UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-2406-CIV-MORENO

MICHAEL POTTINGER, PETER
CARTER AND BERRY YOUNG,
Plaintiffs,
vs.
CITY OF MIAMI,
Defendant.
_____/

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR TERMINATION, OR ALTERNATIVELY, MODIFICATION OF THE POTTINGER CONSENT DECREE

I. Introduction

The product of twenty months of difficult negotiations in light of this court's holding that the City had a policy and practice of criminalizing homelessness, the ***Pottinger*** Consent Decree protects the constitutional rights of a vulnerable population that lives under unimaginably difficult circumstances. As was true when the City agreed to the Consent Decree in 1998, people live on the streets today not because they choose to, but because there is a severe shortage of affordable housing and shelter. As was true in 1998, the Consent Decree is respectful of local authority, imposing no constraints on the City's ability to pursue constructive policies to address that shortage.

The City now seeks termination or modification of the Consent Decree. As the City acknowledges, it bears the heavy burden of establishing that, in light of significant changes in circumstances, the Consent Decree's basic purpose has been fully achieved, and its limits on the City's treatment of homeless persons are no longer necessary. DE 566: 6-7, 12, 25.

The court need look no further than Plaintiffs' pending Motion to Enforce the Pottinger

Consent Decree and to Hold the City in Contempt, DE 568, to see how closely the City's systematic and brutal violations of the Decree resemble the conduct that led to its adoption. The City has certainly *not* complied with either "the letter [or] spirit of the Pottinger Consent Decree." DE 566: 2. As evidence of changed circumstances, it points to an array of services and programs addressing homelessness, a formal policy of respecting the rights of homeless persons, and the growth in downtown Miami. DE 566: 7-14. But the changes were actually anticipated by the parties when the Consent Decree was adopted in 1998 and modified in 2013-2014, and so cannot justify termination or modification under ***Rufo v. Inmates of Suffolk County Jail***, 502 U.S. 367, 385 (1992).

One pivotal circumstance has *not* changed: While the resources directed toward combatting homelessness have improved over the years – an improvement contemplated in 1998, and which the Consent Decree has not impeded – there continue to be many people who "do not have the choice, much less the luxury, of being in the privacy of their own homes. Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places." ***Pottinger***, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992). Police sweeps, arrests, and destruction of their property, as the City has done repeatedly in recent years, "effectively punish[] them for being homeless." *Id*.

II. The City Has Failed to Meet the Heavy Burden of Showing that the Consent Decree "Is Clearly No Longer Necessary"

The City has the burden of showing that the "basic purpose" of the Consent Decree, has been "fully achieved." ***U.S. v. City of Miami***, 2 F.3d 1497, 1505 (11th Cir. 1993) (quoting ***Board of Education of Oklahoma City Public Schools v. Dowell***, 498 U.S. 237, 247 (1991)). This is a demanding test: a consent decree may be terminated only if its continuation "is clearly no longer necessary" to remedy the violations that prompted the decree in the first place. *Id*. at 1508.

To hold that the Consent Decree's basic purpose has been fully achieved, this court would

have to find that the City has complied in good faith and is unlikely to "return to its former ways." *Id*. at 1505 (quoting ***Dowell***, 498 U.S. at 247). ***Dowell*** cautions against "accept[ing] at face value the profession" of a defendant that it will commit no future violations. 498 U.S. at 249. The City accepts that the burden to justify termination is heavy. DE 566:2 ("compliance with both the letter and the spirit" of the Decree); *id***.** (treatment of homeless must be "fundamentally different" from earlier conduct); *id*. (there should be "no policy or practice of constitutional violations"). Yet the City has systematically violated the Decree, both recently and in the past, and its pattern of conduct over the years makes clear that it will continue those violations if the Consent Decree is terminated.

The City errs in reading ***U.S. v. City of Miami*** to allow its burden to be met even when "some noncompliance persist[s]." DE 566: 15. The Eleventh Circuit sharply distinguished between the basic purpose of that decree – to "eliminate discrimination [in hiring] and the effects of past discrimination," *id*., 2 F.3d at 1508 – and the means of measuring progress (such as parity between the composition of the work force and general population). The court correctly held that the former was decisive: the decree's basic purpose. And it remarked that "*nothing* in the record to our knowledge … indicates that the City" had violated the consent decree issue since it was first approved. *Id*. at 1507 (emphasis added).[1] The City equally errs in its claim that significant changes in circumstances justify termination of the Consent Decree. DE 566: 6-17. The changes it cites were largely anticipated by the parties in 1998, and there remains a shortage in shelter and housing.

Significantly, the Consent Decree is a negative injunction, forbidding an unconstitutional policy and practice: arresting people for being homeless and destroying their property. It imposes

[1] Similarly, in the cases the City cites, DE 566: 16, the courts found virtually full compliance with only *de minimis* violations ***R.C. v. Walley***, 270 F. App'x 989, 993 (11th Cir. 2008) ("highly successful execution" of consent decree); ***Labor/Cmty Strategy Ctr. v. Los Angeles County Metro. Trans. Auth***., 564 F.3d 1115, 1123 (9th Cir. 2009) (defendant "complied fully" with only *de minimis* violations).

no obligation to appropriate funds. It leaves the City with full power to work constructively on its own or with other private and governmental entities to implement policy options that *are* consistent with the Constitution, such as providing more affordable housing or shelter. It is respectful of local government autonomy in legitimate policy choices, and so is consistent with federalism. *Cf*. ***Horne v. Flores***, 557 U.S. 433, 448-49 (2009); ***Rufo***, 502 U.S. at 392; ***Dowell***, 498 U.S. at 248.

A. The City's Pattern of Violations Precludes Termination

As set out in Plaintiffs' Motion to Enforce, DE 568, for the last three to six months, the City has been engaging in a systematic practice of seizing and destroying the Plaintiffs' property, banishing them from certain areas of the City, and engaging and arresting them for life-sustaining misdemeanor conduct without offering shelter as required by the Consent Decree.

Typically, in these carefully planned operations, police arrive early in the morning, sound loud buzzers and shine bright lights to rouse homeless people, and bring in a fleet of trucks to power wash streets and sidewalks. City employees, working with City police, seize homeless individuals' vital or irreplaceable property such as clothes, medicine, and ID – with traumatic effects on the targeted individuals. Often the seizures take place even as the owner or someone watching over the property pleads with City workers not to throw it away. Further, City police on many occasions order homeless persons to move on, and have effectively cleared certain areas of homeless people entirely, such as the "Lot 16 area." DE 568: 3-11. The City also violates the Consent Decree on these occasions by not filling out Field Information Cards (FICs). DE 568: 14-15.

The City asserts that its violations are "*de minimis* deviation[s]" or "outlier incidents." DE 566: 12, 25. In fact it has been engaging in a carefully planned activity. For example, the senior advisor to the City Manager acknowledged that the City has had "a real push in terms of trying to address our homeless issues in various areas that we're calling 'hot spots' around the City." DE

578, Pl. Ex. at 40. While he asserted that it was done consistent with the Consent Decree, *id*., the manner in which the "clean-ups" and police sweeps have been conducted is plainly inconsistent with the Consent Decree. The City persisted even after Plaintiffs advised it of these violations. DE 568: 9. Indeed, two days after the status conference, at which the City agreed with the Court that seizures of ID and medication should stop, Transcript of Status Conference Proceedings, June 5, 2018 ("Status Conference"), at 30, the City seized homeless individuals' belongings.[2]

Moreover, as noted in the Plaintiffs' Motion to Enforce, the City's conduct over the last three to six months is virtually identical to the conduct that led to the lawsuit in the first place, and for which this court held the City in contempt in 1991.DE 568: 11-13. *See also* DE 566:17, 25 (acknowledgment by City that it had a "policy of harassment" at the time of the lawsuit). In 1990, Judge Atkins found that the City had conducted sweeps of homeless encampments and ordered homeless people to stand aside while it seized and destroyed their belongings – conduct he described as "innately offensive and repulsive." DE 568: 12. He ordered the City to cease such activities. Instead it continued to engage in them, and he held the City in contempt. DE 568: 12.

Further refuting any notion that the City's violations over the past three to six months are somehow "outliers" is the close resemblance of those actions to violations the City committed in 2013 and 2014. Over several months in 2013, including July, November and December, City workers, accompanied by police, seized and destroyed the property of homeless individuals in the Hospital District on several foccasions.[3] A number of the incidents took place within a week or two

[2] Declaration of Pablo Herrera, DE 578, Pl. Ex. 33 (medication, clothes, shoes, blankets, personal hygiene items seized June 7, 2018); Declaration of Eladio Morales, DE 578, Pl. Ex. 28 (immigration papers, medication, clothes seized June 7); Declaration of Rafael Aguiar, DE 578, Pl. Ex. 27 (medication, phone numbers, personal items, clothes seized June 7).

[3] Statement of Robert Celenza, DE 578, Pl. Ex. 100; Sttement of Kevin Henderson, DE 578, Pl. Ex.102; Statement of Marivic Perez, DE 578, Pl. Ex.103; Statement of Anthony Rozier, DE 578, Pl. Ex.105; Statement of David Walkerow, DE 578, Pl. Ex.106; Statement of Brenda Davis, DE

after the parties submitted their Joint Motion to Approve Settlement, DE 525. (Two of the declarants also recount similar incidents in 2012.[4])

Declarant Marivic Perez recounts a familiar pattern:

> "[On December 17, 2013, around 10:00 am] Six Miami PD cars, including a K-9 unit, came to the area where I have been sleeping on the sidewalk. They blocked off the streets. 'Green shirts' were also present in City pick-up trucks. It appeared that they were preparing to take my belonging as well as those of other homeless persons sleeping the area. An apparent supervisor, 'Steve Harvey' was belligerent and disparaging of the homeless people on the street. I observed them taking the belongings of other homeless persons in the area that were organized and stacked against the fence."

Statement of Marivic Perez, DE 578, Pl. Ex.103. He lost property in similar circumstances on other occasions, including clothing, shoes, toiletries, and other personal items. *Id*.

Like the more recent ones, the 2013 violations occurred as the City sought to severely limit the Consent Decree through sweeping proposals for modification. Moreover, in February and March of 2014, around the time this court approved modifications to the Consent Decree, the City again violated the Consent Decree in the Health District.[5] The harassment became particularly severe under the Brickell Avenue Bridge near the Hyatt in at least four separate incidents. Police roused homeless individuals sleeping there around midnight, at 2:30 am, and around 5:00 am on several occasions in March and April. The officers accused the individuals of trespassing, but offered no shelter, with one officer even asserting that Pottinger did not apply in parks.[6]

B. The City's Other Bad Faith Conduct Equally Precludes Termination

1. The City's Cavalier Approach to Its Obligations Under the Consent Decree Demonstrates Bad Faith

The City has a history of unilaterally adopting or attempting to adopt changes in its conduct

578, Pl. Ex.108; Statement of Danny Dessassau, DE 578, Pl. Ex.109; Statement of William Yoummes Malsachi, DE 578, Pl. Ex.110.

[4] Statement of Kandi Robinson; Statement of Anthony Rozier. DE 578, Pl. Ex.104, 105.

[5] Statement of Richard Pryor; Statement of Diana Inciarrano. DE 578, Pl. Ex.115, 116.

[6] Statement of Vijay Ganta, et al., DE 578, Pl. Ex.107; Emails from Stephen Schnably to Tom Scott, Warren Bittner, April 3, 2014, DE 578, Pl. Ex. 111-113.

related to matters covered by the Consent Decree that would amount to a significant modification of its obligations – without following the Modification provision of the Consent Decree. DE 382: 31 (§ XV ¶ 30), modified by DE 525-1 (§ X ¶ 25b). In 2009, for example, the City decided to clear out an encampment of homeless sex offenders, with City police threatening them with arrest for trespassing even though they did not (and could not) offer shelter. *See* Letter from Carlene Sawyer to John Timoney, Chief of Police, Feb. 2, 2009, DE 578, Pl. Ex.126. Only in 2013 did the City bother to invoke the Modification provision and press the issue. The City then took the position that the 1998 Settlement Agreement did not cover sex offenders. The Plaintiffs took the position that it did. The parties settled the matter by agreeing to express language exempting sex offenders.

Similarly, in 2015, the City undertook serious consideration of a proposed "anti-camping" ordinance that would have outlawed being homeless. As originally proposed the Ordinance would have made it illegal to "live temporarily in a camp facility *or outdoors*" on public property. Proposed Ordinance, File No. 15-0008 (2/2/15, 3/3/2015), DE 578, Pl. Ex. 117. Even apart from that provision, the ordinance would have made it illegal to "camp" outdoors on public property, with camping defined as using camp paraphernalia, and camp paraphernalia including (in the first version) blankets, pillows, and sleeping bags, among other things. In sum, the ordinance would have practically outlawed sleeping in public. No draft of the ordinance included any recognition of the City's obligations under the *Pottinger* Consent Decree. Although ultimately it was not adopted, it did reach the second reading stage. No city that took its obligations under a consent decree seriously could possibly give consideration to a course of action so blatantly inconsistent with them.

More recently, the City appears to have adopted a new approach to implementing the Consent Decree. The law enforcement protocol requires that City police offer *actually available* shelter

in lieu of arresting or threatening to arrest a homeless individual for committing most of the specified life-sustaining conduct misdemeanors. DE 525-1: 3-5 (Section VII.14.C). In certain instances, such as fully blocking a sidewalk, an arrest can be made even if no shelter is available, but only if a warning is first issued. DE 525-1: 4-5 (Section VII.14.C.3.d). Yet as indicated in the arrest records of Tabitha Bass and Chetwyn Archer, and in a number of the more recent FICs, the City has begun to treat prior warnings or earlier offers of services (which may or may not include an offer of shelter) as sufficient to satisfy the protocol. DE 578, Pl. Ex. 35 and 36. They are not. Moreover, this change in practice again mirrors a modification the City proposed in 2013 (to which the Plaintiffs did not agree) and again in its Motion to Terminate, in which what the City calls chronically homeless persons (those "who refuse[] services on three separate occasions within a 180-day period," DE 566: 18-19) would no longer be covered by the Consent Decree.

In addition, City police appear to have applied terms of the proposed anti-camping ordinance to homeless individuals, in violation of the Consent Decree. For example, a number of FICs for December 2017 show police officers approaching homeless individuals and accusing them of camping in the park (see DE 525-1: 5 [§ VII.14.C.3.h, citing CMC § 38-71]), even though there was no such violation. Section 38-71 merely prohibits all camping with "trailers, campers and similar wheeled vehicles," and prohibits camping overnight with tents unless a permit is secured. The police either note that the subject had "camping paraphernalia" – a phrase unique to the proposed ordinance, and nowhere found in the City of Miami Code – or specifically cite the individuals as camping in a park because they had what that proposed ordinance identified as camping paraphernalia (*e.g.*, sleeping bed, blanket). Often shelter is offered, and in a number of cases accepted. Where shelter is refused, however, arrest is avoided – even though the individual commit-

ted no offense – only because the individual left the area. Yet while police may approach individuals not committing any crime to offer services, DE 525-1: 2-3 (§ VII.14.A), they may not then force an individual to leave the park if he or she does not accept that offer.

2. The City's Consistent Mischaracterization of Its Obligations under the Consent Decree Demonstrate Bad Faith

The City has continued its long-standing practice of blatantly mischaracterizing the Consent Decree. In 1995, Judge Atkins observed that "City employees have been misusing the Injunction and misrepresenting it to the public in ways the court is shocked to think about." DE 360, at 12-13. *See* DE 477:32-33. In 2013, the Chairman of the City of Miami Commission claimed that homeless people "can't be arrested for 'life-sustaining' activities such as defecating or urinating on the streets, taking naked baths, starting fires for warmth or blocking private property." DE 477: 32. This overstates the breadth of the Consent Decree (which does not protect trespass on private property) and obscures the City's power to arrest homeless people if there is available shelter.

In 2015, the City adopted an ordinance prohibiting public urination or defecation. CMC § 37-11, DE 578, Pl. Ex. 117. The City has a legitimate interest in such an ordinance (as with any of the life-sustaining conduct misdemeanor ordinances). But as the City knows, the failure to provide anything remotely approaching a reasonable set of public bathrooms has necessitated inclusion of limits on the City's power to arrest homeless individuals for relieving themselves in public. DE 525-1: 4. Rather than publicly acknowledge those limits, however, the City approved the ordinance without any recognition of them. Only in a letter to Plaintiffs did the City acknowledge the limitation, leaving the public in the dark. DE 578, Pl. Ex. 124.

The City's current Motion to Terminate displays the same mindset. The City repeatedly claims in its Motion that the Consent Decree somehow prevents it from providing services to homeless people. DE 566: 5, 17, 18-20, 24. That is false. The City never says how being freed

from the Decree's restrictions on arrest and property destruction would make it possible to offer more services. None of the services the City might provide, on its own or working with other public and private entities is even arguably restricted or hindered by the Consent Decree's limitations on arrest or destruction of property.

Instead of focusing on how to offer more services to solve the problem of homelessness, the City Commission chose to seek termination of the Consent Decree amidst a parade of blatant mischaracterizations of it. The Commission Chair raised the prospect that drug use is somehow protected. DE 578, Pl. Ex. 42, at 39-40 (Chair Hardemon). Commissioner Carrollo complained that because of *Pottinger* "[y]ou have hundreds of people sleeping in the streets there, having sex, urinating in the streets, taking drugs. It's one big party every night," and concluded that "If someone's going to say 'no,' then let it be a Federal judge." *Id*. at 167.

In sum, the City's own conduct makes clear that it has not satisfied the requirement of good faith compliance with the decree, and that it would quickly return (indeed, on a large number of occasions, has already returned) to its former ways in the absence of the Consent Decree.

C. Changed Circumstances Do Not Justify Termination of the Consent Decree

In moving to terminate the Consent Decree, the City asserts that changes in services to homeless persons and in the City's formal commitment to respect homeless people's constitutional rights mean that the Decree is no longer needed and is somehow inequitable. The City also argues that changes in downtown Miami, including an increase in population, employment, restaurants, entertainment venues, and hotels, somehow justify terminating the Decree. DE 566: 7-13.[7]

[7] The City also hauls out the same safety and security issue it raised in 2013, DE 566: 14, without noting that the agreement was modified to address the City's alleged concerns. Nor does it cite any specific problems with protecting security. See DE 477: 17. The City also cites the opioid epidemic, DE 566: 14, again without bothering to say how the Consent Decree interferes either with the provision of emergency services to homeless people or treatment for substance abuse.

The conclusion the City draws from these alleged changes is specious at best. The City says that because it currently offers "a comprehensive range of community-based services," it now has an alternative to "arresting homeless persons and systematically destroying their property" – thus obviating the need for the Consent Decree. DE 566: 11. The City seems unaware that even when there were fewer services for the homeless, it did have an alternative: It could simply respect the constitutional rights of people who are involuntarily homeless, and *not* arrest them or destroy their property. That is all the Consent Decree (and the Constitution) requires.

Leaving this fundamental misconception aside, the City's argument still fails to satisfy the requirements of ***Rufo*** and ***Horne***. Those cases require that the changes not only be relevant to the City's obligations, but also significant. ***Horne***, 557 U.S. at 447 (quoting ***Rufo***, 502 U.S. at 384). Further, changes actually contemplated by the parties at the time the Consent Decree will ordinarily not justify termination or modification, particularly if the party seeking termination or modification has failed to comply with the decree. ***Rufo***, 502 U.S. at 385.

The City points to developments *before* or around the time of the Consent Decree as somehow constituting significant changed circumstances. There must be a significant change in circumstances *since the adoption of the Consent Decree*. The relevant point of comparison is not 1988, when the lawsuit was filed, but 1998, when the City, after careful consideration, agreed to the Consent Decree. Yet the City lists the establishment of its Homeless Assistance Program (1991), the creation of the Miami-Dade Homeless Trust and the imposition of a 1% meals tax to fund it (1993), the creation of the Chapman Partnership (1993), and the opening of the Homeless Assistance Centers (1995, 1998), as somehow changed circumstances. DE 566: 7-8. The Eleventh Circuit's Criminal Mental Health Project, DE 566: 9, was created at roughly the same time, in 2000. It is ironic that the City would cite this program – aimed at reducing the number of mentally ill

people in jails – as a reason to terminate a Consent Decree that limits the City's power to arrest homeless people for minor offenses they cannot help but commit when forced to live in public.

Second, even developments that took place after the Consent Decree was adopted cannot constitute changed circumstances if they "actually were anticipated at the time … [the City] entered into a decree." ***Rufo***, at 502 U.S. at 385. That is so for the vast majority of "changes" the City cites. The rise of downtown as a residential, business, entertainment, and tourist venue was fully contemplated and planned by the City at the time it chose to enter into the Consent Decree. *See* DE 477: 21-23. Given that the Consent Decree in fact in no way undercuts the City's ability to adopt constructive policies, the only logical conclusion is that the City decided that entering into the Consent Decree was fully consistent with promoting the revitalization of downtown.

Other allegedly new circumstances the City cites were already in place or contemplated around the time of the Consent Decree. The City points to the opening of Camillus House's new facility in 2012. DE 566: 8. Yet as it is doubtless aware, even in the 1980s there were plans to redevelop the area where the old Camillus facility was located and move it. Actual plans for the new facility were being made around the time of the Consent Decree, at least as early as 2003.[8] Similarly, the City points to its recent agreement to help fund Camillus House's day services program, DE 566: 8-9, without mentioning that Camillus has long provided services to homeless individuals not living there (and without noting that even with the City's funding, the program had to be cut back after the Homeless Trust, reflecting the U.S. Department of Housing and Urban Development's priorities, eliminated funding for it). [9]

[8] Paul Ahr, The Gifts of Camillus: Celebrating the Life of the Ministry 60 (2010), DE 583, Pl. Ex. 23 ("From the mid-1908s on, various strategies were proposed to purchase the Camillus House building on NE 1st Avenue and relocate its services, but none ever came to fruition."); Camillus House, A New Home for An Old Friend, July 3, 2003, DE 583, Pl. Ex. 22.
[9] Tom Tracy, Bad News, Good News at Camillus House, March 4, 2017, DE 583, Pl. Ex. 37.

The City also claims that its Departmental Order and the training it provides police officers is somehow a changed circumstance. Yet the Departmental Order was incorporated into the 1998 Consent Decree, § V ¶ 7, & Ex. A, DE 382, at 5, 33-37 (and subsequently modified in light of the 2014 Addendum, DE 525-1). The issue is not the formal commitment by the City to respect homeless people's rights. The 1998 Consent Decree accomplished just that. Section I.4 provided that that "the CITY is committed to ensuring that the legal and constitutional rights of all homeless persons be fully respected by all city policies, rules, regulations, practices, officials and personnel." DE 382: 3. Section VI.9 provided that "[t]he 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 …" DE 382: 5. A provision included in a consent decree cannot by definition constitute evidence of changed circumstances. The issue is the City's failure to live up to the obligations it took on.

Even if the City could somehow point to some truly changed circumstances,[10] the most fundamental circumstance remains the same. In 1992, Judge Atkins found that:

> The lack of low-income housing or shelter space cannot be underestimated as a factor contributing to homelessness. At the time of trial, Miami had fewer than 700 beds available in shelters for the homeless. Except for a fortunate few, most homeless individuals have no alternative to living in public areas.

Pottinger 810 F. Supp. at 1558. He further noted that "people rarely choose to be homeless," *id*. at 1563, and that one "notable form of assistance that is unavailable to a substantial number of

[10] The City cites three other service-related developments that are new. DE 566: 9-10. None constitutes a significant change in circumstances. The Lazarus Project provides intensive *voluntary* outreach to individuals with mental health challenges. While valuable, it does not address the shortage of beds. The Homeless Trust's Donation Meter Program gives the public a new way to donate, but by measure is $50,000 in new funding of an agency with annual expenditures around $60 million a significant change. The City's creation of a Department of Veterans Affairs and Homeless Services in 2013 changes its bureaucratic structure, but the services the City describes are the same as before the Department was created.

homeless individuals is shelter space," *id*. at 1564.

There are more shelter spaces today than in 1998; that is exactly what the City, working with the County, was planning at the time. And some new policy approaches have risen to the forefront, such as Housing First. But there is equally no doubt that there remains a major gap between the number of homeless people and the number of shelter beds. Further testimony to the lack of available shelter is the fact of a long wait list for shelter, the opacity of the process for those seeking it, and the unclear supervision, training, and operation of the City's outreach workers.

The gap, as Plaintiffs will demonstrate at the evidentiary hearing, is a large one county-wide and city-wide. There are many ways to count beds and homeless populations, and at the evidentiary hearing Plaintiffs will present the most accurate information available. As one indication, the U.S. Department of Housing and Urban Development (HUD) figures show that there were 3,009 emergency beds in Miami-Dade County as of January 2017.[11] HUD's 2007-2017 Point in time (PIT) Counts by CoC (Continuum of Care Provider) for Miami-Dade County show that there were 3,721 homeless individuals (sheltered and unsheltered) as of January 2017. By this measure, the number of homeless individuals exceeds the number of emergency beds by 712.[12]

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[11] DE 578, Pl. Ex. 85.These are what HUD calls Emergency, Safe Haven, and Transitional Housing Beds. The City, in contrast, cites a figure of over 8,700 beds. DE 566: 8. This figure apparently includes what HUD calls Permanent Housing beds (Permanent Supportive Housing, Rapid Re-housing, and Other Permanent Housing). In January 2017 there were 5,669 such beds, bringing the total to 8,678 Emergency and Permanent Beds. DE 578, Pl. Ex. 85. While in theory any type of bed in Miami could satisfy the definition of "available shelter" under the Consent Decree, in practice the City is likely to offer people on the streets emergency shelter beds as an alternative to arrest, not permanent supportive beds (even though permanent supportive housing is cheaper and more effective). Still, a comparison of the relevant population with the larger figure of Permanent and Emergency Beds in Miami-Dade County would also reveal a shortfall. As Plaintiffs will show, by any reasonable measure, the number of homeless people well exceeds the number of beds.

[12] The comparable figures in the Miami-Dade County Homeless Trust PIT Count for January 2017 were slightly higher: 2,836 sheltered homeless and 1,011 unsheltered homeless, for a total of 3,847 homeless individuals. This would make a gap of 838.

Plaintiffs are attempting to develop figures on beds and the homeless population within the City of Miami. As for the population, the Miami-Dade County Homeless Trust PIT Count for January 2017 showed 609 people living on the streets within the City of Miami, of whom 353 were living in the Downtown area, according to the DDA.

A constructive approach to the problem of homelessness would be for the City to work with other government agencies, non-profits, and the business sector towards the provision of adequate emergency shelter and affordable housing. And even with the Consent Decree in place, the City could theoretically put every one of the 600 or so persons living on the streets of Miami[13] to a choice of accepting shelter or being arrested – which is what the City seems to want to be able to do. What would stop the City from doing so is not the Consent Decree, but the lack of available shelter. Moreover, the City not only admits there is a shortage, see Status Conference at 41, but also seems committed to maintaining a shortage out of fear of being "inundated" by homeless people from around the country, *id*. at 74. This fear makes no sense; the vast majority of people who are homeless in Florida lived in the state for more than a year before becoming homeless. Indeed, Miami's rate of homelessness is lower than the State average. DE 583, Pl. Ex. 21.

Finally, while the City now pays Camillus for 75 "Pottinger beds," DE 566: 9, these beds do not fundamentally change the relevant circumstances. (Nor does the City state whether it would continue funding the beds if the Consent Decree were terminated.) As Plaintiffs understand it, 10 of these beds are used for individuals for stays of up to 24 hours, and so have a daily turnover. They can be accessed by persons on the street only through a City police officer. The other 65 beds

[13] The Miami-Dade County Homeless Trust PIT counts routinely vary from one period to the next. For example, the PIT counts of unsheltered persons in the City of Miami for January 2016, August 2016, January 2017, August 2017, and January 2018 were 640, 681, 609, 684, and 665, respectively. Further, PIT counts undercount the number of homeless persons in important ways.

are occupied exclusively by individuals who came to Camillus through one of the 10 24-hour beds. Individuals in those 65 beds may stay for up to several months with Camillus' services. Thus on any given day most of the 65 beds are occupied. It is unclear whether the City's decision to fund 75 beds added to total bed capacity in Miami-Dade County, or simply reserved some of existing capacity for use by the City police. Either way, the gap between the total number of beds and the total number of homeless people remains great.

III. The City's Proposed Modifications Are Neither Justified by Significant Changes in Circumstances Nor Suitably Tailored

The City asserts that the Consent Decree should be modified because of changed circumstances, relying on the same factors to which it points as justifying termination. For the reasons set out above and in Plaintiffs' 2013 Reply, DE 477, the allegedly changed circumstances do not justify modifying the Consent Decree. Equally important, the City's proposed changes are not suitably tailored to the allegedly changed circumstances as ***Rufo***, 502 U.S. at 383, 391, requires.

The City proposes four modifications. The first two are identical in substance to modifications the City proposed in 2013. It does not connect any of the four to particular changed circumstances.[14] In any event, as set out above, the City points to no significant changed circumstances.

The City proposes to strip "chronically homeless person[s]" of all the Consent Decree's protections, saying it needs "the tools necessary to get the most difficult groups of homeless into a continuum of care and provide them the food, shelter, clothing, beds and medical attention." DE 566: 19.[15] It does not say how exposing them to arrest for being homeless, without the Consent

[14] In contrast to 2013, DE 464: 20, the City does not now claim that the problem of the chronically homeless is new. As Plaintiffs pointed out in 2013, the issue of chronically homeless individuals was an important concern in 1998, and so actually anticipated. DE 477: 23.

[15] Neither HUD nor the Homeless Trust provides a figure for the chronically homeless (by the federal definition) for the City of Miami alone. But the HUD PIT Counts for January 2017 show there were 309 chronically homeless individuals in all of Miami-Dade County, of whom 135 were unsheltered (*i.e.*, living on the streets). DE 578, Pl. Ex. 85.

Decree's protections, would help them. The City does not have the power to commit anyone to mental health treatment except through law, such as the Baker Act. Even if the City began to try to force people into shelters, it would run up a currently insuperable barrier: the large shortage of shelter beds. And even if it could force all "chronically homeless" persons into shelters, it could not make them stay there. Shelters are not prisons. Likewise, continually arresting and jailing homeless people, and then discharging them into homelessness, is not a sustainable solution.

Plaintiffs pointed out in detail the many problems with the City's proposal in their 2013 Response. *See* DE 477: 9-10, 11-12, 18-19, 28, 30, 31-32. The carelessly drafted proposal would exempt anyone deemed chronically homeless from all the protections of the Consent Decree, including the property protections and monitoring obligations. Further, the City's definition (at odds with the federal definition) would, for example, sweep in a person who had been on the streets for only six months and turned down offers of shelter in Homestead (which, under the Consent Decree, may be offered as a voluntary option). Even more ominously, the City's complaint that people "drop out of the continuum of care," DE 566: 18, suggests that leaving a shelter without having found housing would be counted as a refusal of services under the City's definition. That would penalize individuals for leaving shelters, coming close to turning them into detention centers.

The City's second proposal is to eliminate the requirement that shelter offered a homeless person in lieu of arrest be within a mile of the City limits. DE 566: 19-21. It misquotes the very provision it seeks to modify, DE 566: 20, leaving out language added in 2013 that includes as "available shelter" any shelter in the County "if agreed to by the homeless person." DE 525-1: 2 (¶ 11). If "family reunification" is somehow a problem, DE 566: 20, this provision takes care of it.

As a practical matter, the City's proposal would mean that in lieu of arrest, homeless individuals in Miami could be taken against their will to the HAC in Homestead, some 30 miles away.

The City ignores the many reasons that homeless individuals' unbelievably difficult lives might be a little less hard downtown: government services, day jobs, public transportation, and medical care. Homeless persons, like all individuals, have a constitutional right to travel and against forced travel, as well as the right to live in a municipality of their choosing; exile is not a permitted punishment for violating the law. Moreover, the City – which complains without any evidence that other cities "dump" homeless individuals downtown, DE 566: 19 – in essence seeks to dump homeless people in Homestead. The court should not endorse this shell game. Finally, the City's proposal would accomplish nothing. The Homestead HAC is typically full, as are other emergency shelters, rapid rehousing, safe havens, and transitional housing.

This court should not consider the City's third and fourth proposed modifications. DE 566: 21-25. The City provides a diatribe with photos, including two of an area with little foot traffic, DE 566: 21, but does not provide specific changes. This failure makes it impossible for Plaintiffs to respond fully, but Plaintiffs offer the following comments.

The City complains about trash and health hazards, and sidewalks being so blocked that pedestrians have to walk in the streets. DE 566: 21-25.[16] The City does have a legitimate interest in clean streets and free passage on sidewalks. So do Plaintiffs. Indeed, the very photographs of the squalor in which some individuals are forced to live (DE 566 at 21-23) drive home the point that Plaintiffs living on the street are doing so because they have no practical choice.

Nothing in the Consent Decree prohibits the City from cleaning up discarded styrofoam containers or used needles, or requiring people to temporarily move their property out of the way while an area is cleaned up. More public bathrooms and trash cans in areas where homeless people

[16] The photograph on DE 566, at 22, depicts a vacant lot, not goods stored on a sidewalk. The City does not say whether that lot is public or private. Trespassing on private property is not a protected life-sustaining conduct misdemeanor. DE 525-1: 5.

live would reduce the need for clean-ups. But to the City, that would somehow be encouraging homelessness, just as food sharing programs – which the City has unlawfully attempted to prohibit DE 568: 11 n.5 – supposedly give people an incentive to live on the streets.

What the Consent Decree does prevent is throwing away belongings that are recognizably the property of homeless people. DE 525-1: 7. Nor does the Consent Decree permit an army of police officers and NET employees to move in so quickly that homeless persons do not have the time to move their belongings out of the way. And while property that is genuinely abandoned or contaminated need not be preserved, *id*., the many declarations the Plaintiffs have submitted show the deliberately indiscriminate nature of the City's operations. Further, the Consent Decree does not permit the City to "clean up" an area by eliminating homeless people from it. Yet that is the City's aim. For example, right after homeless individuals living near Macy's were placed in shelters, the City's Director of Homeless and Veterans Affairs remarked that "Now it's just a matter of consistently monitoring it to deter people from returning." Email from Sergio Torres, March 20, 2018, at 8:40 am, DE 578, Pl. Ex. 76. *See also* DE 568: 7-8. Finally, while the City has a legitimate interest in clean public areas, the court should recall Judge Atkins' earlier finding that there is a strong public interest in not worsening the plight of homeless individuals by throwing away their belongings or subjecting them to repeated arrests for living in public. DE 568: 12-13.

The City vaguely suggests that accumulations of property and trash on public property should be prohibited, and "the number of items that can be possessed by homeless persons on public property" should be limited, DE 566: 22, 25. It also says that belongings that are health hazards and safety issues should be subject to disposal. DE 566 at 25.

These vague proposals are not suitably tailored to the alleged changed conditions. First, nothing in the Consent Decree prohibits the City from disposing of trash on public property –

where "trash" means items the City *reasonably* understands to have been abandoned. Second, the Consent Decree expressly permits the City to dispose items that are contaminated or pose a health hazard or an "obvious safety issue." DE 525-1: 7-8 (VII.14.F).

The other proposal – to somehow limit the number of items that homeless people may keep on public property – would amount to a ban on living on the streets. It is not possible to live on the streets without keeping some property, and not all of it is small like medicines or ID. Any attempt to set some limit on the kind or amount of belongings a homeless person may keep would be arbitrary. Nor is the burden on the City great. To the extent that belongings of homeless persons fully obstruct passage on a sidewalk, the Consent Decree permits a police officer to warn individuals to cease blocking it, and arrest them if they do not heed the warning – even if there is no available shelter. DE 525-1: 4-5 (VII.14.C.3.d). Even a partial blockage may result in a threat of arrest, if available shelter is offered as an alternative. While the Consent Decree rightly requires that the City secure even large or bulky items when a homeless person is arrested or placed in a shelter, it does not require the City to store mattresses. DE 525-1: 7-8 (VII.14.F). The City gives no evidence why any of these provisions – to which it agreed in 1998 and 2013 – are unworkable.

IV. Conclusion

The Consent Decree neither prescribes a solution for ending homelessness, nor stands in the way of any legitimate policy response to homelessness. The one thing it does is preclude criminalization as a policy response, one universally rejected as an effective approach. This fact, combined with the City's repeated violations and bad faith treatment of the Consent Decree, and the continuing existence of a severe shortage of shelter and affordable housing, leaves the City's proposals for termination or modification of the Consent Decree utterly without any foundation.

WHEREFORE, Plaintiffs respectfully request the Court to issue an order denying the motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of June, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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