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COMMONWEALTH OF MASSACHUSETTS 21-2609-F

SUFFOLK, ss.

SUPREME JUDICIAL COURT
CIVIL ACTION 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,

vs.

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.

CITY OF BOSTON, BOSTON POLICE DEPARTMENT, KIM M. JANEY, IN HER CAPACITY AS MAYOR OF THE CITY OF BOSTON AND INDIVIDUALLY, AND GREGORY P. LONG, IN HIS CAPACITY AS THE ACTING COMMISSIONER OF THE BOSTON POLICE DEPARTMENT AND INDIVIDUALLY'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Now come, the Defendants City of Boston, ("City") Boston Police Department,[1] 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

[1] The Boston Police Department, as a subdivision of the City of Boston, is not a suable entity. *See Curran v. City of Boston*, 777 F. Supp. 116, 120 (D. Mass. 1991). The appropriate defendant is the City of Boston. *See Id.*

(collectively, the "City Defendants") and hereby oppose Plaintiffs' Ronald Geddes, AC, and RAR's, on their own behalf on and behalf of a class of similarly situated individuals (the "Plaintiffs") Motion for a Temporary Restraining Order and Preliminary Injunction.[2]

As grounds, the Plaintiffs fail to meet the threshold requirements necessary to obtain a temporary restraining order or preliminary injunction because they lack standing, have not alleged the deprivation or threat of deprivation of any state or federal constitutional right, have not demonstrated that they will suffer irreparable harm, and because the public interest weighs heavily in favor of the City Defendants.

INTRODUCTION

This case is about the City of Boston and the Boston Public Health Commission's coordinated efforts to mitigate the ongoing human tragedy of unsheltered homelessness, substance use disorder, and mental illness, in the City of Boston. In response to a significant increase in encampments in and around the area of Massachusetts Avenue and Melnea Cass Boulevard and the substantial health and safety risks such encampments pose to their occupants as well as first responders, outreach workers, and the public, the City of Boston and Boston Public Health Commission began a coordinated outreach to provide shelter options, drug treatment and detoxification programs, support services, and free storage to the unsheltered individuals in the City of Boston.[3]

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[2] In an effort to both comply with this Court's November 5, 2021 Order for the Defendants to answer the plaintiffs' complaint by 9 a.m. November 9, 2021, and maintain their rights to move to dismiss plaintiffs' complaint pursuant to Mass.R.Civ.P. 12(b)(1),(6), the City Defendants attach draft individual answers to the plaintiffs' hereto as Exhibits A1-3.

[3] The City of Boston and Boston Public Health Commission's coordinate response is outlined in Mayor Kim Janey's October 19, 2021 Executive Order Establishing a Coordinated Response to Public Health and Encampments in the City of Boston, *attached hereto as Exhibit B*; and the Boston Homeless Encampment Liaison Protocol as of October 28, 2021, *attached hereto as Exhibit C*.

During the first ten months of the calendar year, the City of Boston's Office of Recovery Services street outreach team conducted over 21,000 interactions with individuals on the street (over 2,100 monthly), making over 7,000 referrals to services (over 700 referrals monthly). The City, in partnership with state agencies, continues to create pathways to permanent housing while prioritizing the vulnerable unsheltered population in the Massachusetts Avenue and Melnea Cass Boulevard Area. Since July 2021, the City of Boston's Office of Recovery Services has worked with the City's Street to Home Initiative to house 25 individuals every month from the Massachusetts Avenue and Melnea Cass Boulevard area who have chronic experiences of unsheltered homelessness, mental health challenges and substance use disorder.

The City Defendants are committed to ensuring the safety and well-being of people who use substances, people with mental health needs, shelter guests and people who may find themselves unsheltered or staying in places not meant for human habitation.

Tents or temporary structures often referred to as "encampments" present unsheltered individuals, outreach workers, and first responders with significant public health, infectious disease, public safety, sanitation and fire safety challenges. These temporary structures lack clean water, adequate hygiene facilities, and present a significant risk of weather exposure during both winter and summer months. Encampments often include visual barriers that make it difficult for outreach workers and first responders to monitor the well-being of people who may be at risk for overdose. Additionally, encampments are difficult for first responders to access in the event of a medical, safety or fire emergency.

Each and every unsheltered person is in a situation of risk and in need of assistance. City and community partner agencies are committed to working with every person in need to help them resolve immediate situations of risk and to facilitate access to a continuum of services,

including substance use treatment, other behavioral health care, medical care, emergency shelter, and housing.

The City's approach is focused on assessing and supporting the unique needs of unsheltered individuals by providing a range of services that address those needs through agency partnerships and recognizing the importance of reinforcing an individual's agency by providing a choice between opportunities whenever possible.

With these principles and objectives in mind, it is unequivocal that the City of Boston and the Boston Public Health Commission's coordinated response to the encampments and unsheltered individuals in the area of Massachusetts Avenue and Melnea Cass Boulevard is one of empathy and compassion. It is resource and data driven and grounded in public health. Most importantly, it is based on the belief that all unsheltered individuals shall be treated with dignity and deserve the opportunity to improve their quality of life by providing access to shelter and/or medical treatment. It is not, contrary to plaintiffs' arguments, the criminalization of homelessness.

FACTUAL BACKGROUND

A. The Public Health Crisis in The Area of Massachusetts Avenue and Melnea Cass Boulevard.

On October 19, 2021, Dr. Bisola Ojikutu, Executive Director of the Boston Public Health Commission ("BPHC") declared that "substance use disorder, unsheltered homelessness, and related issues in the City of Boston," particularly in the area around Melnea Cass Boulevard and Massachusetts Avenue,[4] constituted a public health crisis. *See* Declaration of Public Health Crisis, *attached hereto as Exhibit D.*

Director Ojikutu's declaration cited the "significant public health, infectious disease, public safety, sanitation, and fire safety challenges," that encampments of individuals experiencing homelessness created for unsheltered individuals, outreach workers, and first responders. *Exhibit D,* ¶ 4. The declaration further stated that encampments of individuals experiencing homelessness, i.e. "temporary structures," "lack clean water, adequate hygiene facilities, and present a signficant risk of weather exposure, particarly in late fall and winter, tents were unfit for human habitation and indiviauls living in tents are at increased risk for overdose, human trafficking, sex trafficking and other forms of victmization." *Id.*

Between January 1, 2021, and September 4, 2021, Boston police responded to 6 homicides, 22 unattended deaths, 13 sexual assaults, and 122 aggravated assaults in the area of Mass and Cass. *See* Affidavit of Ryan Walsh, Deputy Director of the Boston Regional Intelligence Center, Boston Police Department, *attached hereto as Exhibit E.* In the last month alone, there have been 4 incidents of arson. *See* Affidavit of John Dempsey, Fire Commissioner/Chief of Department, Boston Fire Department *attached hereto as Exhibit F.*

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[4] For ease of reference and consistency, for the purposes of the instant opposition, the City Defendants will refer to the area around Melnea Cass Boulevard and Massachusetts Avenue as "Mass and Cass."

Boston EMS personnel have responded to Mass and Cass over 4,000 times, 723 of which were for narcotic related illness incidents. *See* Affidavit of James Hooley, Chief of Boston Emergency Medical Services, *attached hereto as Exhibit G.*

B. Mayor Kim Janey's October 19, 2021, Executive Order

In response to the ongoing public health crisis in the area of Mass and Cass, Mayor Kim Janey issued an Executive Order entitled "An Executive Order Establishing a Coordinated Response to Public Health and Encampments in the City of Boston." *Exhibit B.* Mayor Janey's Executive Order cited the health and safety dangers created by tents and other temporary shelters in the area of Mass and Cass. *Id.* at ¶ 4. Such health and safety dangers were listed as the blocking sidewalks and access and egress to certain streets, lack of clean water and adequate hygiene facilities, the number of sexual assaults and other violence, rodent control and infectious disease outbreaks that daily street sweeping could not abate, and difficult for health care providers to access individuals to provide services. *Id.*

The Executive Order directed City Departments to establish a command structure to work with other city and state agencies to share information and align resources for those encamped in the area of Mass and Cass. *Id.* at Section I. The Executive Order also set forth procedures and social interventions to address the public health crisis created by tents or temporary shelters. *Exhibit B,* Section II. Such procedures allowed the enforcement of existing laws that prevented tents and temporary shelters to be placed on public ways in the City of Boston. *Id.* The Executive Order stated that enforcement actions should not criminalize the status of being an unsheltered individual, an individual with substance use disorder, or an individual with mental illness. *Id.* As such, all individuals were to be treated with dignity, would be recognized to have

a property interest in their belongings, would be given appropriate notice prior to removal of their tent, offered substance abuse or mental health treatment and offered alternative shelter. *Id.*

The Executive Order authorized the removal of encampments only after unsheltered individuals were: 1) provided advanced notice of the removal of the encampment; 2) engaged concerning availability of shelter and treatment options; 3) City employees identified a specific shelter or treatment bed available to an individual at the time of removal; 4) provided the option of short term storage of personal items. *Exhibit B*, Section II. The Executive Order stated that no unsheltered individual will be required to remove their encampment unless there is a shelter available for that individual. *Id.* Only after the above protocols were followed and only after an individual refused to remove their encampment, were City workers authorized to remove encampments. *Id.*

The Executive Order does not require the arrest or prosecution of any individual who refuses to remove their encampment. *Id.* Rather, the Executive Order plainly states that Boston police may continue to enforce criminal laws as well as disorderly conduct where an individual refuses to remove their encampment. *Exhibit B*, Section II.

C. The Boston Homeless Encampment Liaison Protocol.

The Mayor's Office also issued a revised Homeless Encampment Protocol on October 28, 2021.[5] *See generally Exhibit C.* The Protocol set forth relevant legal authority related to removal of encampments: G.L. c. 111, s. 31, emergency, and s. 122 nuisance, G.L. c. 270, § 120 (trespass); G.L. c. 272 § 53 (disorderly conduct, disturbing the peace, public urination, public nudity, lewdness); G.L. c. 161 § 95 (loitering on public transit property); and G.L. c. 22 § 13A (accessibility of public sidewalks and ways) as well as the high rate of criminal activity recurring

[5] Only removals that have occurred after October 28, 2021 were conducted pursuant to the revised Encampment Protocol.

in the vicinity of the encampments and the vulnerable nature of the population staying there. *Id.* at Section III.

i. *Standard Site Resolution Protocol.*

The Homeless Encampment Liaison Protocol consists of two kinds of site resolution protocols: the standard site resolution protocol and the immediate site resolution protocol. *Id.* at Sections V-VI.

The Standard Site Resolution Protocol consists of five steps: 1) notice of removal to unsheltered individuals; 2) notice to medical care providers; 3) outreach regarding services; 4) removal of encampment; and 5) post-removal notification. *Id.* at Section V.

Notice of removal provides at least 48 hours of notice prior to requiring removal of tents through 1) prominently posted signs in the immediate area of the tents; 2) notice affixed directly on the tent; 3) verbal notice and where individuals speak another language, translated notice in such language(s). *Exhibit C,* Section V. The notice is required to indicate 1) the area that would be cleaned and have tents removed; 2) the specific date and time by which individuals must remove their property; 3) the availability of free storage, how to arrange for storage, duration of storage and instructions on retrieval; 4) notice that any property left may be immediately disposed of; 5) contact numbers for agencies that provide recovery support services; and 6) contact information for available shelters. *Id.* The Protocol also requires the City to provide notice to medical providers known to be providing medical care to individuals in the area to allow them to coordinate continuum of care and ensure individuals were not disconnected from care. *Id.*

Between the time notice and removal, City staff are required to conduct verbal outreach and engagement actions at each tent. *Id.* Such outreach should continue at the time of notice as

well as at least one day prior to the day of removal. *Exhibit C,* Section V. Outreach shall include the following: 1) communication of required date of removal; 2) offer each individual the opportunity to engage in drug treatment services including inpatient detoxification; 3) offer each individual the opportunity to access shelter, including an identifiable bed or other low-threshold housing or shelter that is reserved to offer the individuals at the posted site, and for any individuals who indicate that they cannot comply with substance abuse rules at an identified shelter, offer an opportunity to engage in substance abuse treatment services or enter an inpatient detoxification program; 4) offer transportation, including vouchers, for individuals to travel to drug treatment or a shelter; 5) offer each individual free storage through its storage program; and 6) offer assistance in contacting family members and support of family reunification. *Id.*

At the time of removal of an encampment, individuals are required to remove their belongings but only when there is shelter, housing, or treatment placement available for that individual. *Id.* If an individual cannot comply with rules and requirements related to certain housing and shelter placements, the individual must be offered an alternative shelter or housing or an inpatient detoxification program at least 48 hours before being required to move. *Exhibit C,* Section V.

If an individual refuses to remove an encampment, City workers are then authorized to request assistance from Boston police. *Id.* City workers are then required to demonstrate to Boston police that they have complied with the five step protocol. *Id.* Once that is satisfied, a Boston police officer may make a final demand that the individual remove their encampment from the public way. *Id.* At the time a Boston police officer gives a final demand, the officer must offer an individual directions on how to move to a shelter, direct the individual to outreach workers who can assist in accessing shelter or housing resources, offer the individual the

opportunity to go to inpatient detoxification or substance treatment services, and offer the individual free storage for their belongings through the City's storage program. *Exhibit C,* Section V.

If, after those steps have been completed, an individual continues to refuse to remove their encampment from the public way, it may be considered disorderly conduct and at that time may be subject to enforcement. *Id.* In the event an individual is arrested for refusing to remove their encampment, the Boston police officer will ensure that the individuals' belongings are stored in the City's storage program, and will provide acute medical care including summoning Boston EMS. *Id.* At all times, individuals are free to leave with or without their encampment and/or belongings. *Id.* Individuals who leave are not subject to arrest even if they do not remove their encampment and/or belongings. *Exhibit C,* Section V.

Upon removal of an encampment, notices are required to be posted regarding where and how temporarily stored items can be retrieved. *Id.* Such notices will also contain the contact information for social service agencies and outreach workers will continue to engage unsheltered individuals in an attempt to connect them with services. *Id.*

ii. *Immediate Site Resolution Protocol.*

The Immediate Site Resolution Protocol occurs where there is an imminent risk to public health, safety, or security. *Exhibit C,* Section VI. In such situations, the removal of an encampment with less than 48 hours notice. *Id.* In the event of such circumstances the City worker must document the reason for that determination and provide as much notice as possible consistent with the imminent risk. *Id.* City workers will attempt to meet the needs of individuals through outreach and connections to social services and will provide notice that the area has been cleaned and certain items may be in storage. *Id.* Such notice will provide information on how to

check if personal property has been stored and how to retrieve such property. *Exhibit C,* Section VI. The City provides a procedure to file complaints associated with the implementation of the protocol. *Exhibit C,* Section VII. To date, the City has not utilized the immediate site resolution protocol.

iii. *The City's Free Property Storage Program.*

The City's free storage program provides any individual who lacks permanent shelter with personal belongings at the clean up site up to 90 days of free storage of eligible property. Individuals are provided with at least one 27 gallon storage container. *Exhibit C,* Section VII. The City provides free transportation to the storage site and will maintain a log of all items stored including the date each item was put into storage and the contact information and name of its owner. *Id.* After 90 days if the property is not claimed, the City may discard it. *Id.* Eligible property that can be stored for free for up to 90 days include bicycles, walkers, crutches or other individualized motorized transit including wheelchairs or motorized scooters that are not the property of a medical facility and any items that can fit in a 27 gallon container that are not 1) live animals; 2) illegal; 3) property infested with pests; 4) wet items (unless the removal occurs while it is raining) or items contaminated with biohazards including human or animal waste; 5) food, liquid or other organic matter; 6) weapons or explosives; 7) building materials such as wood products, rigid plastics or metal pallets; or 8) other items that are deemed unsafe to store by City officials including locked or sealed containers. *Id.* Items left at the site may be subject to disposal. *Exhibit C,* Section VII.

Property that is left at the unattended site on the date of the noticed cleanup is subject to immediate disposal, however, the City will make reasonable efforts to collect and store eligible property that is in plain sight even if it is unattended including but not limited to, personal

identification, photographs, legal and medical documents, medications and medical or mobility devices and any other property that is safe to store and is of apparent substantial value. *Id.* Individuals may establish proof of ownership when retrieving their personal items by describing the location of the cleanup, the time, and an accurate description of the property. *Id.* The City will also deliver items to people who have secured permanent housing. *Id.*

D. <u>The Encampment Protocol In Action</u>

The BPHC's Homeless Service Bureau (HSB) works to end homelessness and minimize the amount of time individuals spend in shelters by assisting guests in finding suitable housing within the City of Boston and Greater Boston. *See* Affidavit of Gerry Thomas, Interim Deputy Director of the Boston Public Health Commission , *attached hereto as Exhibit H.* In addition to providing emergency shelter services, BPHC's Homeless Services Bureau provides a range of services, including housing placement, employment, behavioral health, and healthcare. *Exhibit H,* ¶ 4.

HSB also provides housing stabilization so individuals can remain in housing and not return to shelter by addressing the challenges that led them to homelessness to begin with. *Id.* at ¶ 6. The housing department provides various housing programs to shelter guests based on the number of bed stays a guest has within the City of Boston Continuum of Care. *Id.* at ¶ 7. HSB provides housing navigation help finding market-rate units, lease signing and move-in assistance, short term rental assistance, and move-in costs. *Exhibit H,* ¶ 8. HSB provides specialized housing search services for individuals living with HIV/AIDS to help finding suitable housing in Boston and surrounding neighborhoods, and referrals to other services and specialized services for veterans experiencing homelessness. *Id.* at ¶ 9.

These services provide individualized services to each client that BPHC works with in a manner that is informed by each client's unique needs and wants. *Id.* at ¶ 10. BPHC has contracted with the Boston Health Care for the Homeless Program (BHCHP) to provide a medical clinic serving guests at both BPHC shelters. *Id.* at ¶ 11. BHCHP also provides direct medical services and outreach in the areas surrounding Southampton and Atkinson Streets. *Exhibit H,* ¶ 11.

Sobriety, including abstinence from drugs, is not a requirement for staying in Commission shelters or those of its partners at Pine Street Inn. *Id.* at ¶ 12. BPHC's Recovery Services programs provide clean needles, drug testing strips, and other harm reduction materials adjacent to the Commission's Shelters. *Id.* BPHC does not discriminate and has policies and practices in place to field and respond to reasonable accommodation requests. *Id.* at ¶ 13. Controlled substances are allowed with a prescription. *Exhibit H,* ¶ 14.

The BPHC shelters operate on a 24/7 basis and have excess capacity. *Id.* at ¶ 15. Individuals may stay inside all day if they choose, and shelters provide three meals a day. *Id.* The BPHC has declared amnesty for its two shelters, meaning that individuals who have been restricted from the shelter for violations of policies (other than those related to violence) in the past are now allowed to use BPHC shelters. *Id.* at ¶ 17.

Since October 19, 2021, the HSB efforts have resulted in a number of individuals being placed in housing. *Exhibit H,* ¶ 21. In the the first week of operation under the Protocol, ending November 6, 2021, HSB staff had 42 encounters with individuals interested in housing; these outreach efforts have revealed that many individuals living in the Mass and Cass encampments are generally eager to engage in housing search and placement and that many others are willing to enter temporary emergency shelter. *Id.*. During this same period, the broader Commission and

partner agency outreach efforts have resulted in 28 individuals moving into shelter, 32 individuals moving into residential treatment program settings and 13 individuals into transitional and permanent housing, the majority of which were permanent housing placements. *Id.* at ¶ 22.

During outreach efforts that are ongoing between notice of removal and removal, Boston police have provided support by directing traffic and ensuring road safety. *See* Affidavit of Kim Thai, Special Assistant, City of Boston, *attached hereto as Exhibit I.* In two instances, the BPD Street Outreach Unit officers, trained in recovery outreach and engagement, came with a Boston Emergency Services Team (BEST) clinician to assist with engaging individuals that were not responding to public health outreach staff. *Id.* at ¶ 7. The BPHC and HSB staff are not instructed to make any threat of arrest for reason of living in an encampment or any other reason as they conduct these outreach efforts. *Exhibit H,* ¶ 24. On the date of removal, City workers arrive at 6:00 a.m. and do not begin removal until the afternoon. The removal process is an all day process. *Exhibit I,* ¶ 13. For any property that was unattended at the time of removal, City workers make every attempt to locate the persons whose property this was, and ensure that valuable items such as personal identification, mail and other valuables were not left on the street. *Id.* at ¶ 12.

No arrests have been made in connection with outreach efforts conducted since October 19, 2021. *See* Affidavit of Devin Larkin, Special Assistant, City of Boston, *attached hereto as Exhibit J.*

STANDARD OF REVIEW

The party seeking a temporary restraining order or preliminary injunction must show "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the

injunction; and (3) that, in light of the [moving party's] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction." *Loyal Order of Moose, Inc., Yarmouth Lodge #2270 v. Board of Health of Yarmouth,* 439 Mass. 597, 601 (2003) (quoting *Tri-Nel Mgt., Inc., v. Board of Health of Barnstable,* 433 Mass. 217, 219 (2001).

Where a party seeks to enjoin government action, the court must also "determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Loyal Order of Moose Inc., Yarmouth Lodge #2270,* 439 Mass. at 601 (quoting *Commonwealth v. Mass. CRINC,* 392 Mass. 79, 89 (1984)). The standard used to consider a request for a temporary restraining order is the same as that used for a preliminary injunction. *G6 Hospitality Property LLC, v. Town of Braintree Board of Health,* WL 11565471 (Mass. Super. 2017) (citing *Quincy Cablesystems, Inc. v. Sully's Bar, Inc.,* 640 F.Supp. 1159 (D.Mass. 1986). Within this analytical framework, this Court should deny Plaintiffs' request for a temporary restraining order.

ARGUMENT

A. The Plaintiffs Do Not Have Likelihood of Success on the Merits.

Plaintiffs do not have a likelihood of success on the merits because they do not have standing to bring their Eighth Amendment or Article 26 claims. Assuming *arguendo,* Plaintiffs did have standing to bring their Eighth Amendment and Article 26 claims, they still do not have a likelihood of success on the merits because the Executive Order does not criminalize sleeping in public places.

Plaintiffs also do not have a likelihood of success under their Fourth and Fourteenth Amendment claims because the facts set forth in the verified complaint demonstrate that they

were afforded due process prior to their property being removed and that the removal of their property was not unreasonable because they had abandoned their property at the time it was seized. With respect to Plaintiffs' claims under the MCRA, the City is not subject to the claim and the individual defendants are entitled to qualified immunity, and Plaintiffs have also failed to demonstrate that they were threatened, intimidated, or coerced to give up a constitutional right.

Plaintiffs similarly will not be able to show that they were discriminated against on account of their disabilities because they were offered a shelter that was not particularized to their needs. The City's outreach program offered drug treatment and/or shelter at single sex shelters and plaintiffs refused without requesting an accommodation and there is no evidence that the shelters would not have provided a reasonable accommodation to them.

a. The Plaintiffs Lack Standing Under the Eighth Amendment And Article 26 Because The Executive Order and Encampments Protocol Are Not Criminal Laws.

The plaintiffs lack standing to bring claims under the Eighth Amendment of the United States Constitution and Article 26 of the Massachusetts Declaration of Rights because the Executive Order does not criminalize, fine, or punish any conduct. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The protections enshrined in Article 26 of the Massachusetts Declaration of Rights "are at least equally as broad as those guaranteed under the Eighth Amendment." *Torres v. Commissioner of Correction,* 427 Mass. 611, 695 (1998) (quoting *Michaud v. Sheriff of Essex County,* 390 Mass. 523 (1983)).

To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury." *Slama v. Attorney General,* 384 Mass. 620, 624 (1981). "[I]t has been an established principle in this Commonwealth that only persons who have themselves

suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of [another] branch of government." *Kaplan v. Bowker,* 333 Mass. 455, 459 (1956).

For the plaintiffs to have standing in the instant case, they must show that the "challenged action has caused [them] injury" and that there was a "breach of duty owed to [them] by the public defendants." *Sullivan v. Chief Justice for Admin & Management of the Trial Court,* 448 Mass. 15, 21 (2006). Simply alleging injury alone is not sufficient and "[i]njuries that are speculative, remote, and indirect" do not confer proper standing. *Id. See Los Angeles v. Lyons,* 461 U.S. 95, 101-102 (1983) ("plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury ... [that is] real and immediate, not conjectural or hypothetical" [quotations and citations omitted]); *Warth v. Seldin,* 422 U.S. 490, 501 (1975) (plaintiffs must allege "distinct and palpable injury" to invoke judicial intervention).

The Mayor, through the Executive Order, did not purport to create any new law or prohibition - much less any new criminal law or prohibition. The Executive Order explicitly limits its operation to calling upon City officials to enforce *existing* laws and *existing* powers. It does not purport to direct the police to arrest in any particular situation, nor does it purport to create any criminal law or prohibition. Not only does the Executive Order not purport to create any rules or criminal prohibitions, but it couldn't. First, an Executive Order is an exercise of the Mayor's *executive* authority to direct the manner in which City employees within departments perform their jobs. Ma. St. 1948, c. 452, s. 11. Second, the City generally, even when acting through the legislative process of enacting ordinances, cannot "define and provide for the

punishment of a felony or to impose imprisonment as a punishment for any violation of law." Articles of Amendments to the Massachusetts Constitution, Article 89, § 7.[6]

In other words, the Executive Order does not criminalize conduct that was not *already* criminal. If anything, the Executive Order *prevents* Boston police from arresting an unsheltered individual who refuses to remove an encampment on a public way *and* refuses to leave for disorderly conduct[7] until all steps set forth in the site resolution protocol have been documented and followed. Because the Executive Order does not criminalize, punish, or fine *any* conduct, plaintiffs cannot demonstrate an injury or threatened injury and therefore, lack standing to challenge the Executive Order under the Eighth Amendment of the United States Constitution or Article 26 of the Massachusetts Declaration of Rights. *See Yeager v. City of Seattle,* WL 7398748 at *5 (declining to apply Eighth Amendment analysis to non-criminal statutes).

b. The Plaintiffs Lack Standing Under The Eighth Amendment and Article 26 Because They Have Not Been Convicted Nor Threatened With Arrest.

Even if the Executive Order and Encampments Protocol did authorize the criminalization and/or punishment of individuals who refuse to remove encampments, the plaintiffs still do not have standing to bring claims under the Eighth Amendment or Article 26 because they have not been arrested, prosecuted, or convicted of any crime as a result of the implementation of the Executive Order.

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[6] Under the City of Boston Charter, in order for the Mayor to enact an ordinance prohibiting encampments in the City of Boston, the proposed ordinance has to be filed with the city clerk. The Boston City Charter, Section 17E. The Boston City Council would then have sixty days to either adopt or reject the ordinance. *Id.* If the City Council did not reject or accept the ordinance within sixty days of filing with the city clerk, the ordinance would then take full effect as if it had been adopted by the City Council. *Id.*

[7] The crime of disorderly conduct includes persons who, "with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof ...:(a) engage[ ] in fighting or threatening, or in violent or tumultuous behavior; or ... (c) create[ ] a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor." G.L. c. 272, § 53; *Commonwealth v. Chou,* 433 Mass. 229, 232 (2001).

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The protections enshrined in Article 26 of the Massachusetts Declaration of Rights "are at least equally as broad as those guaranteed under the Eighth Amendment." *Torres v. Commissioner of Correction,* 427 Mass. 611, 695 (1998) (quoting *Michaud v. Sheriff of Essex County,* 390 Mass. 523 (1983)). The Eighth Amendment is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, *see Whitley v. Albers*, 475 U.S. 312, 327 (1986), and thus, does not apply until "after sentence and conviction." *Hubbard v. Taylor*, 399 F.3d 150, 166 (3rd Cir.2005) (quoting *Graham v. Connor*, 490 U.S. 386, 392 n. 6, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

That is, "[a]s a matter of law, the Eighth Amendment's protection against cruel and unusual punishment only applies where a plaintiff is a prisoner during the alleged incident." *Rivera v. Diaz*, No. 09–1919, 2010 WL 1542191 at *6 (D.P.R. April 15, 2010) (citing *Torres–Viera v. Laboy–Alvarado*, 311 F.3d 105, 107 (1st Cir.2002)). "An examination of the history of the Amendment and the decisions of [the Supreme Court] construing the proscription against cruel and unusual punishment confirms that it was designed to protect those *convicted* of crimes." *Ingraham,* 430 U.S. at 664 (emphasis added).

The law is well settled that "a plaintiff who has not been prosecuted under a criminal statute does not normally have standing to challenge the statute's constitutionality [under the Eighth Amendment]." *See, Boyle v. Landry,* 401 U.S. 77, 91 (1971); *Palermo v. Rorex,* 806 F.2d 1266, 1271 (5th Cir. 1987) ("The cruel and unusual punishment clause of the Eighth Amendment applies only in criminal actions, following a conviction."); *Robinson v. California,* 370 U.S. at 663 (*post-conviction* challenge to validity of California law for criminalizing narcotics

dependence). *But see Martin v. City of Boise,* 920 F.3d 584 (2019) (finding two plaintiffs had pre-conviction standing based on the credible threat of prosecution under the existing ordinance).

Here, plaintiffs do not have standing to challenge the Executive Order on Eighth Amendment or Article 26 grounds because none of the plaintiffs have alleged to have been threatened with arrest, arrested, prosecuted, or convicted of a crime associated with the implementation of the Executive Order.

Plaintiffs will likely argue that under *Martin v. City of Boise,* 920 F.3d 584, 609-610 (2019), they have standing because the Executive Order threatens arrest by stating that unsheltered individuals who refuse to leave and refuse to remove their encampment after the site resolution protocols have been followed *may* be considered disorderly. Unlike the plaintiffs in *Martin,* who were found to have standing to seek prospective relief from ordinances that banned sleeping because they faced a credible risk of prosecution for sleeping outside--an involuntary and biological act--after being denied access at a shelter, the plaintiffs here face no such risk. In fact, plaintiffs' risk of being arrested is no greater now than it was before the issuance of the Executive Order.

Thus, even if this Court were so inclined to grant pre-conviction standing to plaintiffs for prospective relief under the Eighth Amendment and Article 26 where the threat of arrest is present, no such threat exists under the alleged facts. "If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974). Accordingly, plaintiffs do not have standing to challenge the Executive Order or Encampment Protocols under the Eighth Amendment of the United States Constitution

and Article 26 of the Massachusetts Declaration of Rights and therefore, do not have a likelihood of success on the merits.

c. The Plaintiffs Cannot Demonstrate a Violation of the Prohibition Against Cruel and Unusual Punishment Clause of the Eighth Amendment.

Even if plaintiffs had standing to bring claims under the Eighth Amendment and Article 26, such claims do not have a likelihood of success on the merits because contrary to plaintiffs' arguments, the Executive Order is *not* the equivalent of a prohibition on "living in public places."

The Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways." *Ingraham,* 430 U.S. at 667. First, it limits the type of punishment the government may impose; second, it proscribes punishment "grossly disproportionate" to the severity of the crime; and third, it places substantive limits on what the government may criminalize. *Id.* With respect to the third limitation, courts have held that it should be a "rare case" where a court invokes the Eighth Amendment's criminalization component. *Jones v. City of Los Angeles,* 444 F.3d 1118, 1146 (9th Cir. 2006) (Rymer, J. dissenting). It is the third limitation that plaintiffs invoke to challenge the Executive Order and Encampment Protocols.

The entire premise of the plaintiffs' challenge to the Executive Order--that it bans "living in public places"--is flatly wrong. The Executive Order bans *encampments* on public ways and the plaintiffs have failed to cite to any legal authority that prohibitions on encampments (versus sleeping or the use of bedding in order to sleep) is a violation of the Eighth Amendment. Plaintiffs reliance on the Ninth Circuit case, *Martin v. City of Boise,* and its progeny to support their argument that the City's prohibition on encampments is akin to criminalizing homelessness, is wide of the mark.

In *Martin,* the Ninth Circuit held that two city ordinances[8] that prohibited sleeping in public places even when no indoor sleeping options existed, violated the Cruel and Unusual Punishments Clause of the Eighth Amendment. As the *Martin* court explained, [o]ur holding is a narrow one. . . 'we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place.' We hold only that 'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.'" *Id.* at 617 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

In determining that the number of homeless individuals had exceeded the number of beds available in shelters, the court examined the emergency shelter system in Boise. There were three privately-operated homeless shelters. *Id.* at 605. One shelter was regularly full and turned away guests. *Id.* The other two shelters, a men's and women's shelter, were operated by a Christina nonprofit organization. *Id.* In those shelters, check-in times were early, shelter was denied to those arriving after 8:00 pm (and sometimes earlier), and in non-winter months stays were limited to 17 days for men and 30 days for women and children unless individuals opted into an intensive Christian-based recovery program. *Id.* at 605-606. Under these circumstances, the

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[8] The two ordinances at issue were 1) the Disorderly Conduct Ordinance which prohibited "[o]ccupying, lodging, or sleeping in *any* building, structure or place, whether public or private" without permission; and 2) the Camping Ordinance which prohibited camping on "any of the streets, sidewalks, parks or public places at any time," and defined camping as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at any time between sunset and sunrise. . . indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another *or in combination with either sleeping or making preparations to sleep (including laying down of bedding for the purpose of sleeping).* *Martin,* 920 F.3d at 618.

court concluded that the ordinances were enforced when there were no beds available to unsheltered individuals, because one shelter could be full while the others turn people way for exceeding the length of stay or other non-capacity rule, or would require them to enroll in religious programming that may be antithetical to their beliefs in order to stay longer. Id. at 609-610. In order to meet the burden of determining that there were enough beds,

Recognizing *Martin* as controlling Ninth Circuit precedent, courts have upheld government efforts to remove encampments. *See Quintero v. City of Santa Cruz*, WL 1924990, at *3 (N.D. Cal. Apr. 30, 2019), *appeal dismissed*, WL 6318730 (9th Cir. Sept. 11, 2019)(denying a TRO against an encampment removal and distinguishing *Martin* on grounds that record does not show city had prosecuted anyone and that the city had offered alternative adequate options by talking to encampment residents, passing out vouchers, opening a shelter for at least 60 days, and identifying two other shelters that would have space for longer than 60 days); *Le Van Hung v. Schaaf,* WL 1779584, at *4 (N.D. Cal. Apr. 23, 2019)(no likelihood of success on merits of 8th Amendment claim against the removal of an encampment even assuming insufficient shelter beds because clearing the park did not require the arrest of any person residing in the park, but simply that they move from that particular location); *Miralle v. City of Oakland,* WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018)(denying a preliminary injunction against an encampment removal where city offered indoor shelter, stating that "*Martin* does not establish a constitutional right to occupy public property indefinitely at Plaintiffs' option.").

Under *Martin, however,* courts in the Ninth Circuit have invalidated ordinances that preclude simply sleeping on public property. The United States District Court of Oregon in *Blake v. City of Grants Pass,* WL 4209227 at * 6 (2020), found that the city's two anti-camping

ordinances--which did not prohibit sleeping[9]--but did prohibit the use of "bedding, sleeping bag, or other material used for bedding purposes for the purpose of maintaining a temporary place to live," violated the Eighth Amendment because the ordinances banned the use of bedding and as such, criminalized an individual's "life sustaining need to keep warm and dry while sleeping in order to survive the elements." *Id.* at 6. More recently, the Eastern District of California, recognizing *Martin* as controlling precedent, issued a preliminary injunction against a city ordinance that made it unlawful for any individual to "sit, lie, stand, sleep on any public property within the City without being subject to criminal penalties." *Warren v. City of Chico,* WL 2894648 at *2.

Here, unlike the bans found to be unconstitutional in *Martin,* and its progeny, the Executive Order does not prohibit sleeping in public places, nor does it prohibit the use of bedding while sleeping or lying down, and it does not prohibit sleeping in public places even if there *are* available shelter beds. The Executive Order does not even *displace* unsheltered individuals as plaintiffs argue. Rather, the Executive Order only displaces an *encampment* on a public way after the site removal protocol is followed when an unsheltered individual has been offered drug treatment or an *available* bed. Encampments, unlike bedding, are not "minimal measures taken to keep one warm and dry when there is no alternative shelter available." *Cf. Blake,* WL 4209227 at *16. Moreover, encampments are not "universal and unavoidable consequences of being human," *Jones*, 444 F.3d at 1136, or "conduct that is an unavoidable consequence of being homeless--namely sitting, lying or sleeping on the streets." *Martin*, 920 F.3d at 617. Encampments pose significant health and safety risks to their occupants, first responders, and the public because among other things, they lack running water, hygiene

[9] Following the Ninth Circuit's decision in *Martin,* the City of Grants Pass amended its anti-camping ordinances to remove the ban on "sleeping." *Blake,* at *6.

facilities, conceal illicit activities and/or individuals in need of medical attention from first responders, and expose their occupants to extreme weather. Indeed, the *Martin* Court recognized that an ordinance "barring the obstruction of public rights of way or the erection of certain structures" would not be unconstitutional so long as it did not punish a person "for lacking the means to live out the 'universal and unavoidable consequences of being human'" at 617, n.8; *see also Blake,* WL 4209227 at * 16 (2020) (acknowledging that prohibition on "encampments that cause public health and safety concerns" would not violate the Eighth Amendment).

Plaintiffs' argument that a prohibition on encampments violates their Eighth Amendment rights unless they are provided with housing that meets their specific disability-related needs, is a gross misstatement of the *Martin* holding. The *Martin* holding is narrow and applies only to the criminalization of *sleeping* in public where there is no option of indoor sleeping. *Id.* at 603-04.

More fundamentally, whether considering mere sleeping or the actual erection of tents and shelters in the middle of the sidewalk, the City's approach complies with the holding of *Martin.* While it is not necessary to undertake an analysis as to what "available" shelter means because the Executive Order does not prohibit sleeping in public, it is worth noting that plaintiffs' argument that *Martin* requires "available" shelter to be individualized disability-related housing, stretches its holding beyond its logical extreme. *Martin* held that shelter is not "available" only if one is prevented from using it because he is denied entry or is required to participate in religious activities that are antithetical to his beliefs. *Id.* at 609-10. It did not hold that the Eighth Amendment requires the government to either allow encampments indefinitely or provide individualized housing for persons with disabilities.

The Executive Order has established a command structure to track and marshal available resources so that City departments can know the availability of shelter beds, other transitional

housing, and inpatient recovery services and only conduct removal when such options are available. In conducting cleaning of specific portions of streets and sidewalks under the Protocol, City staff have offered individual's substance use treatment services and placements, transitional housing when available, and shelter beds. The shelter beds available in Boston provided by BPHC (and other providers) do not share the limitations the court pointed to in *Martin*: capacity is confirmed on removal days; shelters do not turn away people for capacity; shelters accept guests after late afternoon; shelters do not limit stays; shelters do not require religious activities, shelters do not require sobriety, and shelters are obligated to address requests for accommodations.

Where active substance use might make it impossible for an individual to access such shelter beds they are offered the opportunity to enter substance use treatment. And unlike in *Martin* where the ordinance criminalized sleeping throughout the city, the Protocol only requires people to move from those portions of public property that have been specifically noticed 48 hours in advance for cleaning. *Martin* does not create a right to erect and maintain a shelter on a specific portion of public sidewalk until such time as the City provides individualized housing, regardless of other options for shelter, treatment, housing, or to simply move. Thus, even if *Martin* was authoritative, the Executive Order would survive Eighth Amendment and Article 26 scrutiny. Plaintiffs do not have a likelihood of success on their Eighth Amendment and Article 26 claims.

d. Plaintiffs' Do Not Have a Likelihood of Success on Their Claims Against Mayor Kim Janey and Acting Commissioner Gregory Long[10] In Their Individual Capacities[11] Because They Are Entitled to Qualified Immunity.

"An official sued under § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was 'clearly established' at the time of the challenged conduct." *Plumhoff v. Rickard,* 134 S.Ct. 2012, 2023 (2014). "[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Id.* The Supreme Court has " 'repeatedly told courts ... not to define clearly established law at a high level of generality,' since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Id.* (quoting *Ashcroft v. al-Kidd,* 131 S.Ct. 2074, 2084 (2011)).

"The purpose of this requirement is "to ensure that before they are subjected to suit, [public officials] are on notice that their conduct is unlawful." *Hope v. Pelzer,* 536 U.S. 730, 739 (2002) (quoting *Saucier v. Katz,* 533 U.S. 194, 206 (2001)). "By providing government officials with the ability to reasonably anticipate when their conduct may give rise to liability for damages, the doctrine of qualified immunity strikes a balance between compensating those injured by official conduct and protecting the [g]overnment's basic ability to function." *Farmer*

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[10] The verified complaint is without allegations whatsoever that Acting Commissioner Gregory Long has violated any of the plaintiffs' constitution rights. Long is not alleged to have directed anyone to arrest or threaten to arrest the plaintiffs. Nor is Long alleged to have directed or actually participated in the removal and /or disposal of any of the plaintiffs' belongings. Thus, there are no factual allegations to support any claims against Long.

[11] Plaintiffs also sue Mayor Janey and Commissioner Long in their official capacities. Official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent. *Monell v. Dep't of Social Services,* 436 U.S. 658, 690 (1978). "As long as the government entity receives notice and opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham,* 473 U.S. 159, 166 (1985).

v. Moritsugu, 163 F.3d 610 (D.C. Cir. 1998) (citation and internal quotation marks omitted). Officials are entitled to the same "fair warning" that their conduct will deprive persons of constitutional rights. *Hope*, 536 U.s. at 739-40.

As set forth *supra,* plaintiffs do not have an Eighth Amendment right to an encampment on a public way. Assuming *arguendo,* that the Ninth Circuit holding in *Martin* clearly established one's Eighth Amendment right to sleep in public when no indoor sleeping option was available, there is not a single case that holds that laws or regulations banning encampments runs afoul of the Eighth Amendment. Accordingly, Mayor Janey and Commissioner Long are entitled to qualified immunity.

Mayor Janey and Commissioner Long are entitled to qualified immunity on plaintiffs' Fourth and Fourteenth Amendment claims because the facts do not allege that they actually seized or disposed of anyone's property or directed anyone to do so.

Moreover, the Executive Order and Encampments protocol does not run afoul of the Fourteenth Amendment. Indeed, the Protocol provides due process prior to the removal of property from the public way including notice, an opportunity to remove the belongings or store them and an opportunity to be heard through the City's complaint process. Accordingly, the Encampment Protocol does not run afoul of the plaintiffs' clearly established Fourteenth Amendment rights and Mayor Janey and Commissioner Long are entitled to qualified immunity.

Mayor Janey and Commissioner Long are entitled to qualified immunity on plaintiffs' Fourth Amendment claims because it is not clearly established that plaintiffs had a right to store their property on a public way indefinitely in the midst of a public health crisis even after they were provided specified notice that their items had to be removed. Accordingly, Mayor Janey or Commissioner Long are entitled to qualified immunity Plaintiffs' constitutional claims.

e. The Plaintiffs Do Not Have A Likelihood of Success on Their Claim Under Title II of the Americans with Disabilities Act.

i. *As Against Defendants Mayor Kim Janey and Commissioner Long in Their Individual Capacities.*

Plaintiffs' Title II claims under the ADA as brought against Mayor Kim Janey and Commissioner Gregory Long in their individual capacities do not have a likelihood of success on the merits because Title II does not provide for suits against state officials in their individual capacities. *See, e.g., Vinson v. Thomas,* 288 F.3d 1145, 1156 (9th Cir. 2002); *Garcia v. State of Univ. of N.Y. Health Scis. Ctr.,* 280 F.3d 98, 107 (2d Cir. 2001); *Alsbrook v. City of Maumelle,* 184 F.3d 999, 1005 n. 8 (9th Cir. 1999).

ii. As Against the City of Boston.

Plaintiffs do not have a likelihood of success on their claims under Title II of the ADA because they have not been discriminated against on the basis of their disabilities.[12] Title II of the ADA prohibits discrimination in public services and transportation and states, "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

The Department of Justice (DOJ) promulgates regulations implementing the ADA. For Title II of the ADA, the regulations state that a public entity may not: 1) deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; 2) afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; 3) provide a

[12] For the limited purposes of this opposition, the City Defendants will accept as true that the plaintiffs are qualified individuals with disabilities under the Americans with Disabilities Act. Similarly, the City Defendants also agree for the limited purposes of this opposition that the City is a public entity engaging in a program or service through its Encampment Protocol.

qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others. 28 C.F.R. § 35.130(b)(1)(i)-(iii).

However, a public entity also may not:

> [p]rovide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others.

Title II of the ADA defines a disability as a physical or mental impairment that substantially limits one or more major life activities of such an individual." Massachusetts courts have generally recognized that the 40A§ 3 definition of disabled encompasses individuals designated as disabled under the federal definitions. *Brockton Fire Dep't v. St. Mary Broad St., LLC*, 181 F. Supp. 3d 155, 157 (D. Mass. 2016); *see also S. Middlesex Opportunity Council, Inc. v. Town of Framingham,* 752 F. Supp. 2d 85, 90 (D. Mass. 2010). With respect to reasonable modifications, Title II's promulgating regulations provide that a public entity "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130.

Where a plaintiff alleges a failure to make reasonable accommodations, the defendant's duty to provide a reasonable accommodation is not triggered until the plaintiff makes a specific demand for an accommodation or the need for an accommodation becomes obvious. *See Wolfe v. Fla. Department of Corr.,* WL 4052334 at *4 (M.D. Fla. Sept. 14, 2012) ("In addition to showing that Wolfe is a qualified individual with a disability, Plaintiff must show that Wolfe

requested an accommodation or the need for one was obvious and the public entity failed to provide a reasonable accommodation.") (citing *McCoy v. Tex. Department of Criminal Justice,* WL 2331055 at *7-9 (S.D. Tex. Aug. 9, 2006)); *see also Rylee v. Chapman,* 316 Fed. Appx. 901, 906 (11th Cir. 2009) ("In cases alleging a failure to make reasonable accommodations, the defendant's duty to provide a reasonable accommodation is not triggered until the plaintiff makes a 'specific demand' for an accommodation.").

When the public entity provides a reasonable accommodation that gives a disabled individual an "equal opportunity to ... gain the same benefit," the public entity has provided "meaningful access." *Alexander v. Choate,* 469 U.S. 287, 301 (1985). A public entity is not required to provide an accommodation that would "fundamentally alter" its programs or services. 28 C.F.R. § 35.130(b)(7)(i) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."). The burden of proving a fundamental alteration lies with the defendant; "[i]f the defendant fails to meet this burden, it must make the requested modification." *Alumni Cruises, LLC v. Carnival Corp.* 978 F.Supp. 2d 1290, 1306 (S.D. Fla. 2013).

A qualifying disabled person is entitled to a reasonable accommodation, but not necessarily the accommodation of their choice. *See Stewart v. Happy Herman's Cheshire Bridget, Inc.,* 117 F.3d 1278, 1285-86 (11th Cir. 199) ("[s]tated plainly, under the ADA a qualified individual with a disability is 'not entitled to the accommodation of her choice, but only to a reasonable accommodation.'"); *Redding v. Nova Se. Univ., Inc.,*165 F.Supp.3d 1274, 1296-97 (S.D. Fla. 2016)(stating in the ADA Title III context that a student "was entitled to only

a reasonable accommodation and not necessarily the accommodation of her choice"); *but see Albonga, v. Sch. Bd. of Broward Cty. Fla.,* 87 F.Supp.3d 1319, 1341 (S.D. Fla. 2015) (noting in ADA Title II case that "refusing Plaintiff's requested accommodation if it is reasonable in favor of one the [Defendant] prefers is akin to allowing a public entity to dictate the type of services a disabled person needs in contravention of that person's own decisions regarding his own life and care").

Here, plaintiffs' argue that the City violated Title II of the ADA's reasonable accommodation requirement by not 1) creating an individualized process to assess all unsheltered individuals' disability related needs; and 2) failing to provide individualized housing or the option of remaining encamped indefinitely to individuals with disabilities. Plaintiffs' argument turns Title II on its head.

Plaintiffs' argument attempts to rewrite Title II by adding the requirement that the City must assume that every unsheltered individual has a disability and needs an accommodation. Where the alleged violation involves the denial of a reasonable modification/accommodation, "the ADA's reasonable accommodation requirement usually does not apply unless 'triggered by a request.'" *Reed,* 244 F.3d 254, 261 (1st Cir. 2001). This is because a person's "disability and concomitant need for accommodation are not always known ... until the [person] requests an accommodation." *Id.* Although "sometimes the [person]'s need for an accommodation will be obvious; and in such cases, different rules may apply" *Id.* at 261 n.7. Here, plaintiffs did not request an accommodation, rather they outright rejected the shelter options offered. Moreover, plaintiffs' disabilities (HIV and PTSD) are not such that would be obvious to outreach workers. Therefore, the reasonable accommodation requirement under Title II was not triggered.

Next plaintiffs' argue that whenever the City engages in outreach to connect unsheltered individuals with shelter beds or drug treatment, it is required to *also* offer individualized housing or the option of remaining indefinitely encamped on a public way *irrespective* of whether the programs offered can actually reasonably accommodate individuals' disabilities. Title II does not mandate such an exceedingly high requirement. Indeed, such a requirement would fundamentally alter the City's outreach response, which the law does not require. 28 C.F.R. § 35.130(b)(7)(i) (A public entity is not required to provide an accommodation that would "fundamentally alter" its programs or services.)

Plaintiffs' conclusory allegations that no shelter can ever accommodate their disabilities is insufficient to support their claim under Title II. Plaintiffs allege that their disabilities prevent them from ever staying at shelters because 1) congregate shelters put them at greater risk for contracting Covid-19 and developing severe complications;[13] and 2) rigid, noisy and highly stimulating environments trigger their PTSD as does their inability to control their surroundings. Yet, plaintiffs have failed to show that they requested accommodations from the BPHC shelters and were denied.

This failure is particularly damaging to their prospects of success where BPHC has policies and practices in place to field and respond to reasonable accommodation requests. *Exhibit H*, ¶ 13. In essence, plaintiffs argue that without requesting an accommodation or knowing whether the BPHC shelter can actually reasonably accommodate their disabilities, the only accommodations they would accept would be to remain indefinitely in an encampment or government-sponsored individualized housing. Contrary to plaintiffs' assertion, the ADA

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[13] Plaintiffs' argument that living in an encampment on a public way affords individuals with disabilities more protection from contracting Covid-19 than shelters with established Covid-19 safety protocols run by public health officials strains logic.

requires only a reasonable accommodation not the plaintiffs' accommodation of choice. *See Stewart v. Happy Herman's Cheshire Bridget, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997).

Not one case cited by plaintiffs supports their argument that Title II requires the City to have an individualized process to assess disability-related needs before offering unsheltered individuals with drug treatment or a bed at a shelter. Nor do they support plaintiffs' argument that the only reasonable accommodations for unsheltered individuals living with disabilities is the continued use of dangerous encampments or government-sponsored individualized housing. Plaintiffs' claims under Title II of the ADA are not likely to succeed on the merits because they cannot show that Title II was triggered nor can they show that the BPCH shelters that were offered to them could not reasonably accommodate their disabilities.

Lastly, plaintiffs' argument that the City's Executive Order forces "persons with disabilities either to roam the streets with nowhere to even camp or to be forced into the criminal legal system" flies in the face of the facts. Not a single individual has been arrested for failing to remove an encampment. The City and BPHC have embarked on a compassionate and humane public health response to the unsheltered individuals living in dangerous encampments at Mass and Cass. The City's response requires the offer of drug treatment, inpatient detoxification programs, and available shelter (where reasonable accommodations under the ADA are required), the continued connection with medical care providers, efforts to reunite individuals with their families, free storage as well as transportation, and a commitment to continued efforts to provide additional housing options.

f. Plaintiffs Do Not Have a Likelihood of Success on the Merits of their Fourteenth Amendment Claims Because the Encampment Protocols Provide Due Process.

Plaintiffs do not have a likelihood of success on the merits of their Fourteenth Amendment claims because the Encampment Protocol provides sufficient due process prior to the removal of personal property including: 48 hours notice prior to removal, notice affixed both directly to an encampment and prominently in the area of the removal, free storage of property, at least one 27 gallon bin (and in practice more) to freely store personal belongings as well as bicycles and other mobility devices for up to 90 days, free transportation to the storage site, post-notice removal, delivery of items if individuals move into permanent housing, and a complaint process.

Relevant cases have found that 48 hours[14] is sufficient notice where there is a declared public health crisis and the City offers free storage of both unattended and attended items. *Cf. Sturgeon,* 2020 WL 11191761, at *4 (2020) (two weeks notice of removal was required prior to destruction of property where no storage option was available); *Denver Homeless Out Loud v. Denver, Colorado,* 514 F.Supp.3d 1278, 1308-09 (2021) (finding 48 hours notice of sweep reasonable under the Fourth and Fourteenth Amendment where public health agency determines public health or safety risks based on evidenced-based reasons); *Mitchell v. City of Los Angeles,* WL 11519288 at *4-5 (2016) (finding defendants provided essentially no notice prior to confiscation of property and no meaningful post-deprivation process for return of property).

Here, on October 19, 2021, the Boston Public Health Commission declared the encampments at Mass and Cass a public health crisis on the grounds that such encampments:

[14] Although the Encampment Protocol outlines the procedure for immediate site removal where there is an imminent health and/or safety risk, such protocol still requires as much notice as the imminent risk allows. Nonetheless, there is no evidence that the City has ever invoked the immediate site removal protocol.

> present unsheltered individuals, outreach workers, and first responders with significant public health, infectious disease, public safety, sanitation, and fire safety challenges; these temporary structures lack clean water, adequate hygiene facilities, and present a significant risk of weather exposure, particularly in late fall and winter; tents are unfit for human habitation and individuals living in tents are at increased risk for overdose, human trafficking, sex trafficking, and other forms of victimization.

Unlike the *Sturgeon* and *Denver Homeless Out Loud* cases, where the plaintiffs' were not offered storage prior to their property being destroyed, here the City offers free storage of both attended and certain unattended items, an inventory log, free transportation to and from storage, delivery option if individual secure permanent housing, and removal complaint process. Moreover, on October 19, 2021, the BPHC declared the encampments in the area of Mass and Cass as a public health emergency and as such, 48 hours is reasonable notice under the Fourteenth Amendment of the United States Constitution. *Denver Homeless Out Loud v. Denver, Colorado,* 514 F.Supp.3d 1278, 1308-09 (2021) (48 hours notice reasonable under the Fourth and Fourteenth Amendment where there is an evidence-based public health emergency).

With respect to plaintiffs, the allegations show that they received notice of the scheduled removal and on the date of the removal either left their items unattended and/or did not remove them from the area. Plaintiffs were given notice that their property would be removed, warning that unattended items might be destroyed, and an opportunity to remove them prior to removal. Moreover, the day of removal is protracted, with outreach beginning at 6:00 am but removal of items from the public way beginning only in the afternoon, thus furthering notice and reducing the possibility of individuals leaving items in the cleanup area unattended without the intent of abandoning them. Accordingly, neither the Encampment Protocol nor the removal of the plaintiffs' belongings violated the Fourteenth Amendment and plaintiffs' do not have a likelihood of success on the merits.

g. Plaintiffs Do Not Have a Likelihood of Success On the Merits of Their Fourth Amendment Claims Because Any Seizure of Property Was Reasonable.

Plaintiffs do not have a likelihood of success on the merits of their Fourth Amendment claims because 1) the Encampment Protocol and the City's interest in mitigating the health and safety hazards posed by encampments satisfy the Fourth Amendment reasonable analysis; 2) plaintiffs' property was not seized within the meaning of the Fourth Amendment because it had been abandoned; and 3) even if plaintiffs' property was not abandoned, the seizure was reasonable under the Fourth Amendment.

The City Defendants agree that unsheltered individuals have a Fourth Amendment interest in their unabandoned property. A "seizure" of property under the Fourth Amendment occurs when there is "some meaningful interference with an individual's possessory interests in that property." *Id.* at 1027 (citation omitted). A seizure is deemed unreasonable if the government's legitimate interest in the seizure does not outweigh the individual's interest in the property seized. *Id.* 1t 1030. The Fourth Amendment prohibits the "interference with the possessory interests of their "unabandoned legal papers, shelters, and personal effects." *See Lavan v. City of Los Angeles*, 693 F.3d 1022, 1028-30 (9th Cir. 2012).

i. *Plaintiffs' Individual Fourth Amendment Claims.*

"A warrantless search or seizure of property that is 'abandoned' does not violate the Fourth Amendment," because when individuals abandon their property they forfeit any possessory interest they had in the property. *United States v. Thomas,* 864 F.2d 843, 845 (D.C.). Here, plaintiffs are unlikely to prevail on their Fourth Amendment claim because the alleged facts demonstrate their property was abandoned and, as a result, could not be unconstitutionally "seized." *See id.* The test for abandonment in the Fourth Amendment context is whether,

objectively, the owner intended to abandon the property. *Thomas,* 864 F.2d at 846. Although the inquiry focuses on the intent of the owner, because the test is an objective one, "intent may be inferred from 'words spoken, acts done, and other objective facts.'" *Id.* (quoting *United States v. Colbert,* 474 F.2d 174, 176 (5th Cir. 1973)). "Abandonment may be demonstrated, for example, when a suspect leaves an object unattended in a public space." *United States v. Most,* 876 F.2d 191, 196 (D.C. Cir. 1989).

Unlike in *Lavan*, where the city destroyed homeless individuals' unattended property on-the-spot without notice, knowing that the plaintiffs' property had not been abandoned, *Lavan v. City of Los Angeles,* 693 F.3d 1022, 1032 (2012), here, plaintiffs received advanced notice[15] of the specific removal date, were engaged by outreach workers regarding the cleanup date and shelter options and storage, and on the date of the removal, left their property unattended.

With respect to Plaintiff Geddes, the alleged facts are that he received notice of the specific date of the removal, was offered shelter and storage which he rejected, and on the date of the removal left his belongings unattended to travel to a methadone clinic. *See* verified complaint at ¶ 49. Given that the City's removal process begins at 6:00 a.m. and takes all day and that City workers make every effort to locate the owners of any unattended property, the facts do not support a finding that Plaintiff Geddes had only left his belongings momentarily or that City workers knew his property had not been abandoned. *See Proctor v. District of Columbia,* 310 F.Supp.3d 107, 116 (D.D.C. May 2, 2018) (finding plaintiff who walked away at beginning of cleanup after receiving advanced notice of cleanup abandoned her property).

Similarly, the verified complaint establishes that RAR and AC also received advanced notice of the removal date and as a result hid their tent. *See* verified complaint at ¶ 55. On the

[15] Although plaintiffs' take issue with the notices being in English, the facts establish that they were aware of the removal. Plaintiffs also allege that Notice of Removal signs have been posted in Spanish as of November 1st. *See Verified Complaint,* p. 16, ¶ 55, n.11.

removal date, RAR and AC stored their belongings in a nearby friend's tent that City workers would have had no way of knowing belonged to them or had not been abandoned. ¶ 55. Although they allege that the items in their tent were seized and they were not offered storage, those allegations are contradicted by their other allegations that they hid their tent and stored their items in a nearby friend's tent. *See* verified complaint at ¶ 55. At most, the allegations in the verified complaint present a conflicting dispute of fact with respect to whether RAR and AC's property was abandoned and as such, a temporary restraining order is not appropriate.

Even if plaintiffs' property was not abandoned, the removal of such property was reasonable under the Fourth Amendment. *See e.g. Yeager v. City of Seattle*, 2020 WL 7398748, at *4 (W.D. Wash. Dec. 17, 2020); *see also Watters v. Otter*, 955 F. Supp. 2d 1178, 1190 (D. Idaho 2013). All of the plaintiffs were on notice and knew that the City would not allow them to keep their property at that location and that on the date of the removal, they would be required to move their belongings. And on the day of removal, the activity of the cleanup, including outreach and engagement, started at 6:00 am and continued for hours before abandoned tents were removed in the afternoon. Still, plaintiffs did not timely move the items they wished to keep. To be sure, "'[t]he government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking.' " *Id.* at 1032 (quoting *Clement v. City of Glendale,* 518 F.3d 1090, 1093) (9th Cir. 2008)). However, it is the latter scenario that happened in this case.

The Fourth Amendment does not prohibit the City from removing items stored on its property where a homeless resident, if given an indefinite amount of time, would eventually return to collect them. *Sullivan v. City of Berkeley,* 383 F.Supp.3d 976, 986 (N.D. Cal. April 19, 2019). In assessing the reasonableness of the seizure, courts must conduct a balancing test of the

intrusion on the individual's possessory interests against the government's countervailing interests. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Here, there is no question that the City has a legitimate interest in removing unsafe or hazardous conditions from its public spaces and restoring passage on its public sidewalk. It is clear that the balance of intrusion on the plaintiffs' possessory interests in their belongings weighs in favor of the City's interest in removing the items left behind given the significant public health and safety hazard of the encampments at Mass and Cass. Thus, even if the City did seize plaintiffs' items under the Fourth Amendment, it was reasonable.

ii. *The City's Encampment Protocol is Reasonable Under the Fourth Amendment*

Similarly, the City's Encampment Protocol is reasonable under the Fourth Amendment because it provides 48 hours notice of a specific date and time of removal, warns individuals that property left unattended will be subject to disposal, and prevents removal of items until individuals are offered drug treatment or shelter services. In addition, the Protocol requires translation of the notice to those individuals who do not read English. Individuals are offered at least one 27 gallon storage prior to the date of removal as well as the free storage of large items such as bicycles, walkers, and other motorized mobility items. The City offers free transportation to and from shelter as well as to the storage facility site. No items can be removed until after an individual has been offered shelter and/or drug treatment. On the day of the removal, individuals are given additional time to store items prior to removal. If the individual is unable to comply with the substance use rules of a shelter, they are given an opportunity to engage in substance use treatment. On the day of removal City staff look for and retain mail, identification, and other documents among abandoned property in the cleanup area. After removal, the Protocol requires notice to be posted so that individuals may reach out to social

service agencies and retrieve any stored items. Such procedural safeguards are reasonable under the Fourth Amendment. *Watters v. Otter,* 355 F.Supp.2d 1178, 1189-90 (D. Idaho, June 26, 2013) (Fourth Amendment reasonableness satisfied where notice and storage were afforded prior to removal)

The City's interests are significant given the significant public safety and health risks the encampments pose to their occupants, first responders, and outreach workers. The encampments are subject to rodent infestation, lack bathrooms, running water, or hygiene facilities and greatly increase the risk of the spread of infectious disease.[16] The encampments prevent public health workers and first responders from detecting fires, human trafficking or other victimizations of their occupants. Individuals in need of medical attention are hidden from view. The statistics over the last eleven months are nothing short of alarming: 28 deaths, 13 sexual assaults, 122 aggravated assaults, and over 700 narcan illness responses. The City's interests in removing the encampments are hardly "amorphous" as plaintiffs argue. *See Yeager v. City of Seattle*, 2020 WL 7398748 (W.D. Wash. Dec. 17, 2020) (finding significant governmental interest where there had been at least five fires, two medical calls, and an increase in violence).

Contrary to plaintiffs' arguments, the present facts are not "on all fours" with *Garcia v. City of Los Angeles,* 11 4th 1113, 1117 (9th Cir. 2021), where the Ninth Circuit held that a removal provision in the City's ordinance violated the Fourth Amendment. In *Garcia,* the "Bulky Items Provision" of the City's ordinance authorized without notice the removal and disposal of any item stored in a public area, not designed to be a shelter, too large to fit into a sixty gallon container whether it be attended or unattended. 11 4th at 1117. With prior notice,

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[16] Boston first responders received a safety bulletin warning them to take precautions to avoid the potential spread of Leptospirosis in the area which can be spread by the urine of rodents.
https://www.wcvb.com/article/mass-and-cass-mayor-janey-executive-order-october-19-2021/38004699

the "Bulky Items Provision" allowed for the removal of items designed to be a shelter that could not fit within a 60 gallon bin. *Id.* During the City's cleanups, plaintiffs were prevented from moving their bulky items to another location and instead, all items that did not fit within the 60 gallon bin were immediately discarded. *Id.*

This Encampment Protocol stands in stark contrast to the Bulky Items Provision of the Los Angeles ordinance. First, plaintiffs are given 48 hours notice prior to any removal regardless of the size or use of the items. Second, the Encampment Protocol does not call for the destruction of items that do not fit within a 27 gallon bin. Most critically, the Encampment Protocol does not prevent individuals from moving items too large to fit in a 27 gallon bin or items not eligible for storage to another location. *Cf. Garcia,* 11 F.4th at 1117-1118. The City's Encampment Protocol satisfies the reasonableness requirements of the Fourth Amendment and Plaintiffs are unlikely to succeed on the merits of this claim.

h. <u>The Plaintiffs Cannot Demonstrate a Violation of the Massachusetts Civil Rights Act.</u>

The Plaintiffs cannot demonstrate a likelihood of success on the merits of their claim under G. L. c. 12, § § 11H &11I, the Massachusetts Civil Rights Act ("the MCRA" or " § 11I"). There is no likelihood of success because an MCRA claim cannot be brought against a municipality, and the claims brought against individuals are barred by qualified immunity. Even assuming that the MCRA claim could be brought against any defendants it would fail because the Plaintiffs have not established violation of a constitutional right nor that they were subject to threats, intimidation, or coercion.

i. MCRA Claims Cannot be Brought Against a Municipality.

There is no likelihood of success on the merits of this claim against the City, the Acting Mayor in her official capacity, or the Acting Police Commissioner in his official capacity,

because a municipality cannot be liable under the MCRA. "[A] municipality is not a 'person' covered by the Massachusetts Civil Rights Act. "*Howcroft v. City of Peabody,* 51 Mass. App. Ct. 573, 591-92 (2001); *see also Pimentel v. City of Methuen*, 323 F. Supp. 3d 255, 272–73 (D. Mass. 2018)(dismissing claim because municipality not subject to MCRA); *Kelley v. LaForce,* 288 F.3d 1, 11 n.9 (1st Cir. 2002)(town entitled to summary judgment because town cannot be sued under MCRA); *Radfar v. City of Revere,* 2021 WL 4121493, at *10 (D. Mass. Sept. 9, 2021)(same); *Dyer v. City of Boston,* 2018 WL 1513568, at *7 (D. Mass. Mar. 27, 2018)(same); *Guerriero v. Town of Hanover,* 102 N.E.3d 425 (Mass. App. 2018)(town is a municipality and is immune from claims under § 11). The MCRA claim against the Acting Mayor and the Acting Police Commissioner in each person's official capacity is a claim against the municipality, and likewise cannot succeed. *See Fletcher v. Szostkiewicz*, 190 F. Supp. 2d 217, 230 (D. Mass. 2002).

ii. MCRA Claims Against Individuals Barred by Qualified Immunity

Under the MCRA, claims against public officials sued in their individual capacity are subject to the same standard of qualified immunity developed under § 1983. *Duarte v. Healy,* 405 Mass. 43, 46 (Mass. 1989). That standard considers: "(i) whether the plaintiff's allegations, if true, establish a constitutional violation; (ii) whether the constitutional right at issue was clearly established at the time of the putative violation; and (iii) whether a reasonable officer, situated similarly to the defendant, would have understood the challenged act or omission to contravene the discerned constitutional right." *Limone v. Condon,* 372 F.3d 39, 44 (1st Cir.2004) (citation omitted). That analysis points overwhelmingly towards qualified immunity for both officials, therefore there is no likelihood of success on the merits of Plaintiffs' MCRA claims against either official in their individual capacity. As discussed *supra* Plaintiffs' allegations do not establish a constitutional violation.

Even more plainly, the constitutional right at issue cannot be said to have been clearly established at the time of the putative violation. Plaintiffs have not identified any First Circuit or Massachusetts cases that establishes a right to remain on a particular portion of the public sidewalk of the plaintiffs' choosing without having to leave when a municipality needs to clean up the area or restore the ability of pedestrians to pass. Instead, the Plaintiffs' Eighth Amendment claim is based on an expansive reading of *Martin v. Boise*, a Ninth Circuit case with a holding that differs significantly from the rule plaintiffs now seek to announce in Massachusetts.

Similarly, plaintiffs have not identified any cases clearly establishing that the ADA prohibits requiring individuals to move encampments off of specific sidewalks after notice, an opportunity to engage in substance use treatment, opportunities to stay in emergency shelters operated by private entities subject to Title I of the ADA and public entities (the BPHC) subject to Title II of the ADA, efforts to locate other transitional housing, and the right to leave. Finally and similarly, plaintiffs have not identified any cases that clearly establish that the balance between the advanced notice, free storage options provided by the City, and ability to remove items on the days of scheduled cleanups provided by the City announced in the Executive Order and protocol clearly violate rights concerning the seizure of property.

Finally, there is no plausible way to determine that a reasonable official situated similarly to the Acting Mayor or Acting Police Commissioner defendant would have understood the issuance of the Executive Order or Protocol to contravene any such constitutional rights. The Executive Order does not purport to create any new criminal rules or prohibitions, but rather focuses on the need to focus resources and application of existing rules on a public health crisis. The Executive Order specifically directs City employees to ensure that individuals living

unsheltered in encampments on public property are provided with notice of cleanups, provided an opportunity to store items for free, provided opportunities to enter substance use treatment, provided opportunities to enter shelter, before requiring that they move from the specifically noticed portion of the public way. Even if Plaintiffs can argue that cases involving different (and stricter) rules from another circuit should lead to the invalidation of certain aspects of the city policies, there is no way that a reasonable officer would have understood the Executive Order to contravene such yet-to-announced rights.

3. Plaintiffs have not established violation of a constitutional right nor that they were subject to threats, intimidation, or coercion.

Even if the City or individual defendants were subject to suit, the MCRA claim would fail. "To establish a claim under the Act, the plaintiffs must prove that (1) their exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by 'threats, intimidation or coercion.'" *Swanset Dev. Corp. v. City of Taunton*, 423 Mass. 390, 395 (1996). As set forth in sections a - g above, plaintiffs cannot satisfy the first element because they have not demonstrated that the the Constitution or laws of the United States or Commonwealth secure a right to camp on noticed portions of the public way without having to move, even when provided with notice, offers of substance use treatment, shelter, and storage.

Plaintiffs also cannot satisfy the third element, because the requirement that Plaintiffs remove their tents from noticed portions of the public way was not accomplished by "threats, intimidation, or coercion." A "'[t]hreat'...involves the intentional exertion of pressure to make another fearful or apprehensive of injury or harm. 'Intimidation' involves putting in fear for the purpose of compelling or deterring conduct. ['Coercion' is] 'the application to another of such

force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.'" *Cummings v. City of Newton*, 298 F. Supp. 3d 279, 289 (D. Mass. 2018), quoting *Planned Parenthood League of Massachusetts, Inc. v. Blake*, 417 Mass. 467, 474 (1994). The conduct of City staff simply lacks these characteristics. The City has promulgated an Executive Order and Protocol, noticed cleanups of specific portions of public sidewalks, engaged in outreach work to amplify that notice and offer services, and conducted cleanups of its sidewalks. Outreach workers do not threaten arrest or harm, nor do they physically confront or intimidate individuals. Moreover, our cases typically look for actual or potential physical confrontation accompanied by a threat of harm to constitute a threat, intimidation, or coercion under the MCRA. *See, e.g. Bennett v. Holyoke*, 230 F. Supp. 2d 207, 228 (D. Mass. 2002), S.C., 362 F.3d 1 (1st Cir. 2004); *Blake,* 417 Mass. 467, (protesters physically invaded clinic and physically obstructed patients); *Carvalho v. Town of Westport,* 140 F.Supp.2d 95, 100–01 (D.Mass.2001) ("[T]he Supreme Judicial Court has suggested that a showing of an 'actual or potential physical confrontation accompanied by a threat of harm' is a required element of a claim under the Act."). Government employees simply doing the hard work of conveying unwelcome messages do not threaten, intimidate, or coerce people for purposes of the MCRA.

In addition to the fact that City staff did not act in a threatening, intimidating, or coercive manner, as a matter of law the conduct of City staff is not subject to the MCRA because, if anything, City staff were directly interfering with the Plaintiffs' ability to keep their tents on the noticed sidewalks. The MCRA does not apply to a direct interference with a person's rights. *Longval v. Commr. of Correction*, 404 Mass. 325, 333 (1989) (citing *Pheasant Ridge Assocs. Ltd. Partnership v. Burlington*, 399 Mass. 771, 781 (1987)). Here, the City's efforts are direct. The City required people remove their tents from noticed portions of the sidewalk. The notice that the

City gave to individuals of the cleanup is simply a required part of the process of conducting the cleanup. Plaintiffs are complaining about the process of directly requiring them to move off of noticed sidewalks, and as such cannot establish an MCRA violation.

B. The Plaintiffs Have Failed to Establish the Potential For Irreparable Harm

In addition to demonstrating a likelihood of success on the merits, plaintiffs must establish a potential for irreparable harm in the absence of an injunction. *Com. v. Mass. CRINC*, 392 Mass. 79, 87 (1984). The harm itself must be harm "not capable of remediation by a final judgment in law or equity." *Id.*

As set forth *supra,* plaintiffs' allegations do not set forth a plausible claim under the Fourth, Eighth or Fourteenth Amendments. Contrary to plaintiffs' arguments, plaintiffs are not being denied a safe place to sleep. In fact, as a result of the City's coordinated efforts with numerous agencies, the encampment protocol is transitioning unsheltered individuals away from gravely dangerous sleeping conditions to safe shelter. Temporarily restraining the implementation of the Encampment Protocols would irreparable harm the City's interest by halting the City and BPHC's coordinated efforts, grounded in principles of public health, to transition unsheltered individuals away from dangerous encampments to drug treatment and/or shelter where they will be provided with access to resources, medical care, storage for their belongings, and safe and habitable living conditions.

Contrary to plaintiffs' unsupported argument, there is no "legal right" to remain encamped at Mass and Cass. Nonetheless, there is no evidence that Boston police have ever threatened or made a single arrest of an individual who has refused to both leave the area and take down their encampment. Plaintiff's argument that they and the other members of their

class, will suffer irreparable harm if they are not allowed to remain indefinitely in encampments that pose a significant health and safety threat to their occupants, first responders, outreach workers and any member of the public who seeks to travel through the encampment area either by car or on foot, is directly at odds with public health and safety.

C. The Public Interest and Balance of Harm Weighs Heavily in the City's Favor.

It is without question that the public interest and balance of harm weighs decidedly in the City's favor. One cannot reasonably argue otherwise.

The numbers are dire. In the last eleven months alone, 22 people have died at Mass and Cass not including the 6 who were murdered. Another 13 people were the victims of sexual assault. There were 122 aggravated assaults. Boston EMS has responded to the area over 4,000 times including over 700 responses for narcotics related illnesses. There have been 6 reported fires, 4 of which were arson. As the temperatures become increasingly cold, the urgency to remove dangerous encampments and transition unsheltered individuals to treatment programs and/or shelters increases ten-fold. The risk that unsheltered individuals living in encampments may utilize, without detection, makeshift heating devices in order to combat the dropping temperatures, makes any interruption of the Executive Order a serious safety risk.

Plaintiffs' argument that the City's Executive Order is motivated by a desire to "clean up" Mass and Cass and cast the unsheltered individuals who stay there "to the wind" is as appalling as it is wrong. The enormity of the effort undertaken by the City, the BPHC, and its dedicated employees who have worked tirelessly to mitigate the dangerous and inhumane living conditions at Mass and Cass while compassionately providing resources and opportunities for treatment and safe shelter to the individuals who stay there, cannot be questioned.

Plaintiffs' request to halt the encampment protocol until such a time as the City provides individualized housing to all unsheltered individuals or delivers portable toilets, showers, hand-washing stations, and hygiene trailers to the area has no basis in law or fact Plaintiffs' request for a restraining order effectively requires the City to individually house all unsheltered individuals *or* build a makeshift outdoor shelter in a sprawling urban area comprised of several large intersections, multiple three-lane thoroughfares with heavy vehicular traffic, and numerous businesses. Neither the United States Constitution nor any other state or federal law requires such an undertaking and as such, it is at best specious for plaintiffs to suggest that they only seek a "pause" to enjoin the City's lawful efforts to alleviate the public health crisis at Mass and Cass until their demands are met.

Here, the City's Encampment Protocols protect its most vulnerable citizens from the unsafe and uninhabitable living conditions of the encampments at Mass and Cass by providing resources, free drug treatment and/or inpatient detoxification and/or shelter, a continuum of medical care, and free storage in order to build a pathway to transition the unsheltered individuals away from the dangerous conditions of the encampments at Mass and Cass to stable and secure shelter where they can be connected with resources and treatment for their individualized needs. The balance of harm categorically weighs in favor of the City. Plaintiffs' motion for a temporary restraining order/preliminary injunction should be denied.

WHEREFORE, the City respectfully requests that the Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction be denied.

Respectfully submitted,

THE CITY OF BOSTON, THE BOSTON POLICE DEPARTMENT, KIM M. JANEY IN HER CAPACITY AS MAYOR OF THE CITY OF BOSTON AND INDIVIDUALLY, AND GREGORY P. LONG IN HIS CAPACITY AS ACTING COMMISSIONER OF THE BOSTON POLICE DEPARTMENT AND INDIVIDUALLY,

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Certificate of Service

I, Lisa Skehill Maki, 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/ Lisa Skehill Maki
Lisa Skehill Maki