Case No. 19-10957-E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DAVID PEERY, et al.,
individually and as class representative,

Appellants/Plaintiffs,

vs.

CITY OF MIAMI

Appellee/Defendant.

On Appeal from the United States District Court
for the Southern District of Florida

APPELLANTS' REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and the rules of this Court, Appellants hereby submit the Certificate of Interested Persons and Corporate Disclosure Statement:

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

CASES **PAGE(S)**

THE STANDARD OF REVIEW

The City agrees with Plaintiffs that this court exercises *de novo* review over the proper legal interpretation of the Consent Decree and over whether the district court applied the correct burden of proof in deciding the two motions before it. *See* Ans. Br. at 23-24; Op. Br. at 25-26. The rest of the City's statement on the standard of review is devoted to two propositions Plaintiffs acknowledged in their Opening Brief: (a) that a district court's ultimate determination of whether to grant a motion to enforce or a motion to terminate is reversible only for abuse of discretion, and (b) that a district court's findings of fact may be reversed only if clearly erroneous. Ans. Br. at 22-23; Op. Br. at 25. As Plaintiffs' Opening Brief makes clear, however, their challenge is essentially to the district court's misinterpretations of the Consent Decree and its failures to apply the correct burden of proof. *See* Op. Br. at 26-28 (Summary of Argument).

ARGUMENT

I. The district court's order denying enforcement of the Consent Decree was based on substantial misinterpretations of the Decree.

As an initial matter, the City's suggestion that Plaintiffs' arguments are mere disputes with the district court's factual findings is wrong. Plaintiffs take no issue with the district court's factual findings, where such findings were made. But the City's argument relies upon supposed factual "findings" that the district court did

not make. As explained further below, Plaintiffs' arguments rely on the fact that the district court simply misinterpreted the clear commands of the Consent Decree.

A. The district court acknowledged that City officials repeatedly engaged in conduct that would violate the Consent Decree's property protections, but excused that conduct by misinterpreting critical aspects of the Consent Decree.

1. The district court did not find that the property the City discarded was contaminated.

The City does not dispute that, over a several-week period, its workers seized and discarded homeless people's property *en masse* in a systemic City-wide cleanup effort. The City also does not dispute that the Consent Decree does not permit City workers to discard property simply because it is located in a contaminated area. Rather, the City acknowledges that the property itself must be contaminated. Ans. Br. at 27. Thus, the City's only argument is that the district did find that the property that was discarded was contaminated.

But the district court made no such finding. The chief portion of the district court's order the City cites for this is pages 34 to 35. Those pages contain no finding that all the property the City discarded was contaminated—in fact, just the opposite.[1]

[1] Although not explicitly relied upon for this purpose, another passage cited by the City is page 38 of the Order, which states: "The Consent Decree allows the City workers to take property in a manner consistent with their procedures. The evidence showed that, at least for the most part, that was done, and to discard contaminated property." DE 682: 38. This passage appears in a different section of the Order, in a different context, and does not negate the portion of the Order that clearly misinterpreted the Decree. The acknowledgment that the City followed its own

The district court acknowledged that the very reason that much of the property was taken was because of the "unsanitary conditions *in that location*[,]" leading City workers to "believe[]" the property "to be contaminated." DE 682: 34 (emphasis added). The district court further acknowledged that "there were instances during the clean-ups where City workers mistakenly discarded valuable items due to the gravity of the unsanitary conditions"—not because the discarded items were contaminated. *Id*. at 35. In sum, the district court did not find that the discarded property was contaminated; the district court found that clean and valuable property was discarded because it was located in an area deemed unsanitary. The Consent Decree does not permit this. Op. Br. at 30-31.

Moreover, the City completely ignores the district court's misinterpretation of allowing City employees to discard an entire bag if they think it contains contaminated material. As Plaintiffs pointed out in their Opening Brief, the Consent Decree does not permit this, and rather requires an individualized determination that an item is contaminated before discarding it. Op. Br. at 31-32.

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procedures at times—which Plaintiffs do not contest—was immediately followed by a statement that there is no need under Consent Decree to "fish out identifications and medications" from a bag that appears contaminated, *id*. As set out at the end of this section, that is a misinterpretation of the Consent Decree. *See* Section I.A.1 page 3.

2. The district court construed the Consent Decree to require homeless people to carry their critical belonging with them at all times.

Contrary to the City's argument, the district court's requirement that homeless people carry their critical belongings with them was not a mere "suggested solution." Ans. Br. at 28. It was the only way the district court could construe the Decree in a manner that exonerated City workers. Indeed, the court explicitly held that, "[o]bviously, there is no excuse for the taking of identification cards, medicine, eye glasses, cellular phones, or photos, as they, by themselves, do not present a health hazard." DE 682: 23. But in the next three sentences, the district court then excused that behavior by stating that homeless people "should keep those items with them when they are on the move." *Id.* The district court never found that such items were contaminated—in fact, just the opposite. The inescapable conclusion is that the City violated the Consent Decree, and the only way the district court reached the contrary conclusion was to engraft a nonexistent provision onto the Decree. Op. Br. at 33-34.

3. The district court allowed the City to treat property as abandoned even when told the property belonged to someone.

The City sidesteps this issue by dismissing the district court's holding with respect to abandoned property as mere "dicta." Ans. Br. at 29. Contrary to the City's claim, Plaintiffs do not take issue with the Court's factual findings—especially here,

where the findings are in Plaintiffs' favor. *See* DE 682: 28 ("Plaintiffs' witnesses also testified that City workers routinely did not allow homeless persons to retrieve and save the property of another homeless person from disposal."). Rather, the Court found that City workers seized and destroyed property despite having unmistakable evidence that it belonged to a homeless person: the statement of a present witness. *Id.* But again, the district court excused this behavior by misinterpreting the Decree to allow the City to ignore this evidence. *Id.* The Consent Decree does not permit this behavior. Op. Br. at 34-36.

B. The district court misinterpreted the Consent Decree to prohibit arrests but not other harassment and misconduct short of arrest, which the Consent Decree plainly prohibits.

In resolving the Plaintiffs' complaint about the "move on" orders, the district court ruled: "Although the Consent Decree contains a general requirement that City police not harass the homeless, the Consent Decree and Police Department Order 11 do not explicitly prohibit police from ordering homeless persons to move from their locations or from sounding loud noises to wake people before a clean-up operation." DE 682: 36. But contrary to the district court's assertion, the Consent Decree's general anti-harassment provision is not the only relevant one. DE 682: 37. As the district court acknowledged elsewhere in its ruling, the Consent Decree enjoined police from "approach[ing] a homeless individual, who is not committing a crime, unless the approach is to offer services." DE 682: 5 (citing DE 525-1:2 (Section

VII.14.A)). *See also* DE 382: 7 (same). Although not explicitly stated, the command of this provision, particularly when read in *pari materia* with the anti-harassment provision, could not be clearer: City police were prohibited from approaching homeless persons not committing crimes to tell them to "move on."

In an effort to justify the City's actions, the district court connected the "move on" orders about which Plaintiffs complained with the City's clean-up operations. DE 682: 24, 36-37. It concluded: ". . . [T]here is no clear and convincing evidence that *requiring the homeless to move during clean-up operations* was a violation of the Decree . . . ." DE 682: 37. It asserted that such requests for a homeless person to "relocate temporarily" were necessary to protect their own safety, and the "public health, hygiene and sanitation" of other visitors and residents of downtown Miami. *Id.* It pointed out that Plaintiffs acknowledged this in their closing argument, DE 682: 25.

What Plaintiffs did contest, however, were repeated instances where police told them to move on, permanently, and to never return, without any pretense of a clean-up justification. Op. Br. at 22. The Java Brooks incident was one such instance. DE 578-39. Police told her, "You need to get your stuff and . . . leave!" without any claim she was violating the law. Nor was she offered shelter.[2] There is

[2] In an effort to undermine the Plaintiffs' claim of contempt, the City points to the district court's finding that Brooks "basically flaunted the City police" and "showed little incentive to try to get off the streets." Ans. Br. at 33 (quoting DE 682: 30). But

uncontroverted evidence of several other examples of this in the record. *See* Rhodes, DE 675: 12 ("get out, you can't stay in this location"); Allen, DE 675: 49-50 ("they told us we had to move"); Aguilar, DE 691: 91 ("He said, you'd better get out of here before I arrest you, and so I got out of there."). The district court acknowledged other instances in its order. DE 682: 25 (Villalonga was "asked" to move from his area on Lot 16 and was not offered shelter, DE 676: 8-10); *id*. (Chibanguza was ordered to leave a bus stop, though he had a bus card, DE 675: 96); *id*. (Richardson was ordered to get up and leave "quite a few times," DE 676: 101-02). None of these incidents were connected with clean-up operations. This evidence was unchallenged and uncontroverted.[3]

Accordingly, the district court had only one alternative to avoid finding the City in contempt, given uncontroverted evidence of these repeated violations of the Decree and Plaintiffs' due process, liberty, and Fourth Amendment rights, *see* ***Chicago v. Morales***, 527 U.S. 41, 53-55 (1999); ***Catron v. City of St. Petersburg***, 658 F.3d 1260, 1267-68 (11th Cir. 2011); ***Bennet v. City of Eastpointe***, 410 F.3d 810, 815-16, 834 (6th Cir. 2005). That was to (mis)interpret the Consent Decree's

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Brooks' reaction to the officers' wrongful actions, and her supposed "lack of incentive to try to get off the streets," are irrelevant to any determination whether the police conduct depicted in the video violated the Decree.

[3] There is no indication that the district court made any finding that these incidents did not take place. Even if such a finding were somehow inferred, the finding would be clearly erroneous on this record.

anti-harassment (and anti-approach) provisions not to bar the City police's move on orders.

Plaintiffs cited ***Catron***, ***Morales***, and ***Bennet*** as examples of other sources of the rights that are protected by the Consent Decree. Op. Br. at 40-41. The violation of these rights constitutes "harassment" under a Consent Decree that—besides specifically protecting against harassment and unwarranted approach—requires the City "to protect the constitutional rights of homeless persons." DE 382: 5 (Section VI.9).[4]

The City attempts to distinguish ***Catron*** as "inapposite" because the conduct found to violate due process—enforcing an ordinance that allowed police to issue trespass warnings that summarily excluded persons suspected of city or state law violations from specified city lands—was not giving the "move on" orders at issue in the instant case. Ans. Br. at 31. But in fact, the move on orders in the instant case were *identical* in intent and result to the trespass warnings in ***Catron***: the police summarily excluded the Plaintiffs from the public places where they were located and entitled to be, through the exercise of unfettered and unguided discretion, without any kind of hearing or way for a Plaintiff to challenge the exclusion.

[4] Black's Law Dictionary defines "harassment" as "[w]ords, conduct, or action . . . that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose." Bryan A. Gardner, Black's Law Dictionary 721 (Seventh ed. 2001).

A closer review of ***Catron*** demonstrates the strength of its comparison to the instant case. The court applied the three part balancing test of ***Matthews v. Eldridge***, 424 U.S. 319, 334-35 (1976), to determine if the trespass ordinance satisfied the constitutional requirement of procedural due process. Regarding the first element, the court observed that the plaintiffs, four homeless persons, had a "constitutionally protected liberty interest to be in parks or on other city lands of their choosing that are open to the public generally." ***Catron***, 658 F.3d at 1266 (citing ***City of Chicago v. Morales***, 527 U.S. 41 (1999) ("[A]n individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage,' or the right to move 'to whatever place one's own inclination may direct.'")). This is *precisely* the nature of the constitutional rights Judge Atkins ruled were violated by the City's mistreatment of the Plaintiffs, ***Pottinger v. City of Miami***, 810 F. Supp. 1551, 1578-81 (S.D. Fla. 1992), and the rights the Consent Decree was intended to protect by prohibiting harassment. DE 382: 5 ("The CITY hereby expressly adopts a policy as provided for herein to protect the constitutional rights of homeless persons, to prevent arrests and harassment of these persons, and the destruction of their property . . . .")

Regarding the second element, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," ***Catron***, 658 F.3d at 1267 (quoting ***Matthews***, 424

U.S. at 335), the court concluded that this "weighs heavily in Plaintiffs' favor." *Id.* The risk was great because the trespass warnings, like the "move on" orders in the instant case, were especially "easy for the City—through a variety of agents—to issue . . . and because no procedure [wa]s provided for the recipient of a trespass warning to challenge the warning or for the warning to be rescinded." *Id.* Like the move on orders in the instant case, the court noted that "a wide range of acts" might result in issuance of the trespass warnings and there was "no guidance to city officials (or their designees) or police officers in exercising their discretion to . . . issue[ ] a trespass warning . …" *Id.* at 1267-68. The court found that the ease with which trespass warnings could be issued was "particularly problematic" because, like the move on orders in the instant case, there was "no procedural means for a warning-recipient to challenge the warning." *Id.* at 1268.

In ***Catron***, the city argued that the state criminal justice system afforded "sufficient procedural protections." ***Catron***, 658 F.3d at 1268. This court was not persuaded. Like the move on orders Plaintiffs challenge here, the court observed that the trespass warnings served "instantly as some kind of restraining injunction." *Id.* And like the disciplinary investigation of the officers who accosted Brooks, DE 682: 24-25, or the right to file a subsequent civil rights violation lawsuit that the district court endorsed as an adequate remedy for any future complaints of Plaintiffs, DE 682: 4, 32, this court held that any after-the-fact procedure was inadequate,

indeed "beside the point." ***Catron***, 658 F.3d at 1268. "A challenge to a trespass *charge* in state court does not equal a challenge to the validity of a trespass *warning*, especially of the warning's issuance at the outset . . . ." *Id.*

The uncontroverted evidence demonstrated the City used "move on" orders, unrelated to clean-up operations, as a vehicle to eject Plaintiffs from the public spaces they were entitled to occupy. ***Catron*** demonstrates that the City's posited countervailing interest—protecting the safety of the Plaintiffs and the "health, hygiene and sanitation" of the general public—does not constitutionally justify its use of summary "move on" orders. This court's decision in ***Catron*** demonstrates why the move on orders the City used, though short of arrest, constituted "harassment" and misconduct prohibited by the Consent Decree. The only reasonable way to conclude that they did not was to interpret the Consent Decree's prohibitions not to extend to harassment and misconduct short of arrest. Based on the Consent Decree's plain, unambiguous language, this reading by the court was error.

C. The district court misconstrued the Consent Decree in treating an internal police investigation as a remedy for violations.

The district court rejected Plaintiffs' argument that the City should have been held in contempt based on, *inter alia*, the uncontroverted evidence of the City's clear violation of the Consent Decree's anti-harassment and anti-approach provisions in relation to Java Brooks, DE 382: 5 (Section VI.9), 7 (Section 14.A); DE 682: 5

(district court's acknowledgment of Consent Decree's anti-approach provision). Police officers accosted Brooks and ejected her from the public sidewalk where she was located, without any suggestion she was committing an offense and without any offer of shelter. DE 650; DE 578-39; DE 675: 152-54, 156, 158, 159. The court offered three justifications for its ruling: the Consent Decree only prohibited harassment generally, and did not prohibit instructing someone to move on; the video of the Brooks incident did not show the underlying circumstances under which the officers issued the directives; and there was a pending internal affairs investigation of the officers involved. DE 682: 24-25.

As demonstrated *supra*, Section I.B, pp. 5-11, the Decree's anti-harassment provision, alone or in conjunction with the anti-approach provision and general mandate to respect the constitutional rights of Plaintiffs, clearly encompassed a prohibition against this type of offensive, unjustified conduct toward Plaintiffs.[5] Additionally, the video and Brooks' testimony plainly showed the circumstances under which the move on order was given.[6] The only other justification offered was the pendency of the ongoing police internal affairs investigation. DE 682: 24-25. But such *post hoc* actions cannot supplant the remedy of contempt. *See* ***Pottinger***, 810

[5] Again, the video tape and Brooks' unrebutted testimony about the incident make clear that the move on order was unrelated to any clean-up operation.

[6] This shifted the burden to the City to justify the officers' conduct. DE 682: 35-36 (citing, *inter alia*, ***Reynolds v. G.M. Roberts***, 207 F.3d 1288, 1298 (11th Cir. 2000)). But the City presented no evidence on the Java Brooks incident.

F. Supp. at 1556 ("City's threat of disciplinary action insufficient"). This is particularly so where the Consent Decree specifically provides for court enforcement. DE 382: 29 (Section X.25a ("Enforcement/Mediation")); DE 525-1: 8 (Section X.25b ("Enforcement/Mediation").

The City cites other findings of the district court to justify its ruling, namely that Brooks "basically flaunted the City police, who ordered her to move" and that she "showed little incentive to try to get off the streets." Ans. Br. at 33 (citing DE 682: 30). But these findings are obviously irrelevant to the police actions in question. Thus, absent any other stated justification for the district court's rejection of the Plaintiffs' claim of contempt, it appears that the district court construed the Consent Decree to allow the court to substitute the police investigation for enforcement through contempt. This interpretation by the court was in error.[7]

D. The district court misconstrued the Consent Decree by dispensing with the requirement of a contemporaneous warning prior to arrest for obstructing the sidewalk by failing to find a violation.

The district court recognized that even if Archer and Bass had completely obstructed the sidewalk, a warning to stop the suspected violation, and an offer of shelter, had to be made before any arrest. *See* DE 525-1: 3 (Section VII.14.C.2), 4-

[7] The district court's treatment of this incident clearly rests on a misreading of the Consent Decree; there is no basis for inferring a finding, not made, of facts that would justify the officers' conduct, and any such inferred finding would be clearly erroneous.

5 (Section VII.14.C.3.d); DE 682: 25-26. The City seems to concede, at least implicitly, that there is no evidence that a *contemporaneous* warning to stop any offending conduct was given to Archer or Bass (or an offer of shelter). Ans. Br. at 35-36. In fact, a review of the videotaped encounters with Archer and Bass confirms this conclusion. DE 578-37; DE 578-38. The videos begin as the police arrived. The district court made no explicit finding on the issue of the warning or offer of shelter. DE 682: 25-26, 38-39.

As with the evidence regarding the move on orders issued to Brooks and others, once Plaintiffs presented their video evidence and testimony regarding the City's alleged violations of the Consent Decree, the burden of proof should have shifted to the City to show compliance. DE 682: 35-36. But the City presented no such evidence.[8]

The only reasonable interpretation of the Consent Decree is that the warning to stop an obstruction of sidewalks that triggers the right of police to arrest, if shelter has been offered and rejected, must be a warning *contemporaneous* with the encounter leading to the arrest. The entire Consent Decree protocol was aimed at protecting the constitutional rights of Plaintiffs to exist in public, to avoid arrest if at all possible, and to offer homeless persons shelter and services in an effort to

[8] Plaintiffs introduced the arrest affidavits for Archer and Bass which referenced alleged *prior* warnings to clear off the sidewalks and offers of shelter. DE 578-35; DE 578-36.

alleviate their homelessness. A procedure whereby persons who are clearly homeless, suspected of violating an ordinance related to their homeless status, are arrested without providing a contemporaneous warning and offer of shelter, would completely undermine the purpose and intent of the Consent Decree protocol.

The only explanation for the district court's ruling denying contempt for the Archer/Bass arrests in the absence of contemporaneous warnings is an erroneous interpretation of the Decree that no contemporaneous warning was necessary. For the reasons stated, any such reading of the Consent Decree was in error.[9] Op. Br. at 43-35.

II. The district court erred in granting termination of the Consent Decree.

A. The City's pattern of violations precluded termination of the Consent Decree.

The City does not dispute that a recent pattern of violations would preclude termination of the Consent Decree, nor does it dispute that it bears the heavy burden of persuasion to demonstrate that no constitutional violation will recur. The City argues only that there was no pattern of violations. As shown above, Plaintiffs have amply demonstrated such a pattern with regard to their property and their arrest and harassment, which therefore precludes termination as a matter of law.

[9] Because the district expressly disclaimed making any finding, there would be no basis for inferring any finding of a contemporaneous warning, which in any event—given the evidence before it—would be clearly erroneous.

B. In its simultaneous consideration of the two motions before it, the district court erroneously put the burden of proof on Plaintiffs as to the Motion to Terminate.

The City does not dispute Plaintiffs' observation that when a district court is confronted with simultaneous motions to enforce and to terminate a consent decree, the court's failure to apply the correct burden of proof to each is reversible error. Op. Br. at 47 (citing ***Jeff D. v. Otter***, 643 F.3d 278, 285 (9th Cir. 2011)). *See* Ans. Br. at 36-39, 40-43. Further, both parties agree that as to the Motion to Terminate, the *City* had the burden to show that it had substantially complied with the decree, apart from "unintentional … [or] minor or trivial" deviations from it. Ans. Br. at 37 (quoting ***Wells Benz, Inc. v. U.S. for Use of Mercury Elec. Co***., 333 F.2d 89, 92 (9th Cir. 1964)); Op. Br. at 46-47.

The error that Plaintiffs raise here is that, in the face of what the district court itself observed was "vehemently contested" evidence as to the City's actual handling of property during clean-ups—with the City asserting that its procedures protected property, and Plaintiffs presenting evidence that City workers had in practice indiscriminately seized and destroyed it—the court failed to make a finding that the alleged violations had not occurred. Op. Br. at 48 (citing DE 682: 21, 22-23; DE 675: 141). Since there is no claim that the wrongful seizures Plaintiffs alleged were "minor or trivial," the court's failure to make a clear finding that they did not occur—

as required by the burden being on the City to demonstrate substantial compliance—was in error.

The City incorrectly describes Plaintiffs' argument as a dispute with a determination by the district court that no such violations occurred. Ans. Br. at 41. There was no such determination in the court's order. The City points to the district court's reference to testimony by city employees about procedures the City claims to have had in place regarding property, Ans. Br. at 41, but nowhere in that portion of the order (or anywhere else) did the court find that the violations had not taken place. *See* DE 682: 34-35, 38. At most, the court's order could be read to indicate that that the City had (unwritten) procedures for dealing with property, DE 682: 20, and that the City could seize property *if* it did so consistent with the Consent Decree, DE 682: 38.

The City similarly mischaracterizes the district court's order in relation to evidence presented by Plaintiffs that the City did not in fact leave notes behind when it seized belongings. The City asserts that the court made a finding that the City did leave notes. Ans. Br. at 41-42. Yet the portions of the order cited and quoted by the City say no such thing. The court's order credited the City's witnesses that the "City protocol" was to "leave a notice for property they take." DE 682: 20. As to what actually happened in practice, though, the court simply took note of a few photographs of notes offered by the City and observed that "Plaintiffs dispute that

these notes were left ….” Op. Br. at 48 (quoting DE 682: 20); Ans. Brief at 42 (quoting DE 682: 20). There was no finding either way about what actually happened.[10]

The City similarly mischaracterizes the district court’s treatment of the Java Brooks and Chetwyn Archer/Tabitha Bass incidents, asserting that the court found that there were no violations in how the police treated them. Ans. Br. at 42. Again, that assertion is contrary to what the opinion below states. Plaintiffs presented evidence (including a video and arrest records) showing that required contemporaneous warnings were not given to Archer and Bass before their arrests. In declining to hold the City in contempt for this, the district court simply stated that “the video did not show what transpired beforehand,” DE 682: 38-39. *See* Section I.D *supra*, pp. 13-15. In relation to the Motion to Terminate, however, it was the *City’s* burden to show substantial compliance; leaving what happened unresolved effectively meant the court shifted the burden to Plaintiffs to show lack of substantial compliance. Similarly, in relation to the Motion to Terminate, it was the City’s burden, not the Plaintiffs’, to show that it had substantially complied with the

[10] If the City is inviting this court to infer that the district court must have implicitly made a finding in the City’s favor, that invitation is contrary to the undisputed premise that the City had the burden to affirmatively establish substantial compliance—not that the Plaintiffs had the burden of showing a lack of compliance. *See* ***Jeff D. v. Otter***, 643 F.3d at 285-86 (finding error where court denied contempt based on allegations of violations but failed to make specific findings whether the defendant had demonstrated substantial compliance).

Consent Decree in relation to Brooks, as to whom Plaintiffs presented evidence of a wrongful order to move on. Op. Br. at 48-49. The City wrongly asserts that the court determined that no violation had occurred, Ans. Br. at 42, when in fact the district court's order simply noted the evidence, DE 682: 24-25, and faulted her for "flaunt[ing] the City police" about her *Pottinger* rights, *id*. at 30. *See* Section I.C *supra*, pp. 11-13.

Finally, the City does not dispute that the district court had before it evidence that Plaintiffs had objected informally to the City at times over the years about its compliance with the Consent Decree. Ans. Br. at 42-43. As Plaintiffs noted, the court made no findings regarding this evidence. The City does not contest Plaintiffs' point that the district court failed to make any finding that the violations objected to were "minor or trivial," ***Wells Benz***, 333 F.2d at 92; indeed, they were far from it. Since it was the City's burden to establish substantial compliance over the years, not the Plaintiffs' burden to show lack of substantial compliance, this failure to make any finding was error. If the City means to defend the court's failure to make such findings by arguing that only prior formal motions to enforce would be relevant to the question of whether the City had met its burden of showing substantial compliance, that is a misinterpretation of the Consent Decree. The Decree itself contemplated informal enforcement and monitoring as key parts of ensuring compliance. DE 382: 13-14, DE 525-1: 8 (Records Generation/ Maintenance/

Access); DE 382: 14-17 (Advisory Committee); DE 382: 28-29, DE 525-1: 8 (informal mediation in case of claims of violation). Moreover, it is well established that efforts short of court action constitute enforcement of a consent decree—for example, for purposes of attorneys' fees. *See* ***Pennsylvania v. Delaware Valley Citizens' Council for Clean Air***, 478 U.S. 546, 558 (1986); ***Sierra Club v. Hankinson***, 351 F. 3d 1358, 1361 (11th Cir. 2003).

C. The district court erred in terminating the Consent Decree in the face of undisputed evidence that the City lacked consistent procedures for protecting the property of homeless individuals.

The City mischaracterizes Plaintiffs' argument as an invitation to "reweigh the evidence and ignore factual findings," Ans. Br. at 43. It does not, however, contest that the City's own witnesses provided inconsistent evidence as to key features of the procedures for handling property, such as whether, when, how, and by whom advance notice of clean-ups was to be posted, and how a determination was to be made whether property was "contaminated" and so subject to disposal. Op. Br. at 50-52. Faced with conflicting evidence, the district court made no specific findings on any of these issues. Approving termination of the Consent Decree in the face of such unresolved issues contradicted the importance the Decree places on the respect for Plaintiffs' property, *e.g.*, DE 382: 5 (City adopts a policy "to prevent … the destruction of their property"); DE 382: 12 ("The CITY shall respect the personal

property of all homeless people"). Equally important, it effectively placed the burden on Plaintiffs to show lack of substantial compliance.

CONCLUSION

Plaintiffs request this court to vacate the district court's judgment and remand the case with instructions to reverse the grant of the City's Motion to Terminate, and to grant Plaintiffs' Motion to Enforce and hold the City in contempt, and to determine the proper remedy. In the alternative, Plaintiffs request the court to remand the case for further proceedings to determine Plaintiffs' Motion to Enforce and the City's Motion to Terminate, in accord with proper construction of the Decree and allocation of the burden of proof.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 5,286 words.

CERTIFICATE OF SERVICE

I certify that on January 21, 2019, I served upon opposing counsel the foregoing document by filing it via the ECF filing system and mailed paper copies to opposing counsel.

Respectfully submitted,

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