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**American Civil Liberties Union Fund of Michigan**

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April 2, 2010

Kirk T. Steudle  
Director, Michigan Department of Transportation  
State Transportation building  
425 W. Ottawa St.  
P.O. Box 30050  
Lansing, MI 48909

Re: Unlawful Seizure of Property and Arrests of Individuals at Camp Take Notice

Dear Mr. Steudle:

We understand that members of Camp Take Notice have been told by state officials that their belongings could be subject to seizure at any point without notice. We also are aware that members of Camp Take Notice have been arrested for performing innocent activities such as sleeping, eating or sitting on public property simply because they have no-where else to go. These actions violate the constitutional rights of members of our community who are the most in need of its protection.

The Fourteenth Amendment’s procedural due process requirements mandate that the private property of individuals living at Camp Take Notice cannot be seized without pre-deprivation notice, an opportunity to contest the seizure and a method to retrieve the property. Moreover, arresting individuals who conduct life-sustaining activities on public property when they have no choice but to live on the street violates our constitutional proscriptions against cruel and unusual punishment. Courts throughout the country have held that “poverty should not be treated as a criminal offense,”<sup>1</sup> and that punishing individuals who are “unemployed, without funds, and in a public place . . . debases society.”<sup>2</sup> The ACLU of Michigan urges you to refrain from taking action that violates the constitutional rights of the homeless – both in Washtenaw County and throughout the state.

**THE PREVALANCE AND GROWTH OF HOMELESSNESS  
IN WASHTENAW COUNTY**

Numerous experts agree that people rarely choose to be homeless, but rather become so due to various economic, physical or psychological factors that are beyond their control.<sup>3</sup> The economic crisis has only increased the number of men, women and children who have become involuntarily homeless in our state. According to the most recent numbers that we have been able

<sup>1</sup> *Alegata v Commonwealth*, 353, Mass 287, 231 NE2d 201, 207 (1967).

<sup>2</sup> *Parker v Municipal Judge*, 83 Nev 214, 427 P2d 642, 644 (1967).

<sup>3</sup> See, e.g., *Pottinger v City of Miami*, 801 FSupp 1551, 1563 (SD Fl 1992) (citing experts).



to obtain, the estimated number of homeless individuals in Michigan has increased by over 10% to reach 86, 169 people.<sup>4</sup>

Although Detroit has been the focus of much national attention over the past two years, communities within Washtenaw County also have been devastated. Indeed, the rate of foreclosure in Ann Arbor is currently 2%, which is double the rate in Detroit.<sup>5</sup> According to the United States Department of Housing and Urban Development, the number of homeless individuals in Washtenaw County rose to over 4,200 individuals in 2008, a number which was expected to rise again in 2009.<sup>6</sup> Experiencing an unprecedented increase in demand at the exact moment that their resources are dwindling, area shelters have been unable to meet the needs of all the homeless individuals in our community. As noted by the Office of Community Development in Washtenaw County, the demand quite simply exceeds the available capacity.<sup>7</sup>

In the midst of this worsening economic climate, the shortage of shelter beds and the limited availability of public housing necessarily mean that many individuals have no choice but to live in tent communities such as Camp Take Notice. There is perhaps no punishment that is more cruel than penalizing an individual for something over which they have no control. As illustrated below, state officials would violate the constitution if they were to arrest Camp Take Notice members and other homeless individuals throughout the state for conducting life-sustaining activities on public land, or seize their belongings without prior notice. Accordingly, we strongly urge you to refrain from taking such action.

**SEIZING HOMELESS INDIVIDUALS' PROPERTY  
WITHOUT PRE-DEPRIVATION NOTICE  
VIOLATES THE PROCEDURAL DUE PROCESS PROTECTIONS  
REQUIRED BY THE FOURTEENTH AMENDMENT**

We understand that Camp Take Notice members have been told that their belongings could be seized at any time without notice. Their fear that this may occur is particularly acute given that state officials arrived with trucks in September to carry out this threat. It is our understanding that it was only the arrival of several media sources that prevented the seizure of personal property at that time. If MDOT seizes homeless individuals' property without pre-deprivation notice, it would violate their Fourteenth Amendment procedural due process rights.

Under the Fourteenth Amendment, state officials cannot deprive an individual of her property without affording her "due process of law" beforehand.<sup>8</sup> In other words, the state must

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<sup>4</sup> *The State of Homelessness in Michigan: 2008 Annual Summary*, Michigan State Housing Development Authority, available at [http://www.michigan.gov/documents/mshda/homelessness\\_summary\\_2009\\_web\\_282448\\_7.pdf](http://www.michigan.gov/documents/mshda/homelessness_summary_2009_web_282448_7.pdf).

<sup>5</sup> ANN ARBOR, MICH, Enactment R-09-431' (Nov 5, 2009), available at <http://a2.gov.legistar.com/LegislationDetail.aspx?ID=535787&GUID=0BB8B6C0-9658-4F6B-9EBC-E3978F965EEC>.

<sup>6</sup> *Annual Report 2008-2009: Shelter Association*, Shelter Association of Washtenaw County.

<sup>7</sup> ANN ARBOR, MICH, Enactment R-09-431' (Nov 5, 2009), available at <http://a2.gov.legistar.com/LegislationDetail.aspx?ID=535787&GUID=0BB8B6C0-9658-4F6B-9EBC-E3978F965EEC>.

<sup>8</sup> US Const, Amm XIV, § 1; *Zinerman v Burch*, 494 US 113, 127, 110 S Ct 975 (1990); see also Const 1963, art 6, § 32 ("No person shall be . . . be deprived of life, liberty or property, without due process of law.").

provide procedural protections such as pre-seizure notifications and post-seizure reclamation opportunities to protect individuals from unjustified deprivations of property.<sup>9</sup> To determine the specific process that is constitutionally required in any given situation, the state must look to the private interests, governmental interests and the value of the available procedure to minimize the risk of error.<sup>10</sup> Here, this analysis clearly shows that in order to comport with constitutional procedural due process requirements, MDOT must (1) provide adequate pre-deprivation notice that is reasonably calculated to inform members of Camp Take Notice or other homeless individuals about the time, date and location of the seizures and how to retrieve any confiscated property and (2) inventory and store seized property in a safe place for at least 30 days to provide the owners a reasonable opportunity to claim it.

The private interests here are significant. The loss of items such as clothing and medicine can have dire affects upon the health and safety of homeless individuals. It is not difficult to hypothesize the consequences of an individual's loss of insulin or heart medication when she does not have the disposable income to replace the prescription. And no matter how monetarily worthless the personal effects of homeless individuals appear to others, these items have great sentimental value for their owner and may represent "the last trace of privacy they have."<sup>11</sup> It is for these reasons that one court rightly urged, "the seriousness of the loss of such property cannot be overemphasized."<sup>12</sup>

Compared to "the more immediate interests of [homeless individuals] in not having their personal belongings destroyed," MDOT simply does not have an overwhelming interest in automatically seizing and destroying these possessions without prior notice.<sup>13</sup> To the contrary, the Supreme Court has made clear that "an officer who happens to come across an individual's property in a public area c[an] seize it only if Fourth Amendment standards are satisfied – for example, if the items are evidence of a crime or contraband."<sup>14</sup> Given this balancing of interests, and because the procedure described above will be highly effective in preventing the unnecessary seizure of property from members of Camp Take Notice, we ask MDOT to replace its unlawful behavior with this constitutionally-adequate policy.

**CHARGING AND ARRESTING INDIVIDUALS FOR TRESSPASS  
WHEN THEY CONDUCT LIFE SUSTAINING ACTIVITIES  
ON PUBLIC PROPERTY DUE TO INVOLUNTARY HOMELESSNESS  
IS UNCONSTITUTIONAL CRUEL AND UNUSUAL PUNISHMENT**

The Eighth Amendment of the Federal Constitution prohibits "cruel and unusual punishment."<sup>15</sup> Over forty years ago, the Supreme Court held that, under this provision, the state

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<sup>9</sup> See, e.g., *Greenholtz v Inmates of the Nebraska Penal and Corr Complex*, 442 US 1, 12-13, 99 S Ct 2100 (1979).

<sup>10</sup> See, e.g., *Mathews v Eldridge*, 424 US 319, 334-335 (1976).

<sup>11</sup> *Pottinger*, 801 FSupp at 1573.

<sup>12</sup> *Pottinger*, 801 FSupp at 1559.

<sup>13</sup> *Pottinger*, 801 FSupp at 1573.

<sup>14</sup> *Soldal v Cook County*, 506 US 56, 68, 113 S Ct 538 (1992) (citation omitted).

<sup>15</sup> US Const Amm VIII. Art 1, § 16 of the Michigan Constitution prohibits "cruel or unusual punishment." Our Supreme Court has emphasized that this distinction provides *greater* protection against unconstitutional punishments under state law, and therefore this practice plainly violates our state constitution as well. *People v Bullock*, 440 Mich 15, 30 n11, 485 NW2d 866 (1992).

cannot criminalize the mere act of “being.”<sup>16</sup> Arresting homeless people for the harmless acts they are forced to perform in public directly contradicts this clear mandate, as these arrests effectively punish homeless individuals for the mere act of existence.<sup>17</sup> After all, involuntarily homeless individuals literally have “no place else to go and no-where else to be.”<sup>18</sup> Consequently, the Constitution’s mandate against cruel and unusual punishment extends to prohibit the arrest of involuntarily homeless individuals who conduct life-sustaining activities on public property.

Of course, the state can arrest a homeless individual who assaults a police officer in the park or purchases narcotics on the street without violating the Eighth Amendment. Unlawful behavior that happens to occur in public does not suddenly become lawful because the individual who commits the crime is homeless. However, our understanding is that members of Camp Take Notice were not engaged in any otherwise-unlawful behavior when they were threatened with arrest. Instead, they were involved in innocent activities, such as sleeping, eating or sitting, which the courts acknowledge all humans *must* perform.<sup>19</sup> To arrest an involuntarily homeless individual for performing such life-sustaining activities in public constitutes cruel and unusual punishment because the individual in question can neither resist the need to perform these activities nor avoid public places when engaged in this otherwise innocent conduct.<sup>20</sup> Thus, by criminalizing “biologically compelled” acts for individuals who are forced to perform such activities in public, the state effectively, and unconstitutionally, criminalizes an individual’s homeless status.<sup>21</sup> Accordingly, we ask the state to refrain from making any such arrests.

**THE STATE SHOULD ADOPT A POLICY  
THAT BOTH MEETS ITS NEEDS AND  
PROTECTS HOMELESS PEOPLE’S RIGHTS**

“It is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens” that “criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change” because he is “powerless to choose not to violate the law.”<sup>22</sup> MDOT’s threats to both remove involuntarily homeless individuals’ property without any process, and to arrest them for performing life-sustaining activities in public, imposes just such a punishment on the members of Camp Take Notice. We appreciate that the state has an interest in preventing crime and beautifying the city. However, penalizing involuntary poverty is far too high a price to achieve these otherwise worthy goals. Indeed, our community and our courts “will no longer tolerate the abuse of constitutional freedoms under the guise of crime

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<sup>16</sup> See *Robinson v State of California*, 370 US 660; 82 S Ct 1417 (1962); *Powell v State of Texas*, 392 US 514, 88 S Ct 2145 (1968).

<sup>17</sup> *Pottinger*, 801 F Supp at 1564.

<sup>18</sup> *Powell*, 392 US at 551 (White, J. concurring in result).

<sup>19</sup> See, e.g., *Jones v City of Los Angeles*, 44 F3d 1118, 1136 (CA 9 2006) vacated 505 F3d 10006 (CA 9 2007); *Pottinger*, 810 F Supp at 1565; *Johnson v City of Dallas*, 860 F Supp 344, 350 (ND Tex 1994) rev’d on other grounds 61 F3d 442 (CA 5 1995).

<sup>20</sup> *Pottinger*, 810 F Supp at 1565.

<sup>21</sup> *Jones*, 444 F3d 1136-1137.

<sup>22</sup> *Powell*, 392 US at 567 (Fortas, J. dissenting).

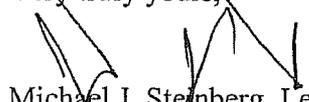
prevention.”<sup>23</sup> Instead, there are actions that the state can take that will *both* satisfy its needs *and* protect the constitutional rights of involuntarily homeless individuals.

With respect to the seizure of property, the state should adopt a policy that (1) provides adequate pre-deprivation notice that is reasonably calculated to inform members of Camp Take Notice about the time, date and location of the seizures and how to retrieve any confiscated property, and (2) inventory and store seized property in a safe place for at least 30 days to provide the owners a reasonable opportunity to claim it. The pre-deprivation notice should be provided no less than seven days before the seizures, and the post-deprivation retrieval procedures should be reasonably flexible to meet the needs of the homeless community. The fact that large cities such as Atlanta, Chicago, Miami, Pittsburgh, San Francisco and Los Angeles have all managed to implement policies that are similar to that which is outlined above demonstrates that it would not be unduly burdensome for Michigan to do so here. We have attached a recent settlement agreement between the ACLU and the City of Pittsburgh as a model policy that properly balances the needs of the state and the constitutional rights of homeless individuals. We urge you to adopt a similar policy in Michigan.

With respect to the arrest of involuntary homeless individuals performing life-sustaining activities, we do not suggest that state should be required to shoulder the entire burden of solving the homelessness in our community. “The lack of sufficient shelter, of course, is not the [state’s] problem alone.”<sup>24</sup> However, when the state does not provide sufficient shelter to house homeless individuals within its borders, it cannot then arrest them for performing harmless acts in public areas when they have no place else to go. So long as the lack of available shelter space continues to leave homeless persons with no choice but to struggle to survive on the streets of our cities,<sup>25</sup> we urge the state to refrain from arresting involuntarily homeless individuals for trespass.

We have no doubt that the state is eager to adopt policies that will comport with the constitutional protections of procedural due process and its prohibitions against cruel and unusual punishment, and we are happy to assist in this endeavor. Please feel free to contact staff attorney Jessie Rossman if you would like to discuss these matters further. We look forward to your response.

Very truly yours,



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<sup>23</sup> *Wheeler v Goodman*, 306 F Supp 58, 64-65 (WD NC 1969) vacated on other grounds 58 US 987, 91 S Ct 1219 (1971).

<sup>24</sup> *Pottinger*, 801 F Supp at 1564-1565 n19.

<sup>25</sup> *Homes Not Handcuffs: The Criminalization of Homelessness in U.S. Cities*, The National Law Center on Homelessness & Poverty and the National Coalition for the Homeless, 14 (July 2009).

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