



Agenda Item: ID17-1183 (1-R)

Date: 8/24/17

## FRESNO CITY COUNCIL



### Supplemental Information Packet

Agenda Related Item(s) – ID17-1183 (1-R )

Contents of Supplement: A letter from the American Civil Liberties Union (ACLU)

Item(s)

Title: BILL NO. B-40 (Intro. 8/17/2017) (For adoption) – Adding Article 17 to Chapter 10 of the Fresno Municipal Code relating to Unlawful Camping (Citywide)

**Supplemental Information:**

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August 24, 2017

**VIA FACSIMILE AND ELECTRONIC MAIL**

Fresno City Council  
2600 Fresno St  
Fresno, CA 93721

**RE: Proposed Nuisance Ordinance, Chapter 10, Article 17, §§10-1700 – 10-1706 of  
the Fresno Municipal Code**

Dear Councilmembers:

I am writing on behalf of the American Civil Liberties Union of Northern California regarding Fresno City Council's proposed ordinance to add Article 17 to Chapter 10 of the Fresno Municipal Code, relating to unlawful camping. As you know, we represented plaintiffs in *Kincaid v. City of Fresno* on behalf of homeless residents in Fresno regarding homeless sweeps in the City. We have concerns when cities attempt to make it illegal to live in a city because an individual does not have a home. Moreover, we understand that Fresno City Council is now considering adopting this proposed ordinance that criminalizes camping on public and private property within the City limits. Councilmember Brandau, the author of the proposed ordinance, explained this was a direct response to homeless individuals in Fresno.

The United States Supreme Court explained that it is unconstitutional to criminalize status like homelessness that "may be contracted innocently or involuntarily." *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

In *Jones v. City of Los Angeles*, the United States Court of Appeal for the Ninth Circuit held that unless a city has sufficient housing for all of its residents, it may not prohibit homeless persons from sleeping on public property.<sup>1</sup> The court reasoned that where the homeless population exceeds the number of available shelter beds, homeless persons must by necessity sleep on public property. The court went on to say that simply being homeless or engaging in innocent activity criminalizes "the status of being homeless." *Id.* at 1139. Although the opinion in *Jones* was withdrawn as moot after the parties settled the case,<sup>2</sup> at least one federal court in the Ninth Circuit has since relied on it to uphold a challenge to an anti-camping law as applied to homeless people, writing that "it seems a reasonable proposition under the Eighth Amendment that homeless persons should not be subject to criminal prosecution for merely sleeping in public

<sup>1</sup> *Jones v. City of Los Angeles*, 444 F.3d 1118, 1132 (9th Cir. 2006) *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007).

<sup>2</sup> See 505 F.3d 1006.

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at any time of day.”<sup>3</sup> And courts have held that a city camping ordinance can violate other fundamental constitutional rights.<sup>4</sup>

This proposed ordinance suffers from the same constitutional flaw as those at issue in these other cases. Fresno’s proposed ordinance states that “it is unlawful and a public nuisance for any person to camp, occupy camp facilities, or use camp paraphernalia” § 10-1702. The proposed ordinance’s language regarding camping includes innocent activity such as “temporarily sleeping.” § 10-1701. Individuals could face up to six months in jail among other sentencing that would criminalize homeless individual’s status under this proposed ordinance. § 10-1703. We are raising concerns that enforcing this proposed law against homeless people could violate the United States Constitution.

In *Kincaid*, Judge Wagner explained that:

The shelter available for homeless persons in the City of Fresno is substantially less than the need for that shelter. The existing overnight facility beds for individuals and families seeking shelter overflow daily, and there is a significant shortage of available overnight homeless shelter beds on a daily basis in Fresno. *Kincaid v. City of Fresno*, 2006 WL 3542732 at \*3 (E.D. Cal. 2006).

The City has not offered any explanation as to where the numerous homeless individuals are supposed to live. The City also heard from many homeless individuals when it introduced the ordinance that Fresno’s homeless population does not have alternatives regarding where to live.

If Fresno City Council decides to adopt this proposed ordinance that still criminalizes being homeless, the City may violate the Eighth Amendment and other fundamental constitutional protections. For these reasons, we urge Fresno City Council not to adopt this harmful ordinance.

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<sup>3</sup> See *Anderson v. City of Portland*, 2009 WL 2386056, \*6 (D.Or. July 31, 2009) (Court denied Defendant’s motion to dismiss because City’s enforcement of the anti-camping and temporary structure ordinance could criminalize them for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property); but see *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1231 n.5 (E.D. Cal. 2009) (rejecting the holding in *Jones*. But the court distinguished the Sacramento ordinance by explaining it was much less restrictive than the one in Los Angeles and explained that cities often ensure they are not criminalizing the state of homelessness with proposed ordinances. Similar to Fresno’s ordinance, in Los Angeles, the ordinance did not create proper bounds to prevent criminalizing the state of homelessness.); see also *State v. Adams* 91 So.3d 724, 751 (Ala.Crim.App.2010). (Court declining to adopt the reasoning in *Lehr* because the court agreed that the Ninth Circuit’s “well reasoned analysis” explained that “punishing criminally not only a person’s pure status, but also a person’s involuntary conduct [sic] is inseparable from that person’s status.” The court further explained that the homeless individuals in *Jones* were punished for sitting, lying, or sleeping in public and that those acts were unavoidable because of their homeless status.).

<sup>4</sup> See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1580 (S.D. Fla.1992) (holding that an anti-sleeping ordinance violated homeless individuals’ fundamental right to travel.).

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Sincerely,



Abre' Conner  
Staff Attorney  
ACLU of Northern California

CC: Lee Brand, Mayor  
All members of City Council  
Douglas Sloan, City Attorney