

COMMONWEALTH OF MASSACHUSETTS

21-2609-F

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
No. SJ-2021-0408

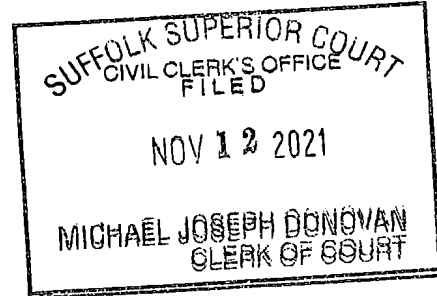
Ronald Geddes, AC, and RAR,  
each on their own behalf and  
on behalf of a class of similarly situated  
individuals,

Plaintiffs,

v.

City of Boston; Boston Police Department;  
Boston Public Health Commission; Kim M.  
Janey, in her capacity as the Mayor of the City of  
Boston and individually; Gregory P. Long, in his  
Capacity as the Acting Commissioner of the  
Boston Police Department and individually; and  
Bisola Ojikutu, in her capacity as Executive  
Director of the Boston Public Health Commission  
and individually,

Defendants.



**DEFENDANTS BOSTON PUBLIC HEALTH COMMISSION AND BISOLA OJIKUTU,  
IN HER CAPACITY AS EXECUTIVE DIRECTOR OF THE BOSTON PUBLIC  
HEALTH COMMISSION AND INDIVIDUALLY'S OPPOSITION TO PLAINTIFFS'  
MOTION FOR A PRELIMINARY INJUNCTION AND  
TEMPORARY RESTRAINING ORDER**

**INTRODUCTION**

Defendants Boston Public Health Commission and Dr. Bisola Ojikutu, in her capacity as Executive Director of the Boston Public Health Commission and individually (collectively "Defendants" or "Commission Defendants"), hereby submit this memorandum in support of their opposition to the motion for preliminary injunction and temporary restraining order filed by

Ronald Geddes, AC, and RAR, each on their own behalf and on behalf of a class of similarly situated individuals (“Plaintiffs”) pursuant to Mass. R. Civ. P. 65. Plaintiffs have failed to meet their burden of demonstrating that a preliminary injunction is warranted.

### **FACTUAL BACKGROUND**

On October 19, 2021, Boston Public Health Commission Executive Director Dr. Bisola Ojikutu issued a temporary order relative to the ongoing public health emergency relative to COVID-19 declaring that substance use disorder, unsheltered homelessness and related issues in the City of Boston constitute a public health crisis. This declaration was made upon findings including that encampments of individuals experiencing homelessness present unsheltered individuals with significant public health, infectious disease, safety, sanitation, and fire safety challenges. This Order was supported by findings that temporary structures lack clean water, adequate hygiene facilities, and present a significant risk of weather exposure, particularly in late fall and winter. The Order authorizes the use of Commission employees, equipment and other resources of the Boston Public Health Commission to support necessary public health interventions.

In the intervening weeks, staff from multiple Commission bureaus, programs, and offices have conducted increased, intensive, and personalized outreach to individuals remaining in tents and other structures in the area. The Commission is working on an ongoing basis with City and other partner agencies to bring additional beds of various kinds online, including low-threshold beds necessary to support regional re-housing and stabilization efforts serving individuals experiencing unsheltered homelessness. The efforts of the Commission have been focused on connecting those we serve with shelter, housing, and services as well as expanding access to low-threshold, non-congregate housing placements for this population. No Commission staff

members have the authority to arrest any individual and staff are not trained or instructed to make any threat of arrest whatsoever.

Plaintiffs are asking the Court for preliminary injunctive relief and a temporary restraining order that would halt this emergency response work at a time when the weather exposure risks associated with unsheltered homelessness are escalating and when progress in relief efforts is taking shape. Exhibit A, Affidavit of Gerry Thomas and Exhibit B, Affidavit of Devin Larkin [hereinafter “Thomas Aff.” and “Larkin Aff.”].

## ARGUMENT

### I. Standard of Review

For the Court to enter a temporary restraining order or preliminary injunction, it must first find that the party seeking a preliminary injunction has demonstrated a likelihood of success on the merits, and that, without relief, it would suffer irreparable harm. Packaging Indus. Grp., Inc. v. Cheney, 380 Mass. 609, 617 (1980). “If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party.” Id. The Court may issue a preliminary injunction “only if it concludes that the risk of irreparable harm to a plaintiff, in light of his chances of success on his claim, outweigh the defendant’s probable harm and likelihood of prevailing on the merits of the case.” Commonwealth v. Massachusetts CRINC, 392 Mass. 79, 87-88 (1984). In cases in which a public entity is a party, a judge may also weigh the risk of harm to the public interest in considering whether to grant a preliminary injunction. Doe v. Worcester Pub. Sch., 484 Mass. 598, 601 (2020), citing Harris v. Commissioner of Correction, 409 Mass. 472, 474 (1991), citing Brookline v. Goldstein, 388 Mass. 443, 447 (1983).

## II. Plaintiffs Fail to Demonstrate a Likelihood of Success

Plaintiffs cannot prove a likelihood of success as to Defendants Boston Public Health Commission, Dr. Bisola Ojikutu, in her capacity as Executive Director of the Boston Public Health Commission and individually (“Commission Defendants”) because Commission Defendants have no ability to arrest, have no policy or practice that directs staff to threaten arrest or deprive any other protected rights, and provide access to services that accommodate individual needs. By statute, the Commission is a legally separate entity from the City of Boston. See Ma. St. 1995, c. 147, s. 3(a) (“There is hereby established a body politic and corporate and political subdivision of the commonwealth to be known as the Boston public health commission. [...] The commission shall not be subject to the supervision of any other department, commission, board bureau, agency or officer of the city except to the extent and in the manner provided in this act.”).

Commission staff have conducted extensive outreach and engagement to individuals living in encampments that has provided individualized housing, shelter, substance use disorder, and healthcare services that are responsive to each individual’s needs. Thomas Aff. and Larkin Aff. These outreach efforts show that many individuals staying in encampments are willing to voluntarily work with Commission outreach teams to enter shelter, housing, and treatment. At least 28 individuals have agreed to engage with the Commission’s shelter services and 42 individuals have agreed to work with the Commission’s Homeless Services Bureau staff to receive housing search and placement services. Thomas Aff. ¶ 21-22. In the period between October 25<sup>th</sup> and November 5<sup>th</sup> the Commission’s Recovery Services staff have placed 65 individuals from the Mass and Cass area into residential treatment program settings and others into housing. Larkin Aff. ¶ 10. In short, the number of individuals who are agreeing

to accept connections to services in this area are encouraging and show the promise of a public health approach to addressing the present crisis.

The Commission's work in the present initiative focused on connecting individuals experiencing homelessness and substance use disorder with appropriate services is an extension of the work the Commission regularly conducts and is within the scope of its duties as Boston's local health department. Thomas Aff. and Larkin Aff.. To the extent that any of the Commission's actions are outside of the scope of the agency's usual functions and authorities, they are authorized pursuant to public health statutes under G. L. c. 111, including sections 30 and 31, as cited in the Order.

There is also no likelihood of success based on the Plaintiff's arguments that the emergency shelter services that the Commission provides are inadequate or inappropriate for individuals with disabilities or actively using substances. In addition to providing emergency shelter services, the Commission's Homeless Services Bureau oversees a variety of programs that address complex needs associated with homelessness, such as emergency shelter, health and behavioral health services, job readiness and training, substance use treatment, recovery support, and housing services. Thomas Aff. ¶ 4.

While the Commission values and actively supports the ability of individuals experiencing homelessness to choose from a range of housing and shelter options that serve their needs, the Commission's shelters welcome and serve all individuals in need of emergency shelter, food, and warmth. The Commission's shelters provide reasonable accommodations when needed, and maintain policies and procedures to process accommodation requests that are consistent with applicable law. Thomas Aff. ¶ 13. Sobriety, including abstinence from drugs, is not a requirement for staying in Commission shelters or those of our partners at Pine

Street Inn. BPHC's Recovery Services programs provide clean needles, drug testing strips, and other harm reduction materials adjacent to Commission's Shelters. Thomas Aff. ¶ 12. Health services, including behavioral health, HIV care, primary care, and substance use disorder services are provided through on-site clinics at the Commission's shelters operated by the Boston Healthcare for the Homeless Program. The Commission's shelters operate on a 24/7 basis and have excess capacity. Individuals may stay inside all day if they choose and are provided three meals a day. Thomas Aff. ¶ 15. The Commission works with other emergency shelter and social service providers to ensure that there is always shelter capacity for each individual seeking shelter in Boston, particularly during winter months.

### **III. Plaintiffs Fail to Demonstrate a Significant Risk of Irreparable Harm**

Plaintiffs have not demonstrated a significant risk of irreparable harm if the injunction is not issued. "Where the moving party has failed to demonstrate that denial of the injunction would create any substantial risk that it would suffer irreparable harm, the judgment must be denied, no matter how likely it may be that the moving party will prevail on the merits."

Packaging Indus. Grp., 380 Mass. at 621.

The policy and practices in question give individuals who have constructed temporary shelters on public sidewalks and streets with an opportunity to voluntarily agree to have their belongings stored, at no cost, for at least 90 days after notice and personalized outreach, including outreach led by public-health professionals from the Commission's Homeless Services Bureau and Recovery Services Bureau. Thomas Aff. and Larkin Aff. This set of facts does not constitute a violation of the Fourth Amendment to the United States Constitution, and plaintiffs have not shown that the continued operation of the Commission's outreach,

engagement, and placement efforts would cause irreparable harm to Plaintiffs' or similarly situated individuals.

#### **IV. Balance of Hardships Weighs in Favor of Defendants**

In fact, the class of individuals described in the complaint are more likely to suffer immediate harm if the ongoing outreach and placement efforts are halted as increased low-threshold housing placements come into existence and the weather grows colder. Plaintiffs cannot show that their risk of irreparable harm outweighs that of granting the injunction or temporary restraining order. The risk of potential harm to the Plaintiffs is far outweighed by the risk of harm presented by an order of this court that would have the effect of ceasing the necessary work of connecting individuals experiencing homelessness, substance use disorder, and other challenges with the resources they need to stabilize their lives. As described above, many individuals who are similarly situated to the named plaintiffs are currently in the process of receiving material benefit from the Commission's outreach efforts.

In addition to the well-documented health, safety, and quality of life issues presented by homeless encampments, the calculus of harms must necessarily also factor into account the harms experienced by other individuals experiencing homelessness and those disabilities who are directly harmed by the existence of the encampments. Encampments on the sidewalks and public ways surrounding the 112 Southampton Street Shelter have unlawfully impaired the ability of our guests, particularly those with disabilities, to navigate to and from the shelter. Thomas Aff. ¶ 25. Encampments in the area surrounding the 112 Southampton Street Shelter have also caused an infestation of rodents and associated infectious disease threat that has required significant expenditures and interventions to remediate. Thomas Aff. ¶ 26.

As nothing in the Commission's response efforts creates any substantial harm to the Plaintiffs, the balancing of hardships argues strongly against an order prohibiting ongoing outreach and placement efforts.

#### **V. Public Interest Favors Defendants**

Where a governmental entity is a party, the Court must "also consider whether the grant of an injunction would adversely affect the public interest." Student No. 9 v. Board of Educ., 440 Mass. 752, 762 (2004); Brookline, 388 Mass. at 447. It is clear that the circumstances presented by crisis levels of unsheltered homelessness and substance use disorder, the public interest requires immediate and ongoing public health interventions to ensure that unsheltered individuals living in tents and other structures unfit for habitation receive appropriate services. Granting the Plaintiff's motion would require the cessation of ongoing outreach and work needed to place individuals in appropriate housing, shelter, or treatment settings. In the context of the ongoing COVID-19 public health emergency, these engagement efforts are immediately necessary to identify individuals who are willing to engage in the process of being placed in shelter, housing, or treatment.

#### **CONCLUSION**

For all of the foregoing reasons, the Court should deny the Plaintiffs' request for a preliminary injunction and temporary restraining order.

Respectfully submitted,  
Boston Public Health Commission and Dr.  
Bisola Ojikutu in her capacity as Executive  
Director of the Boston Public Health  
Commission and individually,

By Their attorneys:



/s/ PJ McCann

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**CERTIFICATE OF SERVICE**

I, Paul L. McCann Jr., hereby certify that on November 9, 2021, the foregoing document was electronically mailed to the Supreme Judicial Court Clerk for Suffolk County for filing and was also electronically mailed to all counsel of record.

/s/ PJ McCann \_\_\_\_\_

Paul L. McCann Jr.