plainly implicated these rights. As one would expect, the plain language of the Consent Decree, for which Plaintiffs forfeited their successful lawsuit, guarded them against this type of harassment and misconduct short of arrest. Thus, the district court erred in interpreting the Consent Decree to omit this protection.

### C. The district court misconstrued the Consent Decree in treating an internal police investigation as a remedy for violations.

The Consent Decree provides for "court enforcement" of the rights in it (after

mediation). DE 382: 29 (Section X.25a). Presented with uncontradicted evidence of a police "move on" order to Java Brooks in violation of the Decree, the district court wrongly construed the existence of an internal police investigation as a sufficient remedy.

Section VII.14.A of the Consent Decree prohibits a police officer from approaching a homeless individual not committing any crime, except to offer shelter, services or assistance, DE 382: 7, DE 525-1: 2; *see also* DE 382: 5 (Section VI.9) (prohibition of harassment of homeless persons). A videotape, together with Brooks' supporting testimony, showed police officers approaching her after she had laid down on a downtown sidewalk in front of the old Macy's storefront, preparing to sleep for the night. DE 650; DE 578-39; DE 675: 151-61. One of them ordered her to leave – without any suggestion she was committing a criminal offense and without offering her shelter or services. *Id*. She testified that she was threatened with arrest if she did not leave. DE 675: 152-54, 156, 158, 159.

Given this clear and convincing evidence of a violation of the Consent Decree, the burden shifted to the City to justify the officers' conduct. DE 682: 35-36 (citing ***Riccard v. Prudential Ins. Co***., 307 F.3d 1277, 1296 (11th Cir. 2002); ***Wyatt v. Rogers***, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996); ***Reynolds v. G.M. Roberts***, 207 F.3d 1288, 1298 (11th Cir. 2000)). The City offered no additional evidence regarding

this incident.[19]

In its ruling, however, the district court simply cited an alleged ongoing police internal affairs investigation. DE 682: 24-25. This effectively construed the Decree to make such an investigation preclude or substitute for court enforcement. The availability of court enforcement after mediation is vital. *See* ***Pottinger***, 810 F. Supp. at 1556 ("City's threat of disciplinary action insufficient"). Reading an express provision to protect the rights of homeless individuals out of the Decree was in error. ***Pottinger***, 805 F.3d at 1298 (consent decrees to be construed as contracts); ***Ernie Haire Ford, Inc. v. Ford Motor Co***., 260 F.3d at 1290.

### D. The district court misconstrued the Consent Decree by dispensing with the requirement of a contemporaneous warning prior to arrest for obstructing the sidewalk and by failing to find a violation.

Plaintiffs presented the evidence of two arrests that violated express provisions of the Consent Decree. The Consent Decree lists obstructing the sidewalk as a life-sustaining conduct misdemeanor. DE 382: 9 (Section VII.14.C.3.d.). No warning, arrest, or threat of arrest may be made unless shelter is available, offered, and refused. DE 382: 8-9 (Section VII.14.C.2). Where a sidewalk is fully obstructed

[19] In cross-examination the City asked Brooks whether "[t]he video has you being directed to leave," to which she responded "yes," DE 675: 156, and asked her if the police "were arresting you," to which she responded, "I have verbal threats and if you would have viewed the video, he was getting off the bicycle to make an attempt to arrest me." DE 675: 159.

such that a pedestrian would have to walk into the street, police must give the individual one warning and can then arrest the person if he or she does not remedy the full obstruction. DE 525-1: 4 (Section VII.14.C.3.d.).

On March 27, 2018, Chetwyn Archer and Tabitha Bass were arrested for obstructing the sidewalk. The district court found that the sidewalks were completely obstructed. DE 682: 25-26. Two police videotapes show the arrests and make clear, however, that no contemporaneous warning was given. DE 578-37, -38. The arrest records, moreover, refer only to warnings allegedly given on *prior* occasions. DE 578-35, -36.[20] They also make clear that no shelter was offered as an alternative to arrest.[21]

Moreover, the district court erred in making no finding on whether a warning was given. Instead, it placed the burden of showing "what preceded the arrests" (whether or not there was a warning), on Plaintiffs. DE 682: 39. This was in error. Once Plaintiffs introduced the videotapes of Archer's and Bass's arrests showing the absence of contemporaneous warnings, the burden shifted to the City to show that it had not violated the Decree. *See* DE 682: 35-36. Since the City introduced no

[20] The arrest record for Bass states that outreach workers offered her shelter and that she has been "given a warning in several occasions," but mentions no contemporaneous warning. DE 578-36. The arrest record for Archer also refers to him having been warned and offered shelter in the past. DE 578-36.

[21] *See* p. 24, *supra*.

evidence to show that a contemporaneous warning had been given despite the absence of evidence of such a warning in the police videotapes and arrest records, the only proper ruling was to find a violation.

If the court meant to rely on references to prior warnings in the arrest records, moreover, that was equally in error. The Consent Decree's requirement of "one warning" can only mean one warning *at the time the obstructing offense is observed.*

## II. The district court erred in granting the City's Motion to Terminate the Consent Decree.

### A. The City's pattern of violations precludes termination of the Consent Decree as a matter of law.

In deciding whether to terminate a consent decree, a defendant's "compliance with previous court orders is obviously relevant." ***Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89, Oklahoma Cty., Okl. v. Dowell***, 498 U.S. 237, 249 (1991). *See also* ***Freeman v. Pitts***, 503 U.S. 467, 491 (1992) ("[A] court should give particular attention to the [defendant's] record of compliance."); ***United States v. City of Miami***, 2 F.3d 1497, 1505 (11th Cir. 1993) (same).

In moving for termination, the City had the "heavy burden of persuasion." ***Johnson v. Florida***, 348 F.3d 1334, 1341 (11th Cir. 2003); *id*. at 1349 (party seeking termination has burden to "demonstrate the absence of an ongoing constitutional violation"); *id*. ("no likelihood that constitutional violation will recur"). *See also* ***City of Miami***, 2 F.3d at 1508 (defendant's burden to show that "the decree's basic

purpose … has been achieved").

The pattern of blatant violations described in Argument I *supra* precludes as a matter of law any conclusion that the City has met its burden to show that it has complied in good faith with the Consent Decree. Further, occurring at the very time the City sought to free itself from the Decree, these systematic violations negate any conclusion that the City is unlikely to "return to its former ways." ***Dowell***, 498 U.S. at 247.

### B. The district court committed legal errors in misallocating the burden of proof and in terminating the Consent Decree in the face of undisputed evidence that the City lacked consistent procedures for handling property.

#### 1. In its simultaneous consideration of the two motions before it, the district court erroneously put the burden on Plaintiffs as to the Motion to Terminate.

The court below heard evidence on the enforcement and termination motions at the same time. As noted earlier, Plaintiffs had the burden of proof on the Motion to Enforce.

In seeking to terminate the Consent Decree, the *City* had the "heavy burden of persuasion," ***Johnson***, 348 F.3d at 1341, to show that "the decree's basic purpose … has been achieved," ***City of Miami***, 2 F.3d at 1508, and thereby "demonstrate the absence of an ongoing constitutional violation," ***Johnson***, 348 F.3d at 1349. The City was also required to "demonstrate that there is no likelihood that the constitutional violation will recur." *Id*. *See also* ***City of Miami***, 2 F.3d at 1504, 1508.

A decree may also be terminated if the party seeking termination proves that changed circumstances "have caused compliance … to become substantially more onerous, or have rendered the decree impracticable, or its continued enforcement inimical to the public interest." ***Johnson***, 348 F.3d at 1344; *id*. at 1345; ***Coffey v. Braddy***, 834 F.3d 1184, 1193 (11th Cir. 2016); *see* ***Salazar by Salazar v. District of Columbia***, 896 F.3d 489, 492 (D.C. Cir. 2018).

It was incumbent on the court below to carefully apply the two different burdens in evaluating the significance of the evidence for each motion. While the court formally acknowledged the different burdens of proof, DE 682: 26, 35-36, in practice it put the burden of proof on Plaintiffs as to the Motion to Terminate. This was clear legal error. *See* ***Jeff D. v. Otter***, 643 F.3d 278, 285 (9th Cir. 2011) (in unified proceeding on motions to enforce and to terminate, lower court erred in basing its determination of substantial compliance on the failure of Plaintiffs to prove, by clear and convincing evidence, facts that would be inconsistent with substantial compliance); *id*. at 289 (formal recitation of the correct burdens was not enough).

In a number of instances where Plaintiffs presented evidence that the City had violated the Consent Decree, the court below failed to make any factual finding on the evidence – even though the burden with respect to the Motion to Terminate was on the City to show that it *had* complied, in order to establish substantial compliance.

With this failure, the court effectively shifted the burden of proof to Plaintiffs on the Motion to Terminate.

First, the court noted that "[t]he manner that the City handled personal property during the clean-ups is vehemently contested," DE 682: 21, and noted that despite denials by City officials that personal property was destroyed only if it was contaminated, "[a]lmost all the homeless witnesses" testified that City workers indiscriminately took property, including ID, medicine, glasses, cellphones, and personal notes and photographs. DE 682: 22-23. The court treated the witnesses as credible, DE 675: 141, but failed to make a finding one way or the other as to whether these violations had occurred.

Second, the court accepted the testimony of the City's witnesses that the City's general procedures included leaving notes about property that had been seized, with information on how to retrieve it. DE 682: 20-21, 34-35. *See also* DE 682: 20 (citing Defendant's Exhibit 657-28 (two photographs allegedly of such notice)). Yet the court also noted "Plaintiffs dispute that these notes were left and argue[d] that there was no guarantee that the owner of the property would receive these notes." DE 682: 20. The court made no determination as to whether such notices had been given in the instances in which Plaintiffs testified their property had been taken.

Third, this failure was evident in two matters related to police conduct. As

noted earlier, the court failed to make a factual finding as to whether the police had in fact ordered Java Brooks to move on in violation of the Consent Decree. DE 682: 24-25, 38-39; *see* p. 43 *supra*. The same was true with respect Chetwyn Archer and Tabitha Bass, with videotapes and arrest reports showing no indication of the contemporaneous warning required in cases of full obstruction of the sidewalk. *See* pp. 44 *supra;* DE 682: 25-26. See DE 578-35; DE 578-36; DE 578-37; DE 578-38. The court found no violation because it said it did not have evidence of what had happened before the police officers' body cams were turned on. DE 682: 38-39.

Fourth, the district court cited as a basis for finding substantial compliance that over twenty years Plaintiffs did not seek formal enforcement action against the City. DE 682: 17, 33. The court, however, made no findings in relation to evidence Plaintiffs introduced of other objections they had made to the City's violations.[22] This, too, effectively shifted the burden of proof to Plaintiffs in relation to the substantial compliance standard for termination – something that was the City's

[22] These included a 2009 letter to the City asserting that it was violating the Consent Decree in its handling of an encampment of registered sex offenders rendered homeless by residency restrictions, DE 578-126, and communications with the City in 2014 objecting to harassment of homeless individuals in the Riverwalk area, DE 578-111, DE 578-112, DE 578-113. In 2015, Plaintiffs objected to a proposed City ordinance that would have outlawed living in public, in flagrant contradiction to the Consent Decree. DE 578-117; DE 578-122; DE 674: 46-49. Also in 2015, Plaintiffs sought and received agreement that a new City ordinance prohibiting urination and defecation in public would be enforced in accordance with the terms of the Consent Decree. DE 578-123; DE 578-124.

burden to show.

The court's failure to make specific factual findings in the face of such "vehemently" contested evidence showing violations effectively shifted the burden of proof to Plaintiffs to show that the City had not substantially complied. This was in error. As the court seemingly found the evidence on both sides to be relatively equal, applying the correct burden of proof should have resulted in a finding for Plaintiffs.

**2. The district court erred in terminating the consent decree in the face of undisputed evidence that the City lacked consistent procedures for protecting the property rights of homeless individuals.**

The burden was on the City in seeking termination to show that it had consistent procedures for protecting Plaintiffs' property rights. As the district court observed, the best way to meet this burden would have been through written procedures that accord with the terms of the Consent Decree. DE 682: 17 ("a written protocol is preferable"). The City had not done so, as the Court found. DE 682: 6. Only after the hearing was over did the City adopt such procedures, precluding their review by the court. DE 682: 6 & n.6, 17. Thus the court could not evaluate whether the written procedures would satisfy the City's burden of showing that there was no likelihood that violations would recur.[23] In this respect alone the City failed to meet

[23] For example, the City's witnesses claimed that property it seized was in fact stored indefinitely, DE 673: 249, DE 677: 48-49. The written procedures proffered but not

its burden.

But even if it were possible for the City to have consistent procedures without formulating them in writing, the evidence *presented by the City itself* showed that it did not have consistent procedures.[24] First, the City accepted that prior notice was required before a clean-up operation, and asserted that such notice was part of its procedures. See DE 682: 20. Yet the City's witnesses differed as to:

- Whether advance notice was always required under its procedures: DE 677: 42, 65-66 (always); DE 673: 263 ("When we're doing a large encampment").
- Which agency was responsible for posting the advance notice: DE 673: 216 (Miami Parking Authority or possibly Homeless Trust); DE 674: 64-65 (Homeless Trust); DE: 677: 42 (City's NET Team)
- How far in advance notice must be posted: DE 673: 217 (7 days); DE 673: 235 (at least 7 days); i*d*. (7-10 days); DE 677: 42 (usually 10 days to 2 weeks); DE 674: 65 (2 weeks)
- The procedure for ensuring the notice was actually posted and remained so: DE 674: 65 (posted daily); DE 677: 65-66 (NET administrator would drive by to check)

Second, there was inconsistency on what is "contaminated," a vital issue since the Consent Decree allows contaminated property to be discarded, DE 525-1: 7 (Section VII.14.F.1):

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admitted after the close of evidence state that the property will be "held for a period of ninety (90) days, after which the City will dispose of the property if unclaimed." DE 680-1: 6.

[24] The principal exception to this inconsistency related to going through even contaminated bags to ensure that no vital items such as identification or medicine was thrown away. While Plaintiffs presented evidence that this procedure, required by the Consent Decree, was violated, they do not dispute that the City's own witnesses were consistent in describing it as the City's procedure.

- Sergio Torres, head of the City's Department of Veterans Affairs and Homeless Services, testified that "contamination" meant "exposed to fluids or has been exposed to inclement … weather." DE 673: 262; *id*. at 270-271.
- Although Torres referred to training on how to determine what is contaminated, the only exhibits the City introduced on training materials, DE 657-39, 657-40, 657-41 have nothing regarding this subject.
- David Rosemond, a NET administrator – whom the City described to the court as an essential witness in characterizing the City's property-related procedures, DE 677: 88, offered no definition at all.

Third, as to other key matters of procedure, there was simply *no* evidence submitted by the City of the existence of *any* procedure regarding vital matters, including where:

- a person sees their own belongings on a city truck and wants to get them back, *see* pp. 20-21, *supra*; or
- a person identifies some belongings on public property as belonging to an individual other than him or herself. *See* p. 19, *supra.*

In short, the district court erred in finding that the City had satisfied its burden to show substantial compliance with the property requirements of the Consent Decree in the face of inconsistent or absent evidence on vital matters.

## CONCLUSION

The Consent Decree has effectively protected Plaintiffs' rights to be free from unconstitutional arrest, harassment, and property destruction based on their homeless status for 20 years. While the City's approach to redressing homelessness has improved, the record establishes a continued and pervasive pattern of Consent Decree violations. As a result of the district court's misinterpretation of the Decree

and mistaken allocation of the respective burdens of proof on the City's and Plaintiffs' competing motions, the court erred in their resolution.

For the foregoing reasons, Plaintiffs request this court to vacate the district court's judgment and remand the case with instructions to reverse the grant of the City's Motion to Terminate, and to grant Plaintiffs' Motion to Enforce and hold the City in contempt, and to determine the proper remedy. In the alternative, Plaintiffs request the court to remand the case for further proceedings to determine Plaintiffs' Motion to Enforce and the City's Motion to Terminate, in accord with proper construction of the Decree and allocation of the burdens of proof.

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 12,857 words.

## CERTIFICATE OF SERVICE

I certify that on September 6, 2019, I served upon opposing counsel the foregoing document by filing it via the ECF filing system and mailed paper copies to opposing counsel.

Respectfully submitted,

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