

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

Supreme Judicial Court
of Suffolk County

Ronald Geddes, AC, and RAR,

on their own behalf and on behalf of a class of
similarly situated individuals,

Plaintiffs,

v.

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

Defendants.

Civil Action No. SJ-2021-0408

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

INTRODUCTION

“Our law does not permit punishment of the homeless simply for being homeless.” *Commonwealth v. Magadini*, 474 Mass. 593, 601-602 (2016). But at this very moment, the unhoused are being criminalized in Boston, facing arrest and prosecution simply for trying to shelter themselves in the only place they have to live—the streets.

The individual plaintiffs and putative class members are homeless and residing in the area of Boston bounded in part by Massachusetts Avenue and Melnea Cass Boulevard (“Mass & Cass”).¹ They are staying at Mass & Cass because they have nowhere else to go, as their disability-related conditions make single-gender, congregate shelter options inappropriate for them. Indeed, the Centers for Disease Control and Prevention have specifically called on governments *not* to destroy encampments, like theirs, during this perilous time. “Clearing encampments,” according to the CDC, can cause people to disperse throughout the community,” “break connections with service providers,” and “increase[] the potential for infectious disease spread.”² Therefore, absent “individual housing options,” the CDC advises that people in encampments should not be punished, but allowed “to remain where they are.”³ Indeed, for the individual plaintiffs and putative class members, leaving Mass & Cass would not simply mean losing shelter; it could cut off their access to the medications, services, and community that keep them alive.

¹ The Chief Justice of the Boston Municipal Court (BMC) has defined “Mass and Cass” as “the geographic location surrounded by: a) Melnea Cass Boulevard, Hampden Street and Norfolk Avenue to the train tracks to the south and west; b) Massachusetts Avenue and Southampton Street to the train tracks and Interstate Route 93 to the north and east; and c) Washington Street, Massachusetts Avenue and Harrison Avenue to the north.” Ex. A, BMC Chief Justice Roberto Ronquillo, Jr., Boston Municipal Court Comm. Resp. Session Juris., Standing Order 02-21 (Oct. 30, 2021).

² See CDC, *Interim Guidance on People Experiencing Unsheltered Homelessness* (July 8, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>.

³ *Id.*

Nevertheless, public officials are in the middle of a weeks' long process of "sweeping" these encampments—threatening, intimidating, and coercing those living there—by telling them that if they do not leave, they may be arrested and they will have their material possessions confiscated. This threat has been communicated every day since the issuance of the acting Mayor's October 19 Executive Order that declares in no uncertain terms that, henceforth, it is *crime* to live in a tent or other makeshift shelter on public land anywhere in the City of Boston. Since October 19, City employees and agents have delivered an insistent message to the unhoused, self-sheltered residents at Mass & Cass that they can no longer attempt to put a roof over their heads on public ways, even though those streets are the only viable place they have to live. These statements have been followed by 48 hours' eviction notices and, soon after, City employees arrive backed up with dump trucks and police officers to forcibly tear down tents and shelters and throw all these residents' worldly possessions into a City dumpster—leaving unhoused residents traumatized and even more vulnerable than they were before.

Of course, some of the Defendants public statements might be read to imply that no one is displaced before the City identifies a better and safer place for them to stay.⁴ But, as the record in support of this motion illustrates, this is not the reality. On threat of arrest, prosecution,

⁴ Danny McDonald, *A Day After Historic Election, Advocates Call On Wu To Change City's Mass. and Cass Course*, BOS. GLOBE (Nov. 3, 2021), <https://www.bostonglobe.com/2021/11/03/metro/day-after-historic-election-advocates-call-wu-change-citys-mass-cass-course/> (Mayor-elect Michelle Wu has stated that Mass. and Cass is a priority for her administration and has announced plans to *begin* auditing city land or facilities in an effort to "alleviate the housing crisis." Wu further stated that the administration will continue to connect individuals who are houseless with services and treatment in the interim, until low threshold housing is able to be established.)(emphasis supplied); *City, State Partnering On Changes At Mass. and Cass*, BOS. 25 NEWS (Oct. 20, 2021) <https://www.boston25news.com/news/local/city-state-partnering-changes-mass-cass/Q67GPRNR6FAKXN6RA5A47EJPH4/> (City and state Health and Human Service Departments met for the first time on Oct. 19, 2021, tasked with identifying resources, shelter, and treatment options, for individuals who are houseless. Acting Mayor Janey stated that the city would work on implementing suggested changes "as soon as possible.")

and property destruction, Defendants tell residents in substance, “you can go to a shelter,” even though many residents, including Plaintiffs, cannot access existing shelters without further jeopardizing their health. Public officials are reportedly working to expand shelter options for unhoused people in Boston. Yet Defendants resorted to their sweep—and its attendant traumatization and property destruction—before those efforts were complete.

This is no different from telling someone who uses a wheelchair that, to avoid arrest and property destruction, they must “go to a shelter” that sits atop a flight of stairs. And, for similar reasons, it is unlawful.

Under basic principles of criminal law, including the bedrock constitutional prohibition against cruel and unusual punishment, people cannot face law enforcement action for conduct they were powerless to avoid. *See Martin v. City of Boise*, 920 F.3d 584, 604 (9th Cir. 2019). Under basic principles of disability law, it is discrimination to carry out a policy in a way that fails to reasonably accommodate the needs of people with disabilities. And under the Fourth Amendment to the United States Constitution and Article 14 of the Declaration of Rights to the Massachusetts Constitution and principles of due process, it is unreasonable to seize the possessions of unhoused people and summarily discard them. These protections are “secured” rights within the meaning of the Massachusetts Civil Rights Act, *see* G.L. c. 12, § 11H, and the defendants are interfering with those rights by “threats, intimidation or coercion” in the form of unceasing pressure tactics to “just leave.”

Absent immediate injunctive relief from this Court, Plaintiffs will continue either to be left without any adequate shelter at all—putting their very lives at risk—or at risk of arrest and prosecution for doing the only thing they can do: live on the streets of Mass & Cass. As explained below, Plaintiffs urgently ask this Court to enjoin the Defendants from carrying out

their policy and practice of using the threat of arrest, prosecution, and property destruction to forcibly displace unhoused persons in Boston, unless and until the Defendants have in place (1) an effective, individualized system for identifying appropriate housing alternatives for any affected person, and (2) proper notice and property storage policies.

FACTUAL BACKGROUND

I. The Situation at Mass & Cass.

“Individuals struggling with substance use disorder, homelessness and mental health have been drawn to the [Mass & Cass] area due to the availability of treatment, health care and shelter.”⁵ A migration to Mass & Cass began after the closure of Boston’s Long Island Bridge cut off access “for hundreds of homeless individuals seeking shelter on the island.”⁶ This year, the area was further transformed by people setting up tents, and other shelters, due to the lack of other available housing, exacerbated by the COVID-19 pandemic.⁷ As of October 19, 2021, there were an estimated 150 tents.⁸ During one recent weekend, city workers reportedly engaged with approximately 350 people in the area, 85 percent of whom had been sleeping there.⁹

⁵ Former Boston Mayor Marty Walsh, *Melnea Cass/Mass Ave 2.0: A strategic plan for Newmarket Square and neighboring communities*, 1 (Oct. 2019), available at https://www.boston.gov/sites/default/files/embed/m/melnea_cass_mass_ave_2.0.pdf.

⁶ WBUR, *Closure of Boston’s Long Island Bridge Cuts Access to Shelter*, <https://www.wbur.org/news/2014/10/09/boston-long-island-bridge>.

⁷ Danny McDonald, *‘There is an urgency’*, *The Boston Globe* (Oct. 19, 2021), available at <https://www.bostonglobe.com/2021/10/19/metro/janey-unveils-mass-cass-plan-city-declares-addiction-homelessness-public-health-crisis/>.

⁸ *Id.*

⁹ See WCVB, *Boston starts countdown to removing tents from ‘Mass. & Cass’ encampment* (Oct. 29, 2021), available at <https://www.wcvb.com/article/boston-starts-countdown-to-removing-tents-from-mass-and-cass-encampment/38108451>.

Many of the people staying in the encampments are vulnerable and in need of health and other services.¹⁰ As Suffolk County District Attorney Rachael Rollins put it, “We are dealing with the most medically compromised population that you can imagine.”¹¹

II. The Mayor’s Executive Order and Implementing Protocol.

On October 19, Acting Mayor Kim Janey issued “An Executive Order Establishing a Coordinated Response to Public Health and Encampments in the City of Boston.” Ex. B, (Oct. 19, 2021) [hereafter “Executive Order” or “EO”]. Under the Executive Order, “tents and temporary shelters are not allowed in the public way in the City of Boston.” *Id.*, Part II, 1.¹² On October 28, 2021, the City released the “Boston Homeless Encampment Liaison Protocol as of October 28, 2021,” which details how the City is to displace the individuals staying at the Mass & Cass encampments. Ex. C [hereafter “the Protocol”].

A. Criminal Enforcement.

The Executive Order provides that tents and temporary shelters will be removed against the backdrop of the threat of arrest and prosecution. It directs that “all City agencies will now prioritize enforcement of existing law and the exercise of existing powers to prevent the placement and maintenance of these encampments in the city.” EO, Part II(1). Both the Executive Order and the Protocol state that a person’s refusal to remove their belongings “may be considered disorderly conduct, and be subject to the enforcement of the existing laws” of Massachusetts.” EO, Part II,

¹⁰ See Ex. K, BMC Chief Justice Ronquillo, Jr., *Police Powers of Court Officers at Temp. Comm. Resp. Session*, Admin. Order 01-21 (Oct. 30, 2021) (acknowledging ongoing humanitarian crisis and establishing special court).

¹¹ Deborah Becker, *Gov. Baker supports sheriff’s plan for ‘Mass. and Cass,’* WBUR (Oct. 25, 2021), available at <https://www.wbur.org/news/2021/10/25/governor-baker-supports-sheriffs-plan-for-mass-and-cass>

¹² “Temporary shelter” is not defined in either the Executive Order or the Protocol. Plaintiffs do not have information as to whether it would encompass bedding items, such as sleeping bags or comforters, or other items used to facilitate sleep and provide defense against elemental conditions.

3; Protocol at 6. Public officials have also suggested that law enforcement will use actual or threatened arrests on outstanding warrants as a means of removing people from the area.¹³ The Trial Court has created a special session to hear cases from the area. Ex. 5, BMC Standing Order 02-21.

B. The “Standard” and “Immediate” Site Resolution Protocols.

The Protocol creates a Coordinated Response Team (“CRT”) to execute the displacements via two different procedures: the “Standard Site Resolution Protocol” [hereafter “Standard Protocol”] and the “Immediate Site Resolution Protocol” [hereafter “Immediate Protocol”]. Protocol at 3.

The Standard Protocol requires city employees to post notices 48 hours before individuals at an impacted encampment location must remove their tents or other temporary shelters from City property. *Id.* at 3-4. The notices are supposed to provide information, including contact numbers and addresses, about agencies that provide a range of recovery support services and shelter and housing services, specifically where the City has identified shelter beds, low-threshold housing options, or other reserved shelter options. *Id.* at 4.

The Standard Protocol states that, “[w]here an individual may have barriers that preclude compliance with rules and requirements related to certain housing and shelter placements, the individual must have been offered the opportunity to go to *any available* low-threshold housing or other shelter, to enter an inpatient detoxification program, or to engage in other drug treatment programming at least 48 hours before being required to move.” *Id.* at 5 (emphasis added). It does not prohibit enforcement action against a person for whom “low-threshold housing or other

¹³ See Deborah Becker, *New court could be operating in Suffolk County jail as early as next week*, WBUR (Oct. 27, 2021), available at <https://www.wbur.org/news/2021/10/27/sheriff-tompkins-trial-court-melnea-cass-tent-encampments>

shelter” is *not* available; nor does it define the term “low-threshold housing or other shelter.” Likewise, the protocol makes no provision for people with substance use issues who are not ready for “treatment.” Nor does it provide for accommodating those who cannot use congregate shelters because of disabilities *other* than substance use disorder, including the types of disabilities of the named Plaintiffs. *Compare id.* at 4 (“For individuals who indicate they cannot comply with substance use rules at an identified shelter, offer an opportunity to engage in substance treatment services or go to an inpatient detoxification program.”), and *id.* at 5–6 (listing preconditions for arrest), *with Verified Compl.*, ¶¶ 9–11, 18–22.

If a person refuses to remove their belongings when ordered, the Standard Protocol expressly authorizes BPD officers to arrest the non-compliant person for disorderly conduct. Protocol at 6.

For displaced people wishing to retain their personal property, the Standard Protocol provides for the storage of only “Eligible Property” fitting in a 27-gallon bin, unless it is “a functional, empty, and disassembled tent ... contained in a bag or neatly tied bundle;” “[a] non-commercial and functional bicycle, walker, crutches, other forms of individual motorized transit such as a mobility scooter, or a wheelchair not clearly identified as property of a medical facility;” or items such as identification papers, eyeglasses, prescription medication, or jewelry. *Id.* at 7. An item is ineligible for storage if it is, among other things, wet (unless removal occurs while raining) or deemed unsafe to store by City officials, such as “locked or sealed containers.” *Id.* at 7–8. Unattended items are generally subject to immediate disposal at the scheduled time of the “cleanup.” *Id.* at 8. The Standard Protocol leaves the determination as to what is considered “Eligible Property” to the discretion of “the relevant staff member.” *Id.* at 7.

For property deemed eligible, the Standard Protocol states that it must be moved into storage prior to the scheduled cleanup date, and individuals will have 90 days from the date of storage to retrieve it. *Id.* at 8. Under the Standard Protocol, information about the availability of storage for eligible property must be given at least 48 hours in advance of a “cleanup” action. *Id.* at 4; *see also id.* at 6 (requiring post-removal notices for property not destroyed during “cleanup” action). People must contact the City to arrange storing options. *Id.* at 8.

In contrast, under the Immediate Protocol, no notice need be given, and displaced individuals’ property may be immediately destroyed, if an appropriate city employee determines that it “poses an imminent risk to public health, safety, or security.” *Id.* at 6. The Immediate Protocol does not include any criteria for how such an “imminent risk” is to be determined, and it does not require officials to provide housing options. Instead, it instructs the CRT merely to “*attempt* to meet the needs of unsheltered individuals by providing outreach and connections to social services.” *Id.* (emphasis added).

III. The Defendants’ Enforcement Actions.

Notwithstanding language in the Executive Order and Protocols referring to a need to “identify a specific shelter or treatment bed available to an individual at the time of removal,” EO, Part II.3, people at Mass & Cass are being forced to leave without being provided any adequate, alternative sheltering options. *See also* Protocol at V(D). This reality is revealed by the actual conduct of the displacement actions on October 25,¹⁴ October 28, and November 1, 2021.

A. Actual and Threatened Displacement.

On October 25, the people who were forced to remove their tents were offered only Pine Street Inn as an alternative shelter. Pine Street and similar congregate shelters, however, are not a

¹⁴ This occurred before the public release of the Protocol, but after the October 19 issuance of the Executive Order.

viable option for many displaced individuals, including because they are congregate shelters where the risk of contracting COVID-19 is higher¹⁵ and are not appropriate for those with certain disabilities common among the impacted population, including Plaintiffs. Indeed, individuals are often not allowed to return due to past stays there, Ex. E, Affidavit of Cassie Hurd, ¶ 8 [hereinafter “Hurd Aff.”], and they do not allow different-sex partners to stay together.

On October 28, the date on which the Protocols were publicly released, City employees and their agents cleared living areas around the corner of Southampton and Theodore Glynn Way. When impacted residents asked where they could go, they were again told “you can go to Pine Street.” No enforcement actions were halted pending confirmation that this option would actually work for the people subject to the displacement.

On November 1, during another clearing action, residents of Mass & Cass were once again not provided—either before or after their possessions were confiscated—any specific, individualized shelter options suitable to their needs. The only immediate, alternative sheltering options suggested were to go to Pine Street, Woods Mullen or Southampton Street congregate shelters. Indeed, Woods Mullen was listed in the displacement notices posted on over the prior weekend, as the only option for women, and Southampton Street was listed as the only option for men, other than drug treatment programs which are not appropriate for many people. Hurd Aff., ¶ 22; Verified Compl., ¶ 53. For many residents of Mass & Cass, these congregate shelters are not viable alternatives due to their disabilities and family situations.

Because these actions occurred without regard to the actual availability of viable beds for the specific person displaced, numerous people were displaced but left without housing options.

¹⁵ See *Interim Guidance on People Experiencing Unsheltered Homelessness*, *supra* note 2.

Hurd Aff., ¶ 27. As discussed more below, each named Plaintiff is now living on the streets without adequate shelter. Verified Compl., ¶ 58. The Plaintiffs are therefore less safe now than they were at Mass & Cass. Verified Compl., ¶¶56–58. These actions also sent a clear message to everyone at Mass & Cass: you must leave on pain of arrest, prosecution, or loss of property, even if you have nowhere else to go.

B. Property Destruction.

On October 29, 2021, notices were posted regarding the planned November 1, displacement action. *See* Ex. D. They were posted only in English, even though many residents speak and read only Spanish. *Id.*; Hurd Aff., ¶ 26. The notices informed impacted people that they could supposedly call a number to arrange for storage of some of their items, purportedly the limited items that are allowed to be stored under the Protocol. However, the number listed for this storage arrangement connected to a *shelter*, and, when the number was called on the weekend, the person answering said she neither knew about the notice nor provided storage. Hurd Aff., ¶ 19.

On November 1, large numbers of City employees, including law enforcement officers descended on the area around approximately 15 tents where many people were living. Hurd Aff., ¶¶ 20–22; Verified Compl., ¶¶52–53. Initially, the BPHC staff had 27-gallon bins which targeted people potentially could use to store a few items, but those who told City representatives that they could not go to the congregate shelters were told they could not store *any* of their items in the bins or otherwise. Hurd Aff., ¶ 12. Whatever possessions targeted people could not carry away were thrown into the street and picked up by City workers, presumably for disposal. Hurd Aff., ¶ 23; Verified Compl., ¶ 54.

IV. Irreparable Harm to Plaintiffs

The individual plaintiffs—Ronald Geddes, “RAR,” and “AC”—were all displaced by the Defendants without being afforded any actually available and appropriate sheltering option. They have each had their property seized and summarily destroyed. They are each extremely anxious and scared about what will happen to them. Verified Compl., ¶ 58.

A. Ronald Geddes

Plaintiff Ronald (“Ronnie”) Geddes is experiencing homelessness in part because of the ongoing collateral consequences of his criminal history and because he lost a job due to COVID. He has bipolar disorder and post-traumatic stress disorder (“PTSD”), related in part to abuse he experienced as a child. He is in recovery for substance use disorder, for which he receives medication for opioid use disorder treatment in the form of methadone. Over the past year or so, he has resided at the Mass & Cass area, in a tent with his possessions neatly arranged. Verified Compl., ¶ 9.

Over the course of this past summer, as public officials increasingly spoke about taking action to displace people at Mass & Cass, Mr. Geddes and other residents of the area regularly discussed their anxieties about what would happen to them. News of the October 19 Executive Order increased their anxieties, and Mr. Geddes still had no viable alternative housing. Given his PTSD and other mental health issues, he simply cannot tolerate staying in a congregate, single-sex shelter, such as Pine Street, Woods Mullen, or Southampton Street. Verified Compl., ¶ 45.

On or about October 23, 2021, the City posted English-only written notices at and near Mr. Geddes’s tent, which told people to remove all of their possessions by Monday, October 25. Mr. Geddes skipped his scheduled methadone treatment on October 25, due to a fear that his encampment would be cleared and his possessions discarded unless he remained with them. That

morning, police were positioned at each end of the street, as City workers approached people in the area. Some workers told him he could go to Pine Street Inn and that, if he did, they could store some of his things for him in a plastic bin. They also told him that they did not know how or when he would be able to get back anything that he put in the bin. After he explained he could not stay at Pine Street, they took back the storage offer. Possibly because it was raining heavily, City workers did not seek to displace him that day. Verified Compl., ¶¶ 44–45.

On October 28, 2021, City employees and their agents arrived to clear Mr. Geddes’s encampment. When they arrived, he was at the clinic for his methadone treatment,. When he returned to his site, *all* his possessions except a wet blanket and few clothes had been removed and thrown in a City trash truck. He saw someone who appeared to be a City employee holding his hockey stick; he asked for and got it back. In response to Mr. Geddes’s question about alternative housing options, Boston Public Health Commission employees told him that he could go to Pine Street. Verified Compl., ¶ 49. When some objected, Mr. Geddes heard Gerry Thomas, Interim Deputy Director of the Boston Public Health Commission say words to the effect of “we may have some SRO [single room occupancy] options and if you come talk to us later we might be able to link you.” Hurd Aff., ¶ 18. According to service provider for affected families, “to my knowledge, no actual housing has yet resulted from this offer.” Hurd Aff. ¶ 18.

B. RAR and AC

RAR and AC are long-term partners who are experiencing homelessness and have been living in the Mass & Cass area over the past year in a temporary shelter situation they created. Verified Compl., ¶¶ 10–11.

RAR’s primary language is Spanish; he speaks and reads only limited English. He has numerous disabilities and health conditions, including HIV, Hepatitis-C, a seizure disorder, a heart

condition, and PTSD. His vision is often impaired due to the impact of his seizures and his wife provides him with assistance to navigate the activities of daily life. He has stayed in the past in congregate shelters, but they exacerbated his PTSD and his vital medications were often stolen while there. In addition, his medical providers have suggested that staying in a congregate shelter is unsafe, due to the risks of contracting COVID-19, which are particularly acute in his case in light of his underlying health conditions. Verified Compl., ¶ 10.

AC has numerous medical conditions, including PTSD, anxiety disorder, bipolar disorder, depression and a seizure disorder. Staying in congregate settings exacerbates her PTSD and anxiety and she is very concerned about contracting COVID-19, particularly because she worries she will infect RAR if she does. She relies heavily on RAR for support during times her depression and anxiety are particularly high, as they are now because of all the displacement that is occurring with no real housing options being provided as an alternative. Living in the tent at Mass & Cass has allowed them to distance from others, while still affording the protection of neighbors also staying there. Verified Compl., ¶ 11.

RAR and AC's tent was located in an area in which English-only notices for displacement were posted over the weekend of October 30 for removal on November 1. Believing they might be at less risk of losing their possessions, on October 31, they packed up their possessions, hid their tent, stored their other possessions in a friend's tent, and slept outside of and right next to the friend's tent. This is where they were when the displacement action commenced on November 1. Verified Compl., ¶ 55.

On the afternoon of November 1, City officials, who appeared to be BPHC and BPD employees, descended on the area of the friend's tent and told them they had to leave the area and their possessions were being removed. AC told them they had no place to store their possessions,

but no storage options were presented to them. AC quickly grabbed a couple of bags of clothes to salvage as City employees and their agents began seizing their friend's tent and all that was in it. The remainder of their possessions were thrown into the street and picked up for disposal. Only afterwards did AC realize that many of their important documents were among the possessions seized and disposed of, including their birth certificates, Social Security cards, copies of other forms of identification, and Emergency Room discharge papers. Verified Compl., ¶ 55.

No immediate housing options other than congregate shelter were suggested to AC or RAR. Verified Compl., ¶ 56. Someone did take down their personal information and said they would look for some housing for them, but nothing specific was actually suggested, and they have been told that there are no options that would allow them to remain together.

After they were displaced, AC and RAR remained in the Mass & Cass area on November 1 because they have no idea where else to go. They hid for a while between some buildings and slept—or tried to sleep—completely unsheltered because they were afraid that setting up their tent would cause them to be targeted for further enforcement. They note that the area is much scarier now with the tents gone and the loss of the communal protection from the encampments. Verified Compl., ¶ 57.

ARGUMENT

When addressing a request for preliminary injunctive relief, courts evaluate: (1) the plaintiff's reasonable likelihood of success on the merits; (2) the potential for irreparable harm to the plaintiff if the injunction is denied; (3) the balance of relevant harms; and (4) the public interest. *Siemens Bldg Techs., Inc. v. Div. a/Capital Asset Mgmt.*, 439 Mass. 759, 762 (2003). The same standards govern a request for a temporary restraining order. *See, e.g., G6 Hospitality Property LLC v. Town of Braintree Bd. of Health*, 34 Mass. L. Rptr. 325, 2017 WL 3573659, at *4 (Mass.

Supr. Ct. July 25, 2017) (citing *Quincy Cable Systems, Inc. v. Sully's Bar, Inc.*, 640 F. Supp. 1159, 1160 (D. Mass. 1986)). These standards are satisfied here.

I. Plaintiffs have a strong likelihood of success on the merits of multiple claims.

Plaintiffs are likely to succeed on three sets of legal claims. First, in violation of constitutional guarantees against cruel and unusual punishment, as well as state and federal guarantees against discrimination based on disability, Defendants are impermissibly threatening criminal enforcement against those who are homeless even where alternative housing options are not actually available *to the affected individuals*. Second, in violation of basic principles of due process, as well as constitutional guarantees against unreasonable seizures, Defendants are impermissibly providing constitutionally inadequate notice and property storage opportunities for those whom they are displacing. Third, because Defendants are using threats, intimidation, and coercion to accomplish the unlawful displacement of individuals and confiscation of their property, the defendants are improperly interfering with secured rights, in violation of the Massachusetts Civil Rights Act.

A. Plaintiffs are likely to succeed on the merits of their claims that Defendants' inhumane displacement actions are unconstitutional and unlawfully discriminatory.

The Eighth Amendment precludes the enforcement of a criminal scheme against homeless individuals for sleeping outside when they have no other “practically available” alternatives. *Martin v. City of Boise*, 920 F.3d 584, 618 (9th Cir. 2019). And what is deemed “practically available” must be determined in relation to the individual needs of impacted people, both under the Eighth Amendment and based on the mandates of state and federal disability discrimination laws, including the Americans with Disabilities Act.

Under these legal principles, and in actual fact, the mere existence of *any* bed at *any* facility cannot justify the arrest, prosecution, or other displacement of a person experiencing homelessness and disability unless it is a bed that the person can actually use. But, here, Defendants do not have an individualized process in place to identify, prior to commencing displacement actions against someone, both the medical and other specific needs of that person and a specific alternative housing arrangement that meets those needs. Thus, Plaintiffs are likely to succeed on their claim that this system violates both the Eighth Amendment and federal and state disability discrimination laws.

1. Plaintiffs are being threatened with arrest and prosecution merely because they have nowhere to live but the public streets in violation of the Eighth Amendment.

Because Defendants are using the threat of *criminal* sanction to displace people at Mass & Cass, without any individualized process to ensure that those they are displacing have available alternative housing arrangements that accommodate their needs, Plaintiffs are likely to succeed on the merits of these claims.

a. Defendants' displacement strategy, which is grounded on a threat that plaintiffs will be arrested if they don't leave the only place they have to live unlawfully criminalizes homelessness.

This Court has previously held that the law of the Commonwealth does not tolerate the criminalization of homelessness. *Magadini*, 474 Mass. at 601-602; *Commonwealth v. Canadyan*, 458 Mass. 574, 578 (2010). And neither does the cruel and unusual punishment clause of the Eighth Amendment Federal Constitution.¹⁶

¹⁶ The Cruel or Unusual Punishment provision of Article 26 of the Declaration of Rights affords at least as much protection as the Eighth Amendment. *Diatchenko v. DA*, 466 Mass. 655, 667 n.13 (2013) (“[T]he rights guaranteed under art. 26 are at least equally as broad as those guaranteed under the Eighth Amendment”). *See also Commonwealth v. Sharma*, 488 Mass. 85, 89 (2021) (in the context of criminal punishments, Article 26 “affords a defendant greater protections than the Eighth Amendment.”); *District Attorney for the Suffolk Dist. v. Watson*, 381 Mass. 648, 650, 665 (1980) (holding that the death penalty violates Article 26 despite being constitutional under the Eighth Amendment).

The Eighth Amendment forbids government actors from using criminal process to compel compliance with bans on living in public places when those subject to such process have no alternative place to stay. In the words of the Ninth Circuit in *Martin*, it violates the Eighth Amendment for a city to subject to criminal enforcement those who live “outside on public property when those people have no home or other shelter to go to.” 920 F.3d at 603; *see also Warren v. City of Chico*, 2021 WL 2894648 (E.D. Cal. 2021) (preliminary injunction granted preventing city from criminalizing sleeping on public property when adequate in-door sheltering options not available); *Blake v. City of Grants Pass, Ore.*, 2020 WL 4209227 (D. Ore. 2020) (appeal pending) (granting in part summary judgment for plaintiffs against city’s criminalization of sleeping on the streets when appropriate sheltering options, including options that do not require individuals to give up legal rights, do not exist).¹⁷ As a result, a city cannot lawfully arrest or prosecute a person for sleeping on public property, until or unless there is an available bed for that person at the time of the displacement. *Id.* at 609-10.

Critically, when faced with the question of what it means for a shelter bed to be “available” for constitutional purposes, the *Martin* court held that the bed must be available in fact, *e.g.* be vacant, and *also* be available “as a practical matter.” *Id.* at 609–10. And a shelter bed is not available as a practical matter if the shelter’s policies prevent the person from using it,¹⁸ or if using

¹⁷Some lower courts have opined that the holding in *Martin* applies only where encampments are forbidden *throughout the city* and where staying in an encampment is *subject to criminal penalties*. *See, e.g., O’Callaghan v. City of Portland, Or.*, 2021 WL 2292344 * 4 (for *Martin* to apply, there must be credible risk of prosecution); *Yeager v. City of Seattle*, 2020 WL 739748 * 5 (W.D. Wash. 2020) (*Martin* inapplicable when criminal charges not at issue); *Gomes v. County of Kauai*, 481 F. Supp. 3d 1104, 1108-09 (D. Hawaii 2020) (*Martin* inapplicable where encampments barred only in one public park); *Frank v. City of St. Louis*, 458 F. Supp. 3d 1090, 1093-1094 (E.D. Mo. 2020) (Eighth Amendment claim not stated when affected individuals free to stay in encampments elsewhere in City, just not in one particular location). Here, the Defendants policies and practices plainly criminalize encampments on all public property throughout the City. *See* EO II(1& 3); Protocols D(3).

¹⁸ Shelters generally impose strict rules governing entry. For instance, there may be a maximum stay of 30 or 60 days per year, a bar on someone returning if they violated shelter rules in the past, or – as is common – a prohibition on

that bed would violate the person’s legally-protected rights, such as requiring a person to participate in religious observations “antithetical to their religious beliefs.” *Id.* at 609–10.

Plaintiffs here have been informed only that there *may* be some beds available in a congregate shelter. But, even if it is true that there are some vacancies in congregate shelters, those beds are not available *to Plaintiffs* because congregate shelters cannot accommodate their protected disability-related needs, *see infra* part b. As a result, any such bed is not available to them for purposes of the cruel and unusual punishment analysis.¹⁹

Settlement agreements further reflect that a determination of availability must be based on a person’s individual circumstances and that where the person cannot use a bed due to disabilities or other equally weighty reasons, it does not qualify as available. For instance, following *Martin*, the parties negotiated a settlement which acknowledged that a shelter is not available if it is inconsistent with disability related needs. Ex. F. Pursuant to the settlement, the City of Boise then amended its Camping in Public Place Ordinance to define “available overnight shelter” to *exclude* housing “that cannot reasonably accommodate the individual’s mental or physical needs or disabilities.”²⁰ *Id.* at Dkt. 390-3, page 2. Boise went on to adopt and implement policy guidance that instructed, “[b]efore making a determination that an individual has engaged in camping or disorderly conduct within the meaning of the Ordinances, a police officer should make an individualized determination to determine if there is available overnight shelter based upon the individual’s circumstances.” *Id.* at Dkt. 390-2, page 3.

someone coming in if they are actively using drugs. *See, e.g.*, <https://www.wbur.org/news/2020/02/07/homeless-shelters-costs-rising-state-help>; Hurd Aff., ¶ 8.

¹⁹ Similarly, housing that requires separation of intimate family members may not be considered available shelter, in light of legal protections for family integrity and the rights of association. *See, e.g., Dep’t of Pub. Welfare v. J.K.B.*, 379 Mass. 1, 3 (1979); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984).

²⁰ It similarly recognized that shelter opportunity is not available if it “does not permit a minor child to be housed in the same facility with at least one parent or legal guardian.” Ex. F. at Dkt. 390-3, page 2.

Similarly, the court-approved settlement in *Vannucci v. Sonoma*, 3:18-cv-01955, Dkt. No. 109-1 (N.D. Cal. July 12, 2019), defined “adequate shelter” as housing that *did* “make reasonable accommodations suitable to the disability-related needs of the person,” and *did not* “require a person to be placed in a separate facility from their spouse, partner, children, or parents, or from a caregiver on whom the person relies for disability-related reasons.” Ex. G. It also spelled out that an unhoused person must be provided “an opportunity to be placed in adequate shelter reasonably suitable to the disability-related needs of the person” *before* any enforcement action is undertaken. Ex. G.

- b. Defendants have wrongly displaced Plaintiffs from their encampments without first identifying housing options that will accommodate their disabilities because it has established no meaningful process to assess the individual needs of unhoused persons and to identify housing that accommodates those needs.**

Defendants’ forced displacement actions do not comport with the Eighth Amendment and cognate state law because Defendants have not, before commencing a displacement action, implemented an individualized process to identify barriers that might prevent a person from accepting congregate shelter options, or to identify alternatives that would meet a person’s individualized needs. Certainly, Defendants didn’t ask any of the Plaintiffs whether they had disabilities that would make going to a congregate shelter inappropriate before ordering them out of their sites and destroying their property.

The Executive Order directs that the “Protocol will clearly state that no City of Boston employee will require an unsheltered individual to remove their encampment from public property unless there is shelter available for that individual,” EO, II(3), and the Standard Protocol mirror this language, Protocol at V(D). However, neither establish a meaningful individualized process to determine whether those targeted for displacement may require an alternative to a congregate

shelter as a result of their specific needs or to identify such alternatives before any displacement actions. And although the EO and the Standard Protocol refer to the *possibility* that individuals will be provided with opportunities to seek “low-threshold” beds or other shelter that might actually be suited to their needs,²¹ nothing in the Defendants’ policies bars enforcement actions against people who lack these alternatives; to the contrary, Defendants are in fact causing enforcement actions against such individuals. Verified Compl., ¶¶ 43–57. Moreover, with regard to any encampment a City employee deems subject to immediate removal,²² the City need only “*attempt* to meet the needs of unsheltered individuals by providing outreach and connections to social services.” Protocol, at 6.

Defendants’ actions during displacements, both before and after the Protocol was promulgated, reflect the absence of any individualized process to take into account disability-related needs and identify housing that will meet them.²³ For instance, during the displacements on October 25, Defendants tore down people’s tents, forced them to leave and threw out their possessions, while informing them only about the Pine Street Inn as a possible alternative. Hurd Aff., ¶ 14–16; Verified Compl., ¶¶ 44–45. Three days later, other people forced to leave the area were generically informed that they could go to a shelter or see the BPHC Homelessness Services

²¹ The EO and Protocol discuss identifying housing options for each individual, *see, e.g.*, EO at 3, Protocol IV D. and V C., but what is happening – and what these documents, through their vague, undefined and imprecise language, *allow* to happen – is something utterly different.

²² The “Immediate Removal” process set forth in the Protocol allows the CRT to decide that a site presents a threat to public health and thereby dispose of any requirements for advance notice, rehousing services or even property storage. This lacuna in the Protocol is very concerning given that those displaced on October 25 and October 28, 2021, based on a notice posted over the weekend prior, were told were purportedly forced to leave their encampments because of the “emergency” of a local business needing to fix some lighting in the area. <https://www.bostonglobe.com/2021/10/25/metro/authorities-ask-mass-cass-homeless-leave/>.

²³ Indeed, as a practical matter, there are simply not enough shelter beds for the entire Mass & Cass population even if congregate settings were appropriate for every resident (which they are not, as set forth herein). Although over 300 individuals live at Mass & Cass, the Executive Order states that the City’s shelters are at 80% capacity on average with roughly 170 beds available. Therefore, the City’s frequent instruction that displaced individuals can simply “go to Pine Street” or another shelter is inadequate on its face.

Unit “sometime later” if they were interested in a single room occupancy. Hurd Aff., ¶ 18. On November 1, a larger number of people were forced out with any assessment of their needs and told only that there were shelters around that they could try to access. Hurd Aff., ¶¶ 22–27; Verified Compl., ¶¶ 52–58.

As discussed in more detail below, a congregate shelter is not viable for the three named Plaintiffs—and others who are similar situated—in light of their disabilities, which include, for RAR, a compromised immune system that make congregate setting especially dangerous during the COVID-19 pandemic, and, for all three, mental health issues that make such a setting inappropriate. Yet, in violation of the Eighth Amendment, without identifying any available alternatives to congregate shelters, Defendants drove Plaintiffs from their encampments and are threatening them with criminal prosecution if they erect their tents again anywhere in Boston.

2. Plaintiffs have a strong likelihood of success that Defendants’ displacement actions violate state and federal disability rights laws because they are devoid of a meaningful process to identify available alternative housing that will reasonably accommodate disability-related needs.

State and federal disability rights laws not only help define what constitutes available for the purposes of the Eighth Amendment; they also provide a separate basis to find the defendants’ implementation of the protocols unlawful.

Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* prohibits state and local governments from discrimination against qualified individuals on the basis of disability. 42 U.S.C. § 1232 (“no 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”).²⁴

²⁴ Congress tasked the Attorney General to promulgate regulations implementing the Act. 42 U.S.C. § 12134. Those

The Supreme Judicial Court has made clear that the term “handicapped individual” in art. 114 of the Amendments to the Massachusetts Constitution mirrors the definition of “disability” in the ADA as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” *Shedlock v. Dep’t of Correction*, 442 Mass. 844, 849, 853. The Court has similarly held that both the ADA and art. 114 prohibit the same conduct, namely, disability discrimination. *See Crowell v. Massachusetts Parole Bd.*, 477 Mass. 106, 111 (2017) (citations omitted).²⁵

Pursuant to the ADA’s controlling regulations, a public entity discriminates on the basis of disability when, amongst other things, it fails to make reasonable accommodations for people with disabilities, *see* § 35.130(b)(7), when it imposes eligibility requirements that screen out or tend to screen out people with disabilities, *see* § 35.130(b)(8), and when it uses criteria or methods of administration that have the effect of discriminating against people with disabilities or of substantially impairing the accomplishment of the purpose of the program with respect to individuals with disabilities, *see* § 35.130(b)(3)(i) and (ii).

Here, there is no question that City defendants are public entities. *See* 28 U.S.C. § 12131(1)(A & B). Nor is there a question that plaintiffs are people with qualifying disabilities. *See, e.g., Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (“Respondents’ HIV infection is a physical impairment which substantially limits a major life activity, as the ADA defines it.”); *Powell v. City of Pittsfield*, 221 F.Supp.2d 119, 146 (D. Mass. 2002) (“Given limitations on sexual and reproductive activity, most courts have found plaintiffs with hepatitis c to be ‘disabled’ within the

regulations appear at 28 C.F.R. § 35.101 *et seq.*

²⁵ Although art. 114 does not include its own cause of action, “actions to enforce the rights guaranteed by art. 114 of the Amendments to the Massachusetts Constitution are authorized by G.L. c. 93, § 103.” *Shedlock v. Dep’t of Correction*, 442 Mass. 844, 853 n.6 (2004).

meaning of the ADA or the Rehabilitation Act.”); *Alejandro v. Palm Beach State College*, 843 F. Supp. 2d 1263, 1270 (S.D. Fl. 2011) (recognizing PTSD as a qualifying disability under the ADA). It is similarly clear that Defendant’s policies and practices of forcibly displacing people experiencing homelessness in Boston discriminates against Plaintiffs on the basis of their disabilities.²⁶

Defendants assert that one of the primary reasons they are implementing these policies is to help people at Mass & Cass obtain better housing; indeed, the Executive Order itself states that one of its “goal[s]” is to “connect[] individuals with appropriate shelter and services.” EO, II(3). In practice, however, Defendants have told people that they can go to Pine Street Inn, and posted notices in advance of expansive displacement actions stating that men can generally go to the Southampton Street shelter and women can go to the Woods Mullen shelter. Ex. D. And these placements are unavailable as a practical and legal matter to many people with disabilities who have compromised immune systems that make them extremely susceptible to COVID-19 in congregate settings, or have mental health needs that are inconsistent with congregate settings.

As the CDC has recognized, people who are HIV positive or have Hepatitis C are significantly more likely to become severely ill with COVID-19.²⁷ Indeed, the World Health Organization has concluded “HIV infection is a significant independent risk factor for both severe/critical COVID-19 presentation at hospital admission and in-hospital mortality. Nearly a quarter (23.1%) of all people living with HIV who were hospitalized with COVID-19 died.”²⁸ As

²⁶ The phrase “services, programs or activities,” which “encompasses virtually everything that a public entity does,” *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998), applies to Defendants’ actions here.

²⁷ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>

²⁸ <https://www.who.int/news/item/15-07-2021-who-warns-that-hiv-infection-increases-risk-of-severe-and-critical-covid-19>.

a result, for many people who are HIV positive or have Hepatitis C—or who, like RAR, have *both* conditions—a congregate shelter is not viable because it poses too great a risk of serious COVID-19 infection.

A congregate shelter is also not viable for many people who have PTSD, such as all three of the Plaintiffs. Ex. J, Affidavit of Dr. Clare Landefeld, ¶ 6 [Hereinafter “Landefeld Aff.”]. “It could be extremely challenging for someone with PTSD to be forced to live under the rigid environment of a congregate shelter where they are unable to control their own surroundings,” and the noisy, highly stimulating environment could be “very triggering for someone with PTSD.” *Id.* ¶ 6.²⁹ In short, a congregate shelter “could exacerbate the symptoms of someone diagnosed with PTSD,” and “trigger their brain to feel that they are in a dangerous situation that they need to avoid or escape as a matter of self-preservation.” *Id.* ¶ 7. As a result “it is likely that a congregate shelter would not be able to reasonably accommodate the disability-related needs of someone with PTSD.” *Id.* ¶ 8.

Despite the high rates of disabilities including PTSD and HIV among the people living at Mass & Cass,³⁰ Defendants do not have an individualized process to assess disability-related needs or to identify an available housing location that will accommodate these needs prior to displacement.³¹ Their displacement policies therefore constitute unlawful discrimination because they fail to identify, let alone make, “a reasonable accommodation that would be as effective in affording [plaintiffs] a safe sleeping arrangement as provided to other” non-disabled residents in

²⁹ The communal sleeping arraignments could be “especially triggering” for someone like Mr. Geddes, who PTSD stemmed from sexual assault trauma. Landefeld Aff.. ¶ 6.

³⁰ See Landefeld Aff.. ¶ 5 & <https://www.bostonglobe.com/2021/04/20/metro/health-officials-struggle-contain-boston-hiv-outbreak/>

³¹ Indeed, while the documents make some, albeit inadequate, reference to adjustments for persons with active substance use issues, Protocol at V. D., they make *no* provision for the need to identify alternatives for those who need them based on other disabilities.

the area of Mass & Cass. *Cf. Alvey v. Gualtieri*, No. 8:15-cv-1861, 2016 WL 6582897, *10 (M.D. Fla. Nov. 7, 2016). The failure to have a process in place to identify such alternative housing similarly imposes an implicit eligibility requirement—the ability to live safely within a congregate setting—that unlawfully screens out people with qualifying disabilities from receiving the benefit of alternative housing. *Cf. Crowell v. Massachusetts Parole Board*, 477 Mass. 106, 112 (2017) (citing 28 CFR § 35.130(b)(8) in explaining the parole board must provide assistance to help disabled incarcerated person identify appropriate post release programming). That failure has also resulted in an unlawful method of administration that substantially impairs the purported objectives of the EO and the Protocols for people with disabilities, because they are unable to take advantage of the sole alternative housing option offered to everyone. *Cf. State of Connecticut Office of Protection and Advocacy for Persons with Disabilities v. Connecticut*, 706 F.Supp.2d 266, 277-78 (D. Conn. 2010) (holding plaintiffs alleged plausible methods of administration claim where they alleged “fail[ure] to adequately assess and identify the long-term needs” of plaintiffs and whether those needs could be met in community-based, rather than institutional, settings); *Concerned Parents to Save Dreher Park Cener v. City of West Palm Beach*, 846 F.Supp. 986, 991 (S.D. Fla 1994) (holding that where a municipality offers programming to the public “it must use methods or criteria that do not have the purpose or effect of impairing its objectives with respect to individuals with disabilities”), citing 28 C.F.R. § 35.130(b)(3).

By implementing policies and practices that will have and has had the effect of forcing persons with disabilities either to roam the streets with nowhere even to camp or to be forced into the criminal legal system, the Defendants discriminate on the basis of disability.

- B. Plaintiffs are likely to succeed on the merits of their claims that Defendants’ property-confiscation actions violate constitutional guarantees of due process and constitutional protections against unreasonable searches and seizures.**

The notice, seizure, storage and destruction aspects of the City’s policy are fundamentally inconsistent with constitutional rights regarding unreasonable seizures and due process. Courts have recognized that when the government seeks to remove the possessions of unhoused people from public streets, procedural due process guaranteed by the Fourteenth Amendment requires the government to provide sufficient advance notice and storage options, *see, e.g., Garcia v. City of Los Angeles*, 11 F.4th 1113 (9th Cir. 2021) (due process requires sufficient advance notice and storage options when encampments being removed), and unreasonable search and seizure law requires the government not to promptly destroy most property. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030-31 (9th Cir. 2012) (destruction of property upon seizure unreasonable with respect to property of those experiencing homelessness).

1. Due Process requires the City to provide sufficient notice prior to any cleanup action.

The City is giving displacement notices to a community of people who have been residing at Mass & Cass for weeks or even months, very often have no access to places to which they can move their property or the means to move that property, and are on the precipice of losing the only place they have left to call home, along with most of their remaining personal possessions. Against this backdrop, the provision in the Standard Protocol for only 48 hours’ notice prior to bringing down this devastating hammer cannot be reconciled with due process protections, nor can the provisions in the Immediate Protocol that eliminate the notice requirement without any criteria to define or limit the purported justification.³²

³² To determine the constitutionality of a challenged procedure, the SJC applies the long-established test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976), which balances “the private interests affected, the risk of erroneous deprivation, the probable value of additional or substitute safeguards, and the governmental interests involved.” *Commonwealth v. Preston P.*, 483 Mass. 759, 767 (2020) (citation omitted).

As seen with regard to October 25, October 28, and November 1, the City can and does provide notice solely or largely over *weekends*, when many government and social service agencies that might otherwise help the residents retrieve at least some possessions are generally closed. Verified Compl., ¶¶ 43, 51; Hurd Aff., ¶ 14. Notice also sometimes is provided only in English, even though this notice is intended to give information to speakers of a variety of other languages. Hurd Aff., ¶ 26. The notice has on at least one occasion reportedly provided unreliable information about how to contact someone to arrange storage. Hurd Aff., ¶ 19.³³ This may be *notice*, but it is entirely inadequate.

Courts faced with these same issues have held that well more than 48 hours' notice is required before property may be seized from those experiencing homelessness, absent specifically determined emergent circumstances. *See, e.g., Sturgeon*, 2020 WL 11191761, at *4 (72 hour notice provided was “woefully insufficient” and “a period of a minimum of two weeks is necessary”); *Denver Homeless Out Loud*, 514 F. Supp. 3d at 1309 (requiring state or city health agency to provide, in writing, and publish “a reasonably detailed explanation of the public health basis(es) for the determination” that “reasonable, evidence-based reasons” exist to undertake any “homeless encampment sweep” with “less than seven days’ advance notice”).

The 48 hours' advance notice requirement in the Standard Protocol is inadequate to protect the implicated property rights, particularly in light of the other serious shortcomings of the City's policy. As recent days have shown, it simply does not provide “sufficient time [for impacted individuals living in deep poverty] to remove their property from designated areas such that they might avoid seizure,” taking into account that “[f]or homeless individuals ... even if they are

³³ *See also* Ex. H Affidavit of Katy Napes-Mitchell, ¶ 12 (noting that she called one of the storage numbers listed on the notice on November 3, 2021, was transferred to a voicemail, and had not received a call back by November 4, 2021).

present during a sweep, they may not be able to move all of their property quickly enough to avoid seizure.” *Denver Homeless Out Loud*, 514 F. Supp. 3d at 1292.³⁴

And certainly to the extent the City is clearing sites without any actual advance notice, including pursuant to the Immediate Protocol’s allowance for the immediate, summary destruction of an individual’s property without *any* prior notice, and based only on a decision by the CRT based on no clear criteria, *see* Protocol, such activities are, unconstitutional. *See Denver Homeless Out Loud*, 514 F. Supp. 3d at 1309 (requiring reasonable advance notice, even where there are evidence-based reasons to believe a public health crisis exists, provided the reasons are clearly and formally articulated by the *state* department of health); *Mitchell v. City of Los Angeles*, 2016 WL 11519288, *7 (C.D. Cal. 2016) (even where true public health emergency asserted, must give at least 24 hours’ notice); *Lavan*, 693 F. 3d at 1032 (“[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. This simple rule holds regardless of whether the property in question is an Escalade or an EDAR, a Cadillac or a cart.”). *Id.* at 1032 (internal marks and citation omitted).

2. The Fourth Amendment and art. 14 protect against the illegal destruction of unabandoned personal property of individuals experiencing homelessness.

Property belonging to individuals experiencing homelessness that is present in public spaces undeniably is protected against unreasonable seizures. *Lavan*, 693 F.3d at 1028 (9th Cir. 2012) (citing *United States v. Jones*, 565 U.S. 400, 406 (2012)).³⁵ The City is engaging in

³⁴ The insufficiency is compounded by the facts that they are not regularly translated into languages other than English; Hurd Aff., ¶ 14; they do not consistently even say where the displacements are going to occur; Hurd Aff., ¶ 11.

³⁵ The property that is being seized and destroyed by City employees is clearly not limited to property that has been “abandoned” and therefore not constitutionally protected. *United States v. Thomas*, 864 F.2d 843, 845 (D.C. Cir. 1989). Indeed, A.C. and others affected on November 1 were standing right there as the City took their things. Verified Compl., ¶ 55.

unreasonable seizures by allowing plaintiffs’ property to be destroyed summarily or after only 48 hours’ notice – *e.g.* if it doesn’t fit in a small 27-gallon bin, *see* Ex. I, is wet; or is in a site that some City employee decides is a public health threat.³⁶

In evaluating whether destruction of seized property is reasonable, courts apply a balancing test. *See, e.g., Berry v. Hennepin Cty.*, 2021 WL 4427215, at *8 (D. Minn. Sept. 27, 2021) (quoting *United States v. Jacobsen*, 466 U.S. 109, 125 (1984) (to determine whether the permanent deprivation of personal property is constitutionally reasonable, courts “balance the nature and quality of the intrusion on the individual’s [constitutional] interests against the importance of the governmental interests alleged to justify the intrusion.”)).

In *Garcia*, which was decided this past September, the Ninth Circuit upheld a preliminary injunction against the planned enforcement of a Los Angeles ordinance that authorized city officials to discard “bulky items,” defined generally as those items too large to fit in a 60-gallon bin. *Id.* at 1116-17.³⁷ As here, the city action in question permitted law enforcement to “discard publicly stored property without impounding it when it constitutes an immediate threat to public health or safety.” *Id.* at 1117. And as here, the city sought to use this ordinance in response to the its “escalating homelessness crisis” that resulted in more than 17,000 people living in vehicles, tents, and other makeshift shelters. *Id.* at 1117. In affirming the grant of a preliminary injunction, the Ninth Circuit observed that “because warrantless ... seizures are per se unreasonable, the

³⁶ The Fourth Amendment, and therefore art. 14, “protect individuals from unreasonable government seizures of their property, even when that property is stored in public areas.” *Garcia*, 11 F. 4th at 1118. It is well-settled that “a warrantless ... seizure is presumptively unreasonable under the Fourth Amendment and art. 14.” *Com. v. Kaeppler*, 473 Mass. 396, 401, 402 (2015). “The destruction of property has long been recognized as a seizure.” *Garcia*, 11 F. 4th at 1118 (citing *United States v. Jacobsen*, 466 U.S. 109, 124–25 (1984)); *see also Altman v. City of High Point, N.C.*, 330 F.3d 194, 205 (4th Cir. 2003).

³⁷ “Bulky items” is defined in the ordinance as “any item, with the exception of a constructed Tent, operational bicycle or operational walker, crutch or wheelchair, that is *too large to fit into a 60-gallon container ... with the lid closed ...*” *Id.* at 1118 (emphasis added). Such items were defined not to include items “designed to be used as a shelter,” whereas here, even items used for shelter will be discarded if they don’t fit into a small 27-gallon bin.

government bears the burden of showing that a warrantless ... seizure falls within an exception to the Fourth Amendment's warrant requirement.” *Id.* at 1117. It went on to hold that people did not lose their possessory interests in items just because they were larger than the allotted *60 gallons*, and thus the plaintiffs had demonstrated that the city’s plan to destroy such items likely facially violated the Fourth Amendment. *Id.* at 1119.

Garcia is on all fours with this case, except here, the City’s plan allows storage of an even more limited capacity of items per person—generally, *27 gallons*—and destroying the rest. The City and its agents should be enjoined from seizing Plaintiffs’ possessions unless and until the City develops a policy that comports with constitutional requirements, which could provide more advance notice and assistance with transporting items elsewhere or provide for storing substantially more of Plaintiffs’ property.³⁸

Although the City asserts a public safety interest in clearing encampments in response to an escalating homelessness “crisis,” just as Los Angeles did in *Garcia*, that amorphous interest is similarly insufficient to override grave constitutional concerns. Nor can it justify Defendants enforcing the Order in a manner counterproductive to public safety – one that drives the vulnerable individuals currently living in those encampments into dangerous and potentially deadly circumstances. Under the applicable balancing test, the City’s approach cannot be justified.

³⁸ The City cannot establish that they have an “objectively reasonable basis to believe” that all the property they are throwing out during the dispersal actions to date was “an immediate threat to public health or safety.” *Lavan*, 693 F.3d at 1026. Under the Protocol, at a site noticed for clean-up items some items are at least potentially “eligible” for storage, Protocol, VII. A., 7–8, so the City cannot have a reasonable, objective basis to believe—just moments later—that *none* of them are. Indeed, the court in *Mitchell*, 2016 WL 11519288, at*4, expressed healthy skepticism of claims that the totality of an unhoused person’s property could reasonably all qualify as “hazardous,” particularly when the state actors knew that in the past, property had included vital items such as medications. Here too the City knows that the items they are gathering and discarding could well include items such as AC’s and RAR’s vital papers. Verified Compl., ¶ 55.

C. Plaintiffs have a strong likelihood of success on their claim that the displacement efforts currently underway are violations of the Massachusetts Civil Rights.

It is a violation of the MCRA for any person to interfere or attempt to interfere by means of “threats, intimidation or coercion” with rights secured by the Eighth Amendment, disability discrimination laws, or any other provision of state or federal law.³⁹ Threatening, implicitly or explicitly, to arrest or to cause someone to be arrested for exercising a legal right constitutes “threats, intimidation or coercion” that interferes or attempts to interfere with that right. *See, e.g., Batchelder v. Allied Stores*, 393 Mass. 819, 823 (1985); *Reproductive Network v. President of the Univ. of Mass.*, 45 Mass. App. Ct. 495, 505 (1998). Invading or threatening to destroy another’s property for exercising a legal right certainly also qualifies as “threats, intimidation or coercion.” *Cf. Planned Parenthood League of Mass., v. Blake*, 417 Mass. 467, 474 (1994) (intruding on private property to stop abortions from being provided constitutes threats, intimidation or coercion); *Bell v. Mazza*, 394 Mass. 174, 180, 184 (actions, including blocking of owners’ access to their property may be “threats, intimidation or coercion”).

As discussed, Plaintiffs have a legal right to remain at Mass & Cass without the threat of arrest unless and until Defendants have a supported basis to know that they have immediate access to an appropriate alternative sheltering arrangement that satisfies their particular needs, including but not limited to disability-based needs. They also have a right for their property to remain unless and until there is a system in place that more adequately safeguards their property rights.

³⁹ 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 [C]oercion ... [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.’” *Planned Parenthood League of Mass., Inc. v. Blake*, 417 Mass. 467, 474 (citations omitted), cert. denied, 513 U.S. 868 (1994). *See also Sarvis v. Boston Safe Deposit and Trust Co.*, 47 Mass. App. Ct. 86, 91-92 (1999).

Yet, against the backdrop of the Executive Order that makes the threat of arrest explicit, the City and its agents are regularly, by word and deed, threatening to arrest and prosecute them—and seize and destroy their property—if they don’t leave even before constitutionally required processes are in place. And certainly, when these coercive tactics work and cause frightened individuals to leave the area, or not resist the seizure of their property, the City’s purposes are served.⁴⁰

Plaintiffs therefore have a strong likelihood of success on their claim that defendants’ actions—from authorizing criminal sanctions, to posting notices, to telling people they must leave immediately when they have a right to remain, to presenting a show of force through the presence of law enforcement, to the actual destruction of property that sends a message to those who dare to remain—violate the MCRA.

II. Plaintiffs are Facing Irreparable Harm Absent Relief from this Court.

Plaintiffs and other members of the putative class are clearly experiencing and facing imminent irreparable harm. And that harm is irremediable without injunctive relief.

It is fundamental that “an alleged deprivation of a constitutional right is involved, typically no further showing of irreparable injury is necessary.” *Whitney v. Ashburnham-Westminster Reg. Sch. Dist.*, 1996 WL 1185116, at *2 (Mass. Super. Feb. 22, 1996) (citations omitted); *see also Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“It has long been established that the loss of constitutional freedoms, ‘for even minimal periods of time, unquestionably constitutes irreparable injury’”)); *Jolly v. Coughlin*,

⁴⁰ Specific intent is not a prerequisite of an MCRA violation, *Redgrave v. Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 99 (1987), but one might be excused for thinking that this system is largely designed to scare people into leaving “voluntarily” before their property is seized and largely destroyed and/or they are arrested.

76 F.3d 468, 482 (2d Cir. 1996) (original emphasis) (“it is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm”).

And, of course, Plaintiffs are experiencing not only deprivation of constitutional rights; they are being deprived of *any safe place safe to sleep*—even a tent; being subjected to the trauma of living on the streets without even the protection of other community members; and being robbed of the last of their meager but valuable possessions. Moreover, the City’s actions are ripping them away from established medical care.⁴¹ In the words of someone who has been watching this unfold, “it is hard to overstate the scope of the disruption and trauma the City of Boston is imposing on the unhoused residents of Mass & Cass” Hurd Aff., ¶ 27.

As this Court has recognized, “time presses sharply” on those “struggling against destitution,” *Smith v. Comm’r of Transitional Assistance*, 431 Mass. 638, 652 (2000), and it would be hard to identify someone struggling harder than the Plaintiffs in this case.⁴²

Where, as here, “Defendants’ actions are likely to displace homeless individuals ... [,] threaten their ability to access charities for food, shelter, and assistance in [in their current community] ... [, and] threaten the already precarious existence of homeless individuals by posing health and safety hazards, Plaintiffs will suffer a great irreparable harm.” *Justin v. City of Los*

⁴¹ The displacement actions risk disrupting access to medical care provided to individuals in the Mass & Cass area by local providers, made possible by the congregation of welfare services in the area, on which many class members rely. Verified Compl. ¶ 17. As providers have repeatedly warned the City, “[s]weeps and the forced removal of unhoused community members out of the Mass. and Cass area will remove much of the stability, safety, and access to support—peer and professional, as well as medical care and life-saving medication people have.” See Dialynn Dwyer, *Experts in public health, housing, and addiction rebuke Boston officials over actions at Mass. and Cass.*, Boston.com (Oct. 26, 2021), <https://www.boston.com/news/local-news/2021/10/26/advocates-rebuke-mass-and-cass-plans/>.

⁴² “[I]t bears reminding that these homeless citizens are among the most vulnerable in our nation. ... Perhaps more than any other group in our society, these people are deprived of even the most basic rights and dignities owing to citizens of our country. As the testimony demonstrated, many homeless people are resigned to “the fact that they [have] to be abused just because they are homeless.” Tr. Vol. II at 88. Many have had little schooling, are poor, and have medical problems which are exacerbated by their inability to receive health care.” *Cnty. for Creative Non-Violence v. Unknown Agents of U.S. Marshals Serv.*, 797 F. Supp. 7, 16 (D.D.C. 1992).

Angeles, 2000 WL 1808426, at *11 (C.D. Cal. Dec. 5, 2000) (internal marks and citations omitted); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1572 (S.D. Fla. 1992) (quoting *State v. Mooney*, 218 Conn. 85, 112 (1991)) (“the bags, bundles or other containers in which homeless persons carry their belongings is the ‘last shred of privacy’ they have”).

III. The Public Interest and Balance of Harms Weigh Strongly in Favor of Granting Injunctive Relief.

Plaintiffs in this action seek only a pause in the City’s displacement actions until the City can actually identify and link those who are being displaced to alternative, actually available housing and ensure protection of basic property rights, and the balance of harms and the public interest cut clearly in their favor.⁴³

First, “a state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction.” *Leaders of a Beautiful Struggle v. Baltimore Police Dep’t*, 2 F.4th 330, 346 (4th Cir. 2021) (citation omitted).

Second, Defendants’ asserted interest in cleaning up the Mass & Cass area does not outweigh protection of plaintiffs’ basic safety. For one thing, there are many alternatives to casting vulnerable people immediately to the winds to address conditions at Mass & Cass. Cities and states faced with the same dangers confronting the City of Boston have implemented measures that improve public health and safety, while still respecting the dignity, autonomy, and rights of

⁴³ Where constitutional rights are at stake, as they are undoubtedly here, the public interest is served by, and the balance of harms necessarily falls in favor of, preserving those rights and liberties. See *Larocque v. Turco*, 2020 WL 2198032, at *15 (Mass. Super. Feb. 28, 2020) (“the court can think of no greater public interest than the protection of individuals’ sacred constitutional rights”); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F.Supp.2d 73, 84 (D.D.C. 2012) (“[i]t is always in the public interest to prevent the violation of a party’s constitutional rights”); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 84 (D.D.C. 2012) (when constitutional rights are at stake, “the thumb of the [c]ourt [should] be on the [constitutional] side of the scales”).

individuals by providing better services in encampment areas,⁴⁴ and during the pause, the City can continue to try to find appropriate housing accommodations for as many individuals as possible so they can voluntarily move out.⁴⁵

As other courts faced with these same issues have recognized, while “Defendants may be slowed in their efforts to keep the City ... clean and safe ... [,] to revitalize and uplift communities, to improve the streets and sidewalks, and to diminish the crime rate,” Plaintiffs “risk a greater harm if the injunction is not granted: the violation of their First, Fourth, and Fourteenth Amendment rights.” *See Justin*, 2000 WL 1808426, at *11; *see also Garcia v. City of Los Angeles*, 481 F. Supp. 3d 1031, 1051 (C.D. Cal. 2020), *aff’d*, 11 F.4th 1113 (9th Cir. 2021) (“the constitutional rights of homeless individuals outweigh the potential hurdles the injunction might pose to the City's efforts to keep the sidewalks clean”).

⁴⁴ *See, e.g.*, Cal. Homeless Coordinating and Financing Council, *Access to Sanitation for People Experiencing Homelessness*, https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/assistance/docs/2019/bcsh_homeless_coordinating_financing_council_lahela_mattox.pdf; Suggested edits for Seattle source (in highlighted text): Michael Taylor-Judd, *Update on City Efforts to Expand Shelter, Hygiene, and Outreach to Individuals Experiencing Homelessness* (Mar. 17, 2020), <https://humaninterests.seattle.gov/2020/03/17/update-on-city-efforts-to-expand-shelter-hygiene-and-outreach/> (announcing portable toilets, hand-washing stations, and hygiene trailers at locations across Seattle in addition to additional garbage and needle disposal services); Owen Valente et al., *Final Research Report: Homelessness and Hygiene Project (CSI)* (2021), https://communityservices.humber.ca/assets/files/showcases/2021/report_full_HomelessnessHygieneHub.pdf; Elizabeth Chou, *YMCA Will Open Up Showers for Unsheltered, LA Mayor Says, During Coronavirus Crisis*, L.A. Daily News (Apr. 3, 2020), <https://www.dailynews.com/2020/04/03/ymca-will-open-up-showers-for-unsheltered-la-mayor-says-during-coronavirus-crisis/>. *See also* Hurd Aff., ¶ 29.

⁴⁵ Notably, the Protocol itself pays lip service to “reinforcing an individual’s agency by providing a choice between opportunities, wherever possible.” Protocol, at 1. That the options available to the government to best serve its purported interests while still preserving constitutional rights would require additional time and resources does not sway the analysis. *See Matter of McKnight*, 406 Mass. 787, 797 n. 9 (1990) (quoting *Blaney v. Commissioner of Correction*, 374 Mass. 337, 342 n. 3 (1978) (“the unavailability of appropriated funds would not justify the failure of ... officials to stop violating ... constitutional rights”)); *Klayman v. Obama*, 957 F. Supp. 2d 1, 43 (D.D.C. 2013), *vacated and remanded*, 800 F.3d 559 (D.C. Cir. 2015) (“Of course, the public has no interest in saving the Government from the burdens of complying with the Constitution!”). And, here, it is not clear that pursuing these alternative courses would in fact cost more than the current, resource-intensive displacement operations.

CONCLUSION

Plaintiffs respectfully request that the City defendants be enjoined from conducting displacement actions unless and until appropriate protections for plaintiffs' constitutional rights are put in place. Specifically, a temporary restraining order and/or preliminary injunction should:

(1) Prevent the Defendants from forcibly displacing unhoused people in the City of Boston, and forcibly preventing their return, including via the threat of arrest, prosecution, and/or property destruction, whether pursuant to the October 19 Executive Order and October 28 Protocol or otherwise, unless and until the City has in place an effective, individualized system for identifying appropriate and practically available housing alternatives for any affected person. At a minimum, such a system must ensure that affected people are offered, or notified of, alternative housing arrangements that accommodate their disabilities, critical health care needs and fundamental familial arrangements that are actually available at the time of the displacement.

(2) Prevent the Defendants from forcibly displacing the Plaintiffs and putative class members (or, if already displaced, from forcibly preventing their return), unless the Defendants have in place adequate notice and property retention protections under which people can store and subsequently access any belongings that do not pose an imminent threat to public health.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2021, I caused a true and correct copy of the above document to be served via electronic mail upon all counsel of record in the above-referenced matter.

/s/ Kevin S. Prussia
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