



Agency: City Council, City and County of Honolulu  
Date/Time: Wednesday July 11, 2018, 10 a.m.  
Place: Kapolei Hale  
Re: Testimony of the ACLU of Hawai'i in Opposition to Bill 52, Relating to Illegal Lodging

Dear Chair Martin, Vice Chair Pine, and City Councilmembers:

The ACLU of Hawai'i ("**ACLU**") writes in opposition to Bill 52, which makes it a petty misdemeanor to "lodge on a public sidewalk or other public area." The ACLU is concerned that this bill will further criminalize unsheltered communities and their life functions without a valid government interest. Additionally, the definition of "lodging" appears to be vague and overbroad. Finally, the bill does not adequately recognize the realities of "available shelter space," which could result in the separation of families, the payment of unaffordable fees, and the inability to use shelter for a number of valid reasons.

In January 2018, there were approximately 4,495 homeless individuals on Oahu. Of these, approximately 2,145 were unsheltered.<sup>1</sup> Both the overall number of homeless persons and the number of unsheltered persons in Oahu has increased since 2013, when efforts to criminalize homelessness began.<sup>2</sup> Between 2013 and 2018, the number of individuals without shelter in Oahu rose from 1,465 to 2,145—a 46.4 percent increase, even though the strategy of "compassionate" disruption was being intentionally pursued for most of this period.<sup>3</sup> Hawaii's rate of homelessness in 2015 was by far the highest in the nation, over three times higher than the national rate.<sup>4</sup>

Hawai'i has the highest cost of living in the country. Comparisons of Hawaii's elevated cost of living range from 17 percent to 60 percent higher than the national average.<sup>5</sup> In Hawai'i, 83 percent of impoverished individuals must spend more than half of

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<sup>1</sup> Partners in Care, *Homeless Point-In-Time Count Report January 22, 2018* at 12, available at [http://www.partnersincareoahu.org/sites/default/files/2018\\_OAHU%20\\_PIT\\_Report\\_FIN AL-6.5.18.pdf](http://www.partnersincareoahu.org/sites/default/files/2018_OAHU%20_PIT_Report_FIN AL-6.5.18.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> Compare *id.* with Partners in Care, *Homeless Point-In-Time Count Report January 22, 2017* at 13, available at <http://www.partnersincareoahu.org/sites/default/files/2017%20State wide%20PIT%20Report%20-%20Full%20Report%20-%20FINAL.pdf>.

<sup>4</sup> Nat'l Alliance to End Homelessness, *The State of Homelessness in America (2016)* at 15, available at <http://endhomelessness.org/wp-content/uploads/2016/10/2016-soh.pdf>

<sup>5</sup> Hawai'i Appleseed Center for Law and Economic Justice, *The State of Poverty in Hawai'i: How Hawai'i Residents Are Faring Post-Recovery* at 5, available at <http://hiappleseed.org/sites/default/files/State%20of%20Poverty%20%5BFINAL%5D.pdf>

their income on housing,<sup>6</sup> and average rents increased by 45 percent between 2005 and 2012.<sup>7</sup> As a result, “[m]ore and more households struggle to afford even a modest place to live in Hawai‘i” and “many families do not earn enough to afford market rents.”<sup>8</sup> The lack of affordable housing in Hawai‘i is a primary factor for the state’s disproportionately large homeless population.<sup>9</sup>

Bill 52 would add on to a comprehensive set of ordinances, rules, and statutes affecting, targeting, and being primarily enforced against unsheltered communities. As set forth by the Department of Justice in its Statement of Interest in *Bell v. Boise*,<sup>10</sup> by the Ninth Circuit Court of Appeals in *Jones v. City of Los Angeles*,<sup>11</sup> and in *Pottinger v. City of Miami*,<sup>12</sup> laws that criminalize poverty itself are unconstitutional.<sup>13</sup> In nearly identical ways, the County has passed a series of increasingly draconian measures that, when woven together, violate the Eighth Amendment to the United States Constitution by criminalizing the status of not having permanent shelter.<sup>14</sup>

Just as in *Pottinger* and *Jones*, there are not nearly enough shelter beds for the entire homeless population of the County of Honolulu: there are nearly 2,145 unsheltered individuals on Oahu, and there does not appear to be enough beds to accommodate more than a fraction of those unsheltered. Homeless individuals already face arrest or

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<sup>6</sup> See Wayne Wagner, *Homeless Property Rights: An Analysis of Homelessness, Honolulu’s “Sidewalk Law,” and Whether Real Property is a Condition Precedent to the Full Enjoyment of Rights Under the U.S. Constitution*, 35 U. HAW. L. REV. 197, 202-03 (2013).

<sup>7</sup> Hawai‘i Appleseed Center for Law and Economic Justice, *Hawaii’s Affordable Housing Crisis* 3 (July 2014), available at <http://www.hiappleseed.org/sites/default/files/Hi%20Appleseed%20Housing%20Crisis%20Report.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> See *Homeless Property Rights*, *supra* note 5, at 223.

<sup>10</sup> See Statement of Interest of the United States, *Bell v. City of Boise, et al.*, Civil Action No. 1:09-cv-540-REB, Doc. 276 at 3 (Aug. 6, 2015), available at <http://www.justice.gov/opa/file/643766/download>.

<sup>11</sup> 444 F.3d 1118 (9th Cir. 2006) *vacated pursuant to settlement agreement*, 505 F.3d 1006 (9th Cir. 2007).

<sup>12</sup> See, e.g., *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992) *remanded for limited purposes*, 40 F.3d 1155 (11th Cir. 1994).

<sup>13</sup> See also *Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 432 (N.D. Cal. 2017) (discussing that an Eighth Amendment claim is viable when the laws criminalize involuntary conduct when shelter is unavailable).

<sup>14</sup> The proposed bills and their enforcement would also raise serious Fourteenth Amendment concerns. See, e.g., *Jeremiah v. Sutter County*, No. 2:18-cv-00522-TLN-KJN, 2018 WL 1367541, at \*5 (E.D. Cal. Mar. 16, 2018) (stating that officials violate the Fourteenth Amendment when they are deliberately indifferent to the additional dangers caused to those individuals who cannot afford adequate housing in closing homeless lodging situations). Our testimony does not address these and other legal and constitutional issues.

harassment if they sleep in parks,<sup>15</sup> state parks,<sup>16</sup> or in their own car.<sup>17</sup> Thus, almost half of homeless persons (47.7 percent) in the City and County of Honolulu sleep and live on or alongside public streets or sidewalks because they have nowhere else to go.

The definition of “lodging” in Bill 52 is also vague and overbroad. Under the bill, “lodge or lodging” means “to occupy a place temporarily; to sleep; to come to rest and refuse to vacate the area as requested.” Under this definition, taking a nap in a park, enjoying the sun at the beach, or resting on a bench would be potentially punishable. Similarly, merely being anywhere public constitutes “occupying a place temporarily” and could result in a violation. The bill does not appear to provide adequate notice that such innocent conduct is illegal.<sup>18</sup> This is particularly problematic because the ordinance does not contain an intent requirement so that completely innocent behavior could potentially result in 30 days in jail.

Finally, Bill 52 does not properly recognize that there are a number of valid reasons for individuals not being able to be in temporary shelter. As an initial matter, because the state does not disseminate current information, many individuals do not even know which shelters have available beds. Further, many temporary shelters pose high barriers to staying there, including fees, curfews, family limitations, and length of stay limitations, among others. Additionally, unsheltered individuals with families, substance abuse or mental health issues, night jobs, pets, or who have “maxed out of shelter”<sup>19</sup> may not be welcome in all of Oahu shelters either. Those individuals will have no option but to violate Bill 52.

Instead of wasting limited public resources enforcing constitutionally infirm bills—which would likely result in costly lawsuits—without actually reducing the number of unsheltered individuals on Oahu, the ACLU strongly encourages the City and County of Honolulu to reconsider its proposed approach to our housing crisis. In particular, to meet its constitutional obligations, the County needs to and should address the root causes of our housing crisis as opposed to criminalizing its consequences. Doing so is not only constitutional, but it is also moral, cost effective, and good public policy.

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<sup>15</sup> See City and County of Honolulu, Hawai‘i, Municipal Code, Chapter 10, Article 1, § 10-1.2(a)(12) (1990).

<sup>16</sup> See HRS § 184-5 (2013); Hawai‘i Administrative Rules § 13-146-51 (2011).

<sup>17</sup> See HRS § 291C-112 (2013).

<sup>18</sup> The U.S. District Court for the District of Hawai‘i has emphasized the importance of the City announcing its intentions at every stage, as a safeguard against unconstitutional deprivations, in situations when unsheltered individuals have a strong private interest. See *James v. City of Honolulu*, 125 F. Supp. 3d 1080, 1094 (D. Haw. 2015).

<sup>19</sup> Temporary shelters generally have time limits for how long a person or family can stay after which they may get kicked out for “maxing out.” Unfortunately for many families and individuals there is no permanent housing at the end of temporary shelter.

Thank you in advance for your time and attention to this matter. If you have any questions or comments, please feel free to contact me at 522-5908 or [mcaballero@acluhawaii.org](mailto:mcaballero@acluhawaii.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'Mateo Caballero', with a stylized flourish at the end.

Mateo Caballero  
Legal Director  
ACLU of Hawai'i