UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 88-2406-CIV-MORENO

MICHAEL POTTINGER, PETER CARTER AND BERRY YOUNG,

Plaintiffs,

v.

CITY OF MIAMI,
Defendant.
_____/

PLAINTIFFS' RESPONSE TO DEFENDANT'S "MOTION FOR LIMITED MODIFICATION OF THE POTTINGER SETTLEMENT AGREEMENT"

I. Introduction

For 15 years, as downtown Miami has come to realize its long-envisioned residential, commercial, and cultural renaissance, the *Pottinger* Settlement Agreement ("Settlement") has protected the basic constitutional right of homeless people not to be arrested or have their property destroyed simply because they are homeless. In his landmark ruling, Judge C. Clyde Atkins found the City to have systematically and deliberately violated that right. *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992). After a decade of litigation, including two years of hard bargaining, the City agreed to a decree governing the power of police officers to arrest homeless individuals who have no place to go, and protecting their property. This agreement has the same finality as a judgment of this Court, and is subject to modification only under Fed.R.Civ.P. 60(b).

The Settlement is of paramount importance to Plaintiffs because it protects their fundamental rights, putting in place a carefully demarcated set of restrictions on the City's arrest power. As this Court noted in approving it, the Settlement represented "a fair and equitable resolution" of the case, one that "protects the interests of the Plaintiffs, the City, and the public." See Final Or-

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der Approving Settlement and Dismissing Case, Pottinger v. City of Miami (Oct. 1, 1998) (DE 398). App. 6 at 2, 10. As it also noted, support for the Settlement was "widespread among the community." *Id.* at 8. The responses of the City, the County, and other community leaders to the lawsuit—including the creation of a trust funded by 1% meals tax and other contributions to provide shelter and other services—made Miami a national model.

The Settlement is strikingly modest and respectful of local authority. It did not remedy past wrongs by wresting control of local governmental institutions to the Court. Rather, it employed a negative injunction, a classic form of limited judicial relief. The Settlement neither obligates the City to raise taxes nor directs how public monies are spent. It leaves resource issues entirely in local hands. And the Settlement mandates no particular policy approach to ending homelessness, leaving this to the multiple public and private stakeholders to determine.

The City now comes forward with what it calls a set of "limited, specific and necessary" proposals for modification. (DE 464: 17-18). In fact, these proposals would eviscerate *Pottinger*. They would entirely terminate the decree for two substantial groups of homeless people: the "chronically homeless" and registered sex offenders rendered homeless only because they comply with county residency restrictions. The changes would enable the City to involuntarily commit homeless individuals for mental health or substance abuse treatment for up to 48 hours, in violation of the Constitution. The City would be able to ship homeless persons to shelters in the far corners of the county upon pain of arrest if they refuse to go. The clear purpose of these proposed changes is to resurrect the City's authority to arrest homeless persons for simply living in public and revitalize this unconstitutional tool to drive this perceived blight out from its borders.

The question before the Court is limited: has the City cleared the "high hurdle" for modifying a binding court order? ***Sierra Club v. Meiburg***, 296 F.3d 1021, 1034 (11th Cir. 2002). The gov-

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erning test is set out in ***Rufo v. Inmates of Suffolk County Jail,*** 502 U.S. 367, 383 (1992): has there been a significant change in circumstances since the Settlement was approved, and, if so, are the proposed modifications suitably tailored to the changed circumstances? The City has not made out even a prima facie case on these two elements. The developments to which the City points—growth in downtown and in services available to homeless—were fully anticipated and under way in 1998. The need for protection from arrest and destruction of property remains as strong today as in 1998. And the public interest would not be served by a renewal of the City's earlier campaign to drive homeless individuals out of the City or make them less visible.

A city in desperate straits, burdened by an unworkable Settlement or faced with a rapidly expanding homeless population, might feel pressed to propose such sweeping changes. But the City's own Motion shows downtown is thriving, homeless services and shelter have expanded, and all the while the City has complied with "the letter and spirit" of ***Pottinger***. (DE 464: 2). The City's Motion points to nothing that renders unworkable the Settlement's basic purpose: to ensure that no one is arrested or has their property destroyed simply for being homeless.

The City asserts that its proposed approach to alleviating homelessness—using the threat or practice of arrest to pressure homeless individuals into accepting services—represents the best policy.[1] This Court need not decide what constitutes the best approach to dealing with the problem of homelessness—a matter currently disputed among Miami-Dade County local governments. The City claims, as it did in the 1990s, that other municipalities put a disproportionate share of the County-wide burden of homelessness on Miami;[2] other municipalities deny doing

[1] (DE 464: 5 n.7 (noting City's desire to "have the tools necessary to get the most difficult groups of homeless into a continuum of care"), 12, 18 (City's proposals best serve homeless)).
[2] (DE 464:16-17); *Miami Bears Disproportionate Homeless Burden*, Miami Herald, Apr. 24, 2013 (Letter by Chair, Downtown Development Authority Homeless Task Force and pro bono

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so.[3] The Miami-Dade County Homeless Trust (a County agency) regards the City's proposed approach as "warehousing" or worse.[4] These policy questions are for local governments, working with state and federal agencies, to decide. But protecting constitutional rights is not a matter for the court, not local policy.

II. The Litigation and the Settlement

Plaintiffs brought this lawsuit in 1988, alleging that the City routinely and unconstitutionally arrested homeless persons and destroyed their property for harmless, life-sustaining acts they were forced to conduct in public, such as sleeping, eating, sitting, and congregating. (DE 1). In 1989, the court certified the suit as a class action. ***Pottinger v. City of Miami***, 720 F. Supp. 955 (S.D. Fla. 1989). In 1990, it issued a preliminary injunction ordering police "not to destroy prop-

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DDA counsel), available at http://tinyurl.com/MiamiHerald-2013-04-24. *See also* Charles Strouse & Joanne Cavanaugh, *Big Battle Is in Sight for Shelter*, Miami Herald, June 26, 1994, at 1B, 1994 WLNR 2409799 ("Miami commissioners . . . have long protested that they don't want their city to be the dumping ground for homeless from other places.").

[3] See Kathleen McGrory, *Other Miami-Dade Cities Deny "Dumping" Homeless People in Downtown Miami*, Miami Herald, July 1, 2013, avail. at http://tinyurl.com/MiamiHerald-2013-07-01.

[4] This April DDA officials urged the Homeless Trust to spend part of its "$42 million budget and an $8 million surplus last year" to help fund more shelter beds within Miami. See *Miami Bears Disproportionate Homeless Burden*, footnote 2 *supra*. The Chairman of the Trust criticized the City's approach as "warehousing." Kathleen McGrory, *Proposals Reignite Debate over Downtown's Homeless Population*, Miami Herald, June 8, 2013; see *id.* ("They'll have to cart me out" before the Trust accepts the City's proposal) (quoting Book), available at http://tinyurl.com/MiamiHerald-2013-06-08; Kathleen McGrory, *Miami Commission Approves Plan to Add 15 Beds at Homeless Shelters*, Miami Herald, June 13, 2013, available at http://tinyurl.com/MiamiHerald-2013-06-13 (Trust "would rather spend money on more comprehensive case-management services for the homeless."). The City later approved an appropriation of additional funds that met with the Trust Chairman's praise, Ron Book, *Miami's Homeless Plan Signals Win All Around*, Miami Herald, July 30, 2013 (Op-Ed), available at http://tinyurl.com/MiamiHerald-2013-07-30. But the tensions remain. In its Motion, the City blames the Trust for not committing "to fund these additional Pottinger beds" (either 98 or 350) (or mats). (DE 464: 8). And in September Chairman Book disparaged the City's request for modifying the Settlement as "the Sarnoff arrest-and-release plan." Charles Rabin, *Miami Moves to Overturn Court-ordered Homeless Rights*, Miami Herald, Sept. 11, 2013, available at http://tinyurl.com/MiamiHerald-2013-09-11.

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erty collected at the time of contact with homeless persons and to follow their own written policy of preserving property obtained in any manner . . .." (DE 142). App. 3. This injunction followed two incidents in which "City police awakened and handcuffed class members, dumped their personal possessions – including personal identification, medicine, clothing, and a Bible – into a pile, and set the pile ablaze." ***Pottinger***, 810 F. Supp. at 1555-56.

In 1991, the court held the City in contempt for violation of the 1990 injunction, and further enjoined it "from destroying property which it knows or reasonably should know belongs to homeless individuals." *Id.* at 1556. (DE 172). App. 4. This was based on incidents in which City police officers first relocated Plaintiffs sleeping at one location to two downtown parks; then circulated notices that park closure hours would be strictly enforced and unattended property would be confiscated and destroyed; and then, days later, appeared at these parks, forced the Plaintiffs' departure, and seized and destroyed the property of absent and present class members. *Id.*

In 1992, following a week-long trial, Judge Atkins ruled that Miami's custom and policy of arresting and harassing involuntarily homeless persons violated their constitutional rights. The court found that the Plaintiffs' homeless status was involuntary— people "rarely choose to be homeless," ***Pottinger***, 810 F. Supp. at 1564—and that accordingly, they were forced to conduct harmless, life-sustaining activities in public places. It determined that "the City has used the arrest process for the ulterior purpose of driving homeless from public areas." *Id.* at 1566-68. The Court found multiple constitutional violations:

- The City's arrests of Plaintiffs for these acts violated the Eighth Amendment's ban against punishment based on status, *id.* at 1561-65;
- The City had violated the Plaintiffs' right to procedural due process based on its overbroad enforcement of misdemeanor ordinances that homeless persons necessarily violate while living in public, *id.* at 1575-77;
- The City had denied Plaintiffs equal protection because its arrests of homeless persons

unjustifiably impinged on their fundamental right to travel, *id.* at 1578-83; and

- The City's unjustifiable seizure and destruction of the Plaintiffs' property violated the Fourth and Fifth Amendments, *id.* at 1570-73 & n.30.

In fashioning a remedy, the court recognized its limited role. Although "the ideal solution would be to provide housing and services to the homeless, . . . assembling and allocating such resources is a matter for the government—at all levels—to address, not for the court to decide." *Id.* at 1583. Instead, its job was to protect the Plaintiffs from arrest and harassment for conducting innocent, involuntary acts in public. Recognizing that homeless persons had "no place to go," the court ordered establishment of two downtown "safe zones" where homeless people could be without fear of arrest for their harmless, life-sustaining conduct. *Id.* at 1584. It further enjoined the City from destroying their property and ordered it to abide by its own written procedure for handling personal property found in public. *Id.*

Upon the City's appeal, the Eleventh Circuit remanded for the district court to clarify its injunction and determine whether changed circumstances warranted modifying it. ***Pottinger v. City of Miami***, 40 F.3d 1155 (11th Cir. 1994). In its Findings and Order on Limited Remand, Judge Atkins found that "the salient facts of this case have not changed substantially. Though improvement in the overall situation is occurring via the Trust, a large number of homeless people still have no place to go and the City, through its police department, still arrests homeless people for harmless activity." App. 5 at 11-12.

The court reiterated that it had "issued primarily a negative injunction" that prohibited the City "from arresting homeless people for 'performing innocent, harmless, inoffensive acts such as sleeping, eating, lying down or sitting in at least two public areas . . ..'" *Id.* at 14. The safe zones were intended only "as an interim or stop-gap measure" until "all homeless people would have a 'place to go.'" The injunction did not prohibit police from "arrest[ing] homeless people

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for criminal or harmful activity, either within or outside of the safe zones." *Id.*.[5] Regarding the location of the safe zones, the court explained that it "did not contemplate the safe zones would be located in the outreaches of Dade County." *Id.* at 15.

In response to the City's contention that all injunctive relief should be abandoned, the court observed that, even if there were no more arrests of homeless persons (contrary to what the court had found), because the City had failed to demonstrate that (1) it would not arrest homeless people in the future for the purpose of driving them from public areas absent some injunctive relief and (2) it would not destroy the property of homeless people in the future, App. 5 at 16-17 & n. 14, injunctive relief was still necessary. *Id.* at 18.

Upon the City's 1995 appeal from this order, the Eleventh Circuit ordered the parties to mediate. ***Pottinger v. City of Miami,*** 76 F.3d 1154 (11th Cir. 1996). Following 20 months of intensive negotiations, the parties entered into a comprehensive settlement. It provided compensation for the aggrieved homeless persons, mandated homeless sensitivity training for police, and created a protocol restricting police authority to arrest homeless persons for living in public. (DE 397, 464-1). This Court approved the settlement in 1998. App. 6.

The arrest protocol follows the contours of Judge Atkins' ruling. It prohibits police from arresting homeless persons[6] whose harmless, life-sustaining conduct[7] causes them to violate any of

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[5] The court noted that the City's only affirmative responsibility, as the City acknowledged itself, was to provide bathrooms and running water in the safe zones. App. 5 at 14 n. 12.

[6] Section VII.10 ("Homeless Person" means any individual who "lacks a fixed, regular, and adequate night time residence and has a primary night-time residence that is (a) a . . . shelter designed to provide temporary living accommodations; (b) an institution that provides a temporary residence for individuals intended to be institutionalized; or (c) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.")

[7] Section VII.14.C.1 ("activities, such as eating, sleeping, sitting, congregating, or walking," that a homeless person must do in public because he or she is without shelter).

eleven specified misdemeanors,[8] unless the officer can offer the homeless person a shelter bed, within or near city limits, that neither imposes religious obligations nor involuntary substance abuse or mental health treatment.[9] Only if the homeless person refuses the offer of shelter can the officer arrest. Section VII.14.C.2. Upon such a refusal, the homeless person's status is no longer "involuntary" and he or she is subject to arrest like any other Miami resident. *Id.*

III. The City's Proposed Modifications to the Settlement

Taken together the City's proposals would:

- Terminate the Settlement as to most homeless people in Miami;
- Allow involuntary civil commitment of homeless individuals for 48 hours, and forced mental health or substance abuse treatment, at a police officer's discretion, with the likely destruction of the homeless person's property;
- Eliminate nearly half the life-sustaining conduct misdemeanors and make their applicability entirely subject to the discretion of police officers;
- Allow homeless individuals to be carted off to facilities in the far corners of the County;
- Make homeless persons' property subject to arbitrary seizure and destruction; and
- Make monitoring of the City's compliance with the Settlement nearly impossible.

A. The City Proposes to Terminate the Settlement as to Most Homeless People in Miami

The provisions in the Settlement protect only those who are defined in Section VII.10 as "homeless." The City asks the Court to modify that definition to exclude "chronically homeless" persons and homeless persons subject to registration under Fla. Stat. § 775.215. It contradicts the spirit of the Settlement to gerrymander this definition, which is based on 42 U.S.C. 11302. The City does not assert that individuals falling within these two groups would somehow no longer

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[8] These are: (a) being in park after hours; (b) public nudity; (c) fires in park; (d) obstructing passage on sidewalks; (e) living/sleeping in vehicles; (f) loitering in restrooms; (g) littering; (h) camping in parks; (i) use of facilities for other than intended purpose (sleeping on park bench); (j) temporary structures in park; and (k) trespass on "public property." Section VII.14.C.3.a-k.

[9] Settlement, Section VII.11 ("An 'available shelter' means a shelter, with a bed at no cost to the homeless person, within the territorial boundaries of the CITY or within one mile thereof, that treats homeless persons with dignity and respect, imposes no religious requirements, and does not impose involuntary substance abuse or mental health treatment").

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be homeless. It just seeks this Court's blessing to pretend that they are not homeless by defining them not to be. This proposed change is not a "modification" of the Settlement, but a termination of it as to these individuals.

The City offers no clear estimate of how many class members would suffer exclusion, but its own numbers strongly suggest that it could be nearly everyone. As for the chronically homeless, the City states that there are "approximately 500" individuals in Miami who are "chronically homeless," of whom approximately 350 are downtown. The City may be relying on a January 2013 count,[10] which shows 351 homeless individuals downtown and 511 city-wide.[11] In any event, the implications are stunning: out of the 511 homeless individuals city-wide, "approximately 500" would be excluded as chronically homeless. The City offers no figures on how many homeless registered individuals live in Miami, and there might be some overlap with the chronically homeless, but even if there were only a few more adding to the total, essentially the entire class would be excluded. By its own figures, the City *is* effectively doing exactly what it says it is *not*: "seeking an Order to have the entire Agreement set aside." (DE 464: 4).

All registered sex offenders and predators would be instantly and permanently excluded. For others, exclusion would not be long in coming. Other homeless individuals would become "chronically homeless" if they "refuse[d] services on three separate occasions within a 180-day period," (DE 464: 20), a starkly different definition from the federal one.[12] Under the City's new

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[10] The City participates in the Homeless Trust's twice-a-year census of homeless persons in Miami-Dade County. See http://www.miamigov.com/nets/about/homeless.html. The figures the City gives in its Motion appear to be drawn from this count. The City states that it will later offer "support" for these statistics and "accurate information." (DE 464: 1 n.1). Its failure to cite the sources of its information leaves the Plaintiffs disadvantaged in responding.

[11] (*Id.* at 16, 21).

[12] The federal Department of Housing and Urban Development's definition of "chronically homeless" is a homeless person who has been homeless or in an emergency shelter for at least

approach, an individual who had been homeless for as few as six months after being evicted from an apartment could be deemed "chronically homeless." The City does not define the term "services." Nothing in its proposal would limit this term to an offer of shelter or more permanent housing. A refusal of mental health treatment by a person who does not meet Baker Act requirements for involuntary civil commitment would suffice as one "strike."[13] The effect of this proposal would be to return to the criminalization of homelessness for most of those on the streets in Miami.

For a proposal so radical, the City is perilously vague as to how it would be implemented. If someone is chronically homeless, under the City's proposal, no record would be kept of the police or outreach worker encounter with the individual. Having eliminated all record-keeping requirements for such encounters, it is not clear how City officials would keep track, if at all.

The City's proposal to eliminate what it broadly calls homeless "sexual predators" from the protections of *Pottinger* should also be rejected. By referencing the registration requirement (Fla. Stat. § 775.215), (DE 464: 24), the City would in fact exclude all those who are required to register, which includes not only sexual predators (defined in Fla. Stat. § 775.21 to include more aggravated offenders) but certain other sex offenders as well (defined in §§ 775.21 (3)(d), 943.0435(12), 944.607). Most of these registered homeless persons incurred their predicate convictions many years ago; many lived crime-free lives thereafter. Among them are the elderly, as well as people suffering from mental and physical diseases, cognitive and educational deficits,

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one year on or at least four separate occasions in the last 3 years, *and* has a serious mental or physical illness or disability. 24 C.F.R. § 91.5 (2013).

[13] The Settlement does refer to offers of "shelter, services or assistance" by police or other City workers. Section VII.14.D.2. But neither "services" nor "assistance" is defined because no consequence (such as being subject to arrest) turns on their refusal. In the City's revised Settlement, a refusal of "services" would be one strike under its "three-strikes and you're out" approach.

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poverty and malnutrition, language barriers, and loss of hearing and mobility. Some are women; some have families they can no longer live with because of residency restrictions.

The City offers no real justification why registered homeless persons should be excluded. It suggests doing so will help "protect children from convicted sexual predators." (DE 464: 32-33). But as the City is well aware, State probation officers and County police officers who specialize in managing sexual offenders and predators provide close supervision of all outdoor encampments, many of whose members wear GPS devices.[14] And nothing in *Pottinger* precludes the arrest of homeless persons, even if no shelter is available, for committing felonies (or non-life-sustaining conduct misdemeanors). Settlement, Section VII.14.C.4, D.2, E.

The City also seems to lump registered homeless persons together with individuals "who cannot be placed in a shelter due to their own inappropriate or illegal actions."[15] Judge Atkins rejected the City's distinction between the deserving and undeserving homeless, and it is nowhere found in the Settlement. Between the trial and Judge Atkins' opinion, Hurricane Andrew struck, leaving 200,000 people without homes. In a post-trial pleading, the City distinguished between the deserving homeless (victims of natural disasters) and the undeserving (victims of mental or physical illness, or of economic misfortune) for the purpose of its power to arrest. ***Pottinger***, 810 F. Supp. at 1564. Judge Atkins emphatically rejected this distinction: if "a situation over which the individual has absolutely no control . . . render[s] that person homeless," it makes no constitutional difference what that situation is. *Id.* at 1564-65. Here, because the County ordi-

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[14] The statutory provisions on regulation and supervision of convicted sex offenders are Fla. Stat. §§ 775.21, 775.24(1), 794.065, 944.607(c) (4), 948.001(10), 948.30, 948.061. The Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, Fla. Stat. §§ 394-10 to 394.931, provides for civil commitment of offenders who remain a danger.

[15] (DE 464: 24). The quoted language here refers to a different group, see p. 32 infra (point 5), but it immediately follows the redlined proposal to exclude registered homeless persons.

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nance bars them from virtually all housing stock, and all shelters bar them too, registered offenders are involuntarily homeless as defined by Judge Atkins: "The plaintiffs truly have no place to go." *Id.* at 1564.

There is a third implicit exclusion. The City aims to be able to transport homeless individuals in Miami to shelters or mental health/drug treatment facilities far from downtown, anywhere in Miami-Dade County. (DE 464: 22 (proposed modification to Section VII.11), 28 (proposed modification to Section VII.14.B). The Settlement precludes this. "Available shelter" means a shelter in or a mile outside the City; and individuals who are subjected to the Baker Act are, the City says, taken to Jackson Memorial Hospital for evaluation. (*Id.*) Once Plaintiffs are outside the City, they would no longer be the City's problem. Reducing the population of homeless individuals in Miami by offering expanded services is fully consistent with the Settlement (and entirely possible under it). Reducing the class by pushing homeless people out of the City is not.[16]

B. The City Proposes to Subject Homeless Individuals to Involuntary Civil Commitment at the Discretion of a Police Officer

Under the Settlement, a homeless individual who commits a "life-sustaining conduct misdemeanor" may be arrested if he or she declines an offer of an available shelter bed. Section VII.11. The City seeks to revise the term "available shelter" to include a shelter, for a period of at least 24 but not to exceed 48 hours, with a bed or a mat ," and to strike the ban on shelters that impose "~~involuntary substance abuse or mental health treatment.~~"[17] That 24-48 hour period, which the City asserts is necessary to provide "treatment," (DE 464: 22), viewed with the inclusion of a reference to facilities that impose *involuntary* treatment, would render the homeless population subject to involuntary confinement for substance abuse or mental health treatment for

[16] There is a fourth potential class of individuals who would be excluded, depending on how one reads the City's proposal. *See* p. 32 (Section IV.B of this Response (point 5)) *infra*.

[17] Underlined text represents the City's additions, and ~~crossed-through~~ text, the City's deletions.

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up to 48 hours, on pain of arrest.

Florida law already provides a comprehensive framework for involuntary commitment that provides mental health evaluation and treatment, Ch. 395, Florida Statutes, "The Baker Act," or substance abuse evaluation and treatment, Fla. Stat. § 397.301, "The Marchman Act. The Agreement itself recognizes that individual Baker Act commitments may be necessary. (DE 428: 28). But the City asks this Court, through deletion of the prohibition on shelters that impose involuntary treatment for between 24 and 48 hours, to endorse an ad hoc protocol that would give the City of Miami police discretion to round up homeless persons and dispatch them from the streets, either through arrest and incarceration, or confinement and involuntary treatment.

The City's proposal is unconstitutional. There is no conceivable circumstance under which this Court can authorize involuntary medical treatment to free individuals, on a class basis, upon threat of arrest and incarceration. *See* ***Addington v. Texas***, 441 U.S. 418 (1979) (state seeking involuntary confinement of individual must prove by clear and convincing evidence that individual is both mentally ill and likely a danger to himself or others); ***O'Connor v. Donaldson***, 422 U.S. 563 (1975) (state cannot constitutionally confine, without more, a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members).[18] Moreover, the City's proposal would flout both substantive constitutional standards and procedural safeguards. See ***Washington v. Harper***, 494 U.S. 210, 211 (1990) (forced treatment must satisfy minimum due process requirements).

C. The City Proposes to Eviscerate the Arrest Protections of *Pottinger*

The Settlement lists eleven carefully negotiated and drafted instances of what are called "life-

[18] The City's proposal also goes beyond what is permissible for sex offenders. *See* ***Kansas v. Crane***, 534 U.S. 407 (2002).

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sustaining conduct misdemeanors." Section VII.14.C.3. These are ones under which homeless persons had frequently been arrested, or were particularly vulnerable to arrest, for engaging in harmless, life-sustaining conduct. These limitations on police arrest authority were intended to minimize the circumstances under which an officer could arrest homeless persons simply because their public visibility was annoying or undesirable. *See* ***Pottinger,*** 810 F. Supp. at 1566, 1568 ("the court finds that plaintiffs have shown that the City has used the arrest process for the ulterior purpose of driving the homeless from public areas," "records also show that once the validity of the ordinance against sleeping in public was called into question, the City resorted to other ordinances to remove homeless individuals from public areas," "the City used the arrest process for the ulterior purpose of harassing and dissipating the homeless").

The City proposes eliminating four from the list of protected misdemeanors,[19] and quite possibly a fifth.[20] Eliminating any of these reverts to a regime under which the City could illegally eradicate the Plaintiffs' presence from downtown by arresting them for behavior vital to their existence. The City proposes to make the remaining protections subject to the proviso that a po-

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[19] (DE 464: 25-26): Section VII.14.C.3.c (fires in parks), d (obstructing passage on sidewalks), g (littering), and j (temporary structures in park).

[20] (*Id.*at 25): Section VII.14.C.3.b (Public nudity, where necessary to carry on the daily necessities of life). The City proposes to exclude this where there is a public restroom within a mile. (*Id.* at 25; DE 464-4: 1). Plaintiffs urged Judge Atkins to order the City to "make public restrooms with adequate security available to Plaintiffs in reasonably close proximity to locations where they reside, either by keeping open and maintaining existing bathroom facilities or by establishing new ones." (DE 355: 25-26). Ultimately the parties agreed to a negative approach—prohibiting the arrest of homeless individuals for answering the call of nature in public unless there is an available shelter bed. This approach reflected the inadequacy of public restroom access and the City's unwillingness to commit public funds to expand it. In its Motion the City does not even address whether the number of public restrooms has significantly changed since 1998. It gives no information on whether the restrooms are truly accessible, or if the mile is measured "as the crow flies." In any case, a mile is an extreme proposal, especially given the advanced age and infirmities of many of the City's homeless. Nor has the City offered any basis for substituting "person" for "child" in Section VII.14.C.4. (DE 464: 26).

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lice officer could arrest a homeless person after warning even if there were no available shelter, so long as in the officer's subjective discretion the homeless person's conduct "endangers the health, safety or welfare of the homeless person or the public." (DE 464: 23). The objective constitutional standards adopted by the 1998 Settlement would be subject to the discretion of each individual police officer. The sole basis the City offers for these sweeping changes is that they would "remove extreme health and safety hazards to the public at large." (*Id.* at 26).

Generalized assertions of this sort cannot possibly support modifying a consent decree. It is true that there is not, for example, an abstract constitutional right to have fires in public parks or to litter. But the purpose of Rule 60(b) modification is *not* to allow a defendant to whittle down a settlement agreement to some bare "constitutional floor" or revisit particular provisions in isolation from the rest of the agreement:

> [F]ederal courts may not order States or local governments . . . to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated. But we have no doubt that, to 'save themselves the time, expense, and inevitable risk of litigation,' petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement.

Rufo, 502 U.S. at 389 (internal quotations and citations omitted), 391 ("a proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor"). *See also* App. 6, Final Order Approving Settlement and Dismissing Case, at 10 (Settlement needs to be evaluated "as a whole").

D. The City Proposes to Eviscerate the Property Protections of *Pottinger*

When the City agreed to the *Pottinger* settlement, the preservation of Plaintiffs' property was central. Homeless persons may lack a residence, but their personal property, maintained in a distinctive manner, is central to their well-being and identity:

> [P]roperty belonging to homeless individuals is reasonably identifiable by its appearance and

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> its organization in a particular area. Typical possessions of homeless individuals include bedrolls, blankets, clothing, toiletry items, food and identification, and are usually contained in a plastic bag, cardboard box, suitcase or some other type of container. In addition, homeless individuals often arrange their property in a manner that suggests ownership, for example, by placing their belongings against a tree or other object or by covering them with a pillow or blanket. Such characteristics make the property of homeless persons reasonably distinguishable from truly abandoned property, such as paper refuse or other items scattered throughout areas where plaintiffs reside. Additionally, when class members leave their living areas for work or to find food, they often designate a person to remain behind to secure their belongings. Thus, whether or not they are present at their living site, plaintiffs exhibit a subjective expectation that their property will remain unmolested until they return.

Pottinger, 810 F. Supp. at 1571 (citations omitted).

The City proposes sweeping changes to the Settlement's property protection provisions. *First*, newly excluded groups of homeless individuals (which may include all homeless persons) would be deprived of all property protections. This would include when they are arrested or if they are taken to Homestead or elsewhere and the City destroys any property left behind for 12 hours.

Second, the City's proposed involuntary civil commitments (effected at the discretion of officers on the street) almost invariably would result in the destruction of property. To be sure, there is an obligation on the City's part, when arresting homeless individuals, to secure their property "to the extent feasible." Section VII.F.2. But the new involuntary civil commitments would not be arrests for felonies or misdemeanors, so the protections would not apply. And any items not secured, including any items left elsewhere, would be disposed of within 12 hours. The City would modify Section F of the Settlement to permit its agents to "remove[] and discard[]" "[a]ny items that have been left in the same location for more than 12 hours." (DE 464: 29). Therefore, if a person were involuntarily held in a shelter for 24-48 hours, anywhere in the County, whatever possessions were left behind in the City would be destroyed under the 12-hour

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rule.[21]

Third, the City proposes to add a general "safety" qualification to the property protections. (DE 464: 29). The City adverts to post-9/11 concerns, (*id.* at 13), asserting that ***Pottinger*** puts extreme limits on its ability to determine whether tents, bundles of clothes, and backpacks are dangerous. (*Id.*). It does not explain why it has waited twelve years after September 11, 2001, to do something about this supposed problem. Nor does the City cite a single specific instance in which law enforcement officers, concerned that something readily identifiable as typically belonging to a homeless person (as Judge Atkins noted) might contain an explosive device, refrained from investigating because of ***Pottinger***.

The Settlement requires the City to "respect" homeless people's property (as it must anyone's). Section VII.14.F.1 (requiring City employees to follow City's internal procedures regarding taking custody of personal property). It does not say that their property must be treated as "inviolate." Whatever would justify a safety-motivated inspection of a traveler's backpack left on a downtown sidewalk would suffice a homeless person's property as well. Nothing in the Settlement prohibits an *inspection* of anyone's property; it even permits the destruction of homeless people's property "as permissible by law and in accordance with the department's operating procedure." *Id.* If the City's operating procedures do not provide for lawful investigation, and if need be destruction, of personal property to deal with terrorist threats, it should not ask this Court to remedy that omission.

E. The City Proposes to Virtually Eliminate Any Means of Monitoring Its Compliance with *Pottinger*

The Settlement requires the City to keep records of arrests and certain other contacts with

[21] This 12 hour rule would apply to *all* homeless individuals, including those who might leave their property where they were staying while they went to work or sought medical care.

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homeless people. Sections VII.14.A, B, C.2, D.2, E.2. In the case of an arrest of a homeless person, an Arrest Affidavit is required. Where a law enforcement officer offers services to a homeless person, a Field Information Card must be filed. And where an individual is taken for an involuntary mental health examination, an Incident Report must be completed. In turn, Section VIII.15(a) requires the City to maintain these records in a computer or paper data base for the express purpose of monitoring the City's compliance with the Settlement. See Sections VIII.15(c), (d).

The City now proposes to drastically cut back record-keeping requirements for contacts by law enforcement officers with homeless individuals, crippling the possibility of future monitoring of its interactions with homeless people even as it seeks new powers to arrest them. Just as eviscerating the protections of the Settlement is not consistent with its basic purpose, neither would be the virtual elimination of any monitoring mechanism.

First, there would be *no* record-keeping requirement as to three groups of individuals:

- the "chronically homeless,"[22]
- "any person identified as a sexual predator as a result of s.775.215, F.S. or Section 21-277 to 21-21285, Miami-Dade County Code";[23] and
- "any person who is made homeless by his or her own actions, criminal or otherwise, occurring at a shelter that causes the person to be ineligible for placement at a shelter facility."[24]

This change would be accomplished by excluding these groups from the definition of "homeless person" in Section VII.10. (DE 464: 20, 24). The "chronically homeless" exemption alone could have a sweeping effect on record-keeping requirements, given the City's (unsupported) assertion that "[o]f those who live on the streets in downtown, it is estimated that about 90% are chronical-

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[22] (DE 464: 20). How exactly the elimination of all record-keeping would function is not clear. *See* pp. 29-33 (Section IV.B) *infra.*

[23] (*Id.*at 24) (referring to §§ 21-277 to 21-285 of the Miami-Dade County Code).

[24] (*Id.*). What this means is unclear. See pp. 29-33 (Section IV.B. (point 5)) *infra.*

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ly homeless." (*Id.* at 17). To be sure, *any* arrest affidavit required under general police procedure would still be filed. But there would be no requirement that the person be identified as homeless, and no requirement that the arrest be made part of the database the City is required to maintain. Monitoring the City's arrests of homeless individuals would be impossible.

Second, even for those individuals not falling within the newly excluded groups of homeless people, the City proposes two sweeping exclusions to the requirement that police file a Field Information Card. It would no longer be required whenever the City offered services either to a homeless individual who "routinely refuses assistance" (in the case of someone committing a misdemeanor that is not "life-sustaining conduct"), or to one who is committing no violation at all, if that person "is routinely encountered." (DE 464: 26-27) (proposing modifications to Sections VII.14.D.2 and VII.14.A). These judgments apparently would be left entirely to City employees, and as a practical matter could well eliminate any record-keeping requirement regarding police encounters outside the context of arrests.

Third, the City proposes to eliminate the requirement that an Incident Report be filed when a police officer takes a homeless person to a receiving facility for Baker Act examination. (DE 464: 29) (regarding Section VII.14.B). Again, monitoring the City's actions under this Section would be impossible. The City's apparent desire to be able to transport such individuals outside the City limits makes this proposed change particularly important.

IV. The City Has Failed to Make a Prima Facie Showing of Changed Circumstances or Suitably Tailored Modifications

The task before this Court is to apply the legal standard set out in ***Rufo***, which Section XV of the Settlement tracks.[25] ***Rufo*** held that the moving party "bears the burden of establishing a *sig-*

[25] *See* Section XV ("This Settlement Agreement may be modified by written agreement of the parties, or upon a showing of a significant change of circumstances warranting revision of the

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nificant change in the facts or law warranting revision of the decree, and that the proposed modification is "suitably tailored to the changed circumstances." 502 U.S. at 383 (emphasis added). Changed factual conditions may warrant modification when (1) they "make compliance with the decree substantially more onerous," (2) the decree "proves to be unworkable because of unforeseen obstacles," or (3) enforcement would be detrimental to the public interest." *Id.* at 384-85. But "modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." *Id.* at 385 (if anticipated changes are now alleged to make a decree unworkable, defendant must "satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)"). *See also* ***Ensley Branch, N.A.A.C.P. v. Seibels***, 31 F.3d 1548, 1563 (11th Cir. 1994). Rule 60(b)(5) does not allow modification simply because "it is no longer convenient [for the moving party] to live with the terms of a consent decree." ***Rufo*** at 383.

The purpose of this standard is to protect the finality of judgments while still ensuring that courts maintain a sufficiently "flexible approach" to allow returning matters to local control "when the circumstances warrant." ***Horne v. Flores***, 557 U.S. 433, 451 (2009). Thus modification may be warranted when, because "the objects of the decree have been attained" and "a durable remedy has been implemented," continued enforcement of the order is no longer necessary. *Id.* at 451-52. A "durable remedy" is one that "gives the Court confidence that defendants will not resume their violations of plaintiffs' constitutional rights once judicial oversight ends." ***Frew v. Suehs***, 775 F. Supp. 2d 930, 935 n.2 (E.D. Tex. 2011) (quoting ***Evans v. Fenty***, 701 F. Supp.

Agreement in a way suitably tailored to the change of circumstances, but in either event, only after approval by the Court.").

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2d 126, 171 (D.D.C. 2010)). The City has failed to make out a prima facie case that any of the requirements of ***Rufo*** and ***Horne*** have been met.

The core of ***Pottinger***—its basic purpose—is that people who are involuntarily homeless may not be arrested for being homeless. So long as there are insufficient shelter beds within the City (as the City concedes[26]), the Settlement restricts the City's power to arrest homeless people for committing "life-sustaining conduct" misdemeanors. But if there is adequate shelter in the City for homeless people, the Settlement will pose no barrier to arresting them for committing those misdemeanors.

A. The City Has Failed to Point to Any "Changed Circumstances" Warranting Modification

The City's burden under ***Rufo*** is especially heavy because the City anticipated most of the "changes" it claims justify its proposals. The City falls well short of satisfying this heavy burden. The City points to the growth in downtown Miami as a significant change. But well before 1998, the City had articulated a goal of making this happen. For example, in 1991 while the ***Pottinger*** lawsuit was ongoing, the City formally adopted a goal of expanding downtown Miami's "role as a center of domestic and international commerce . . . [and as] a regional center for the performing arts, . . . [with] a[n] urban residential base."[27] The City made the judgment in 1998, as it vigor-

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[26] (DE 464: 22 (proposing to place homeless individuals in facilities outside the City), 8 (discussing possible expansion of shelter beds), 21 (proposing that availability of mat is sufficient)).

[27] App. 7, City of Miami, Dept. of Planning, Building and Zoning, Miami Comprehensive Neighborhood Plan 1989-2000: Goals, Objectives, Policies, at 5 (Objective LU-1.4) (February 1991) (available at http://www.miamigov.com/planning/pages/community_planning/MCNP_January_1991.PDF). This goal routinely appeared in its master plans at the time of the litigation. App. 8, City of Miami, Dept. of Planning, Building and Zoning, Miami Comprehensive Neighborhood Plan, Goal 1, at I-1 (1988) ("foster[] the growth and development of Downtown as a regional center of domestic and international commerce, culture and entertainment") (available at http://www.miamigov.com/planning/pages/community_planning/MCNP_January_1988.PDF); *id.*, Goal 2, at I-21 ("Achieve a livable city center with a variety of urban housing types for per-

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ously negotiated the Settlement, that the terms to which it agreed would be consistent with that planned growth.[28]

The City's own description of the success of the downtown shows that things have gone as planned. Downtown Miami, the City tells us, "is now a densely populate[d] center where residents live and work." (DE 464: 12). From 2000 (shortly after it agreed to the Settlement) to 2014, downtown Miami's population will have more than doubled, with at least 22,000 condominium units built since 2003, and many new restaurants and hotels opened. *Id.* at 12-13. These statements reflect the DDA's recent glowing description of a downtown in the midst of a "dramatic permanent transformation" into a "unique urban center in the unique international gateway city."[29] In the past 10 years, the DDA tells us, there has been "an unprecedented growth in new residents, workers, businesses, and students, a new life has been breathed into Downtown," and the "streets are now active at all times of the day and night and each day of the week."[30]

The City also asserts that the growth of homeless services constitutes a significant change. The City points to the establishment of its Homeless Assistance Program in 1991 and the Miami-Dade County Homeless Trust and the Chapman Partnership in 1993. (DE 464: 9-11). Of course, programs in place *before* the Settlement cannot qualify as a significant change of circumstances. Post-1998 developments cited by the City fail to qualify as a "significant change in circumstanc-

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sons of all income levels"); *id.*, Objective 4.1, at I-43 ("By 1995, the City will have a clearly defined and functioning cultural arts district within the downtown area, and a world class cultural performing arts facility will be built within the City by the year 2000.").

[28] ***Horne*** provides a revealing contrast. The Court expressed concern over indications that state or local officials had "welcomed the involvement of the federal court as a means of achieving appropriations objectives that could not be achieved through the ordinary democratic process." 557 U.S. at 447 n.3. The Settlement here directs no appropriations and was achieved only after a decade of heated litigation involving two trials, two appeals, and a long mediation process.

[29] App. 9, DDA, Decade of Change: Downtown Miami 2001-2011 at 1 (April 2012) (available at http://miamidda.com/pdf/DwntwnMiami_Decade-of-Change04202012.pdf).

[30] App. 10, DDA Homeless Task Force Report Executive Summary, at 1 ("DDA Task Force").

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es" under ***Rufo***. *Id.* at 8-12. The City plainly anticipated a growth in the provision of services to the homeless in 1998. Before Judge Atkins, the City stated in 1995 that through the Trust's efforts, funded by the meals tax, "the bed capacity has and will continue to increase and long term continuum of care will be available to homeless individuals to provide them an alternative to homelessness." (DE 348: 24).

Neither is there anything about the character or size of the homeless population that merits the claim of a significant change of circumstances. The City states that in 1998 "none of the parties anticipated those who would simply refuse services, or accept services like a revolving door." (DE 464: 20). In fact, the Settlement expressly defines homelessness without any "expiration date" for individuals who are homeless over a long period. Section VII.10. Nor was the chronic homelessness unknown in 1998. On the contrary, the idea that some people may be homeless over a long period was widely discussed at the time of the lawsuit.[31] The City itself identified chronic homelessness as an important concern in the ***Pottinger*** litigation.[32]

Even if the number of chronically homeless people in Miami had dramatically increased since 1998, this fact would not warrant consideration under ***Rufo***: homeless persons' individual constitutional rights do not disappear just because the government thinks there are too many of them. In any event, the City offers no support for the proposition that the number of chronically homeless has increased dramatically, if at all. The City compares the homeless population in

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[31] See Bruce Taylor Seeman, *Homeless Lawsuit Near Settlement*, Miami Herald, Nov. 16, 1997, at 1B, 1997 WLNR 3123229 ("Expectations for a resolution are particularly high in downtown Miami, where merchants and property owners contend chronic homelessness has blunted efforts to resurrect the city's core"); Cindy Ycaza, *Cities Vow to Aid Homeless*, Miami Herald, Aug. 19, 1993, 1993 WLNR 2271695 (until meals tax takes effect, City will contribute to County-wide fund to expand homeless assistance, including to "chronically homeless people, who often have lived on the streets for months or years and have mental health or substance abuse problems").

[32] (DE 357: 3) ("hard-core homeless persons will seize upon any excuse or mechanism that will enable them to shirk having to become accountable both to themselves and to society").

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downtown Miami nearly a decade after the Settlement (in 2009) with that in 2013, asserting an 83% increase (from 192 to 351). (DE 464: 16).[33]

This legerdemain is not worthy of the Court. The only relevant comparison would be of a date close to 1998 with 2013.[34] The number of homeless individuals in downtown Miami in November 2001 was 307, according to the DDA,[35] and 351 in January 2013.[36] The numbers are too small to merit statistical analysis, but this is a 14% increase, not an 83% increase. Even using 2009 as the baseline, this "trend" is questionable. The City says there were 192 homeless individuals downtown in *January* 2009 (the basis for the "83% increase"), (DE 464: 16), but neglects to mention that the same census showed a downtown homeless population of 361 in *August* 2009. By that measure the downtown homeless population has *declined* by 6% since 2009.[37]

If the precise numbers or composition of the downtown homeless population were relevant to the legal task before this Court, it would of course be the City's burden to prove its point.[38] But the Court need not resolve any of these issues. As Judge Atkins noted in 1995, because "the

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[33] In public comments the DDA has claimed the homeless population downtown has "doubled" since 2009. Charles Rabin, *Miami Moves to Overturn Court-ordered Homeless Rights*, Miami Herald, Sept. 11, 2013, available at http://tinyurl.com/MiamiHerald-2013-09-11.

[34] In fact when it speaks of the *County* the City compares the County-wide population close to the time of the Settlement (in 1997 and 2003) with the County-wide figure for 2013, noting a 50% reduction. (DE 464: 16).

[35] App. 10, DDA Task Force at 2. The figures the City gives in its Motion and those cited in the Homeless Task Force's Executive Summary appear to be drawn from Trust's twice-a-year census. *See* note 10 *supra*.

[36] (DE 464: 16).

[37] *See* App. 11, City of Miami Neighborhood Enhancement Team, Executive Summary: Miami Homeless Assistance Program, 2012, at p. 2 (Table: Homeless Enumeration), available at http://egov.ci.miami.fl.us/Legistarweb/Attachments/65690.pdf. Additionally, it appears that there were 352 homeless individuals in January 2012 (DDA Task Force, at 2) and 351 in January 2013. (DE 464: 16). Even if there were an upward trend, it has leveled off.

[38] ***United States v. South Fla. Water Mgmt. Dist.***, 2011 U.S. Dist. LEXIS 29342 (S.D. Fla. Mar. 22, 2011) ("The party seeking Rule 60(b)(5) relief bears the burden to show that a significant change exists to grant such extraordinary relief."); ***Johnson v. Florida***, 348 F.3d 1334, 1344 n.8 (11th Cir. 2003) (same).

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homeless population is mercurial," the court need not "attempt to fix a number." App. 5 at 6. Now, as then, the number of homeless persons in downtown exceeds the number of available shelter beds in Miami. The City's proposal to use mats and to ship homeless persons to Homestead, (DE 464: 22), together with its talk about acquiring more "Pottinger beds," (*id.* at 8), concede implicitly what the City declines to state candidly: "a substantial number of homeless people still have 'no place else to go,'" (*id.* at 9), now as in 1998.

Further, neither 9/11 concerns nor the enactment of State and County residency restrictions have any bearing on the continuing validity of the Settlement in its current form. As noted earlier, the City has had the last twelve years to deal with the new post-9/11 landscape. The legislation restricting residency is also not a significant change under ***Rufo*** because those rendered homeless by virtue of obeying the law are exactly the kind of involuntarily homeless person the Settlement is meant to protect. Moreover, as a matter of law, legislative changes the defendant has actively participated in bringing about—as is the case with residency restrictions—cannot constitute a significant change of circumstances. The statute that rendered those convicted of sex crimes homeless in Miami is not the state residency statute (which the City incorrectly identifies as "[t]he most significant legislative change" since 1998, (DE 464: 14)), but the County ordinance.[39] And the City was an important player in that process.

First, on June 9, 2005, the City passed its own residency restriction even before the County acted. City of Miami Ord. No. 12691, Section 37-7 (c) (1). This ordinance was significantly broader than the County's eventual version. The City's 2,500 foot buffer included bus stops, cre-

[39] The state statute, which created an exclusionary zone of 1,000 feet and applied only to those convicted of sex crimes after its passage, left housing available for those to whom it applied. It was the County's 2,500 foot zone, when applied to all persons ever convicted of sex crimes, that forced these offenders into the streets.

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ating a one-mile exclusionary swath around its intersecting, population-dense bus lines, putting all housing stock out of bounds. Ord. No. 12691, § 2, 6-9-05; Ord. No. 12713, § 2, 7-7-05) ("Lauren's Law"). Thus it was the City that first created the problem it now cites as a "changed circumstance," as if it were a mere bystander. [40]

Second, the City had the opportunity as the County considered its own ordinance (enacted on November 15, 2005) to raise concerns about how that would affect its duties under the Settlement, but failed to do so. The County passed its own ordinance in part because some municipalities, including the City, were wreaking havoc by enacting increasingly extreme exclusions that could only serve to exile registered offenders to other jurisdictions or force them underground. *See* App. 12, Transcript of Miami-Dade County Commissioner Meeting, 11/15/05, pp. 19-23. The County was well aware its ordinance would leave no housing stock for those convicted of sex crimes, *id.* at 27, 45, 47-50, 58, and invited comment from each municipality. It received no opposition except from some that preferred an even more extreme exclusion. *Id.* at 24-25.

Third, the original County ordinance permitted any municipality to "opt out" of the exclusionary zone provision. Section 21-279(b) (2005). This would have allowed the City to craft an ordinance consistent with its obligations under ***Pottinger***. Not only did the City not opt out, it went all in, retaining bus stops in its buffer zone in spite of the County's warning that this risked litigation. Then in January 2010, the County pre-empted the municipalities, establishing a uniform 2,500 zone excluding bus stops in order to reduce the risk of litigation. Art. XVII ("The

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[40] App. 13, Letter from Walter A. McNeil, Fla. Dept. Corr., to Ronald L. Book, Chair, Homeless Trust, 5/5/09; Letter from Walter A. McNeil, Fla. Dept. Corr., to Ronald L. Book, Chair, Homeless Trust, 7/1/09.

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Lauren Book Child Safety Ordinance") § 21-279.

Having created the problem of enforced homelessness, local authorities are free to devise solutions. As ***Horne*** counsels, making state law work together with a federal court order is properly left to "state law, to be determined by state authorities." 557 U.S. at 471.[41] The City should not be granted this Court's approval to begin arresting individuals who are involuntarily homeless because they are obeying state and local law.

In sum, the City has not shown any changed circumstances that make compliance with the Settlement's modest injunction, prohibiting it from arresting homeless persons with "no place to go" for living in public, substantially more onerous today than it was in 1998. The City points to nothing that makes the Settlement "unworkable" because of "unforeseen obstacles," or "detrimental to the public interest." Indeed, the same public interest that motivated adoption of the Settlement—preventing the unconstitutional criminalization of homelessness—is served by its continued enforcement. Nor has the City shown that the objects of the decree have been attained or that a "durable remedy" is in place. To the contrary, City's own Motion makes clear that homeless people still remain on the streets of downtown, and the City aims to deploy its arrest power to jail involuntary homeless persons for engaging in life-sustaining activities in public and, through these arrests and seizure and destruction of their property, root them out of down-

[41] ***Horne*** involved a class action lawsuit against the Nogales school district in Arizona alleging violation of the federal Equal Educational Opportunities Act. 557 U.S. at 438-440. The federal district court had found a violation and issued a remedial order granting statewide relief, even though Nogales was only one of 239 school districts, because the Arizona attorney general had advised the court that "a 'Nogales only' remedy would run afoul of the Arizona Constitution's requirement of a 'general and uniform public school system.'" *Id.* at 471. The Supreme Court ruled that any issue involving coordination of statewide law with the federal court's order should have been left to state authorities.

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town Miami. This is the same unconstitutional policy and custom that inspired Plaintiffs' lawsuit 25 years ago and necessitated Judge Atkins' judgment.

B. The City's Proposed Modifications Are Not "Suitably Tailored" to Changed Circumstances

The Court need not reach this issue, because the City has failed even to allege any changed circumstances that would satisfy ***Rufo***. In any event, as a matter of law, the City's proposed modifications are not suitably tailed for three reasons.

First, eviscerating a decree or adding new powers that would violate the Constitution cannot, as a matter of law, constitute a suitable modification. *See* ***United States v. City of Miami***, 2 F.3d 1497, 1504-05 (11th Cir. 1993) (proposed modifications cannot be "suitably tailored" if they are inconsistent with the "basic purpose" of the agreement). The basic purpose of the Settlement is to protect the right of homeless individuals not to be arrested or have their property destroyed for being homeless. The changes the City proposes would allow the City to do exactly that.

Second, wholesale rewriting of the Settlement supported only by general claims about public health, safety, and welfare is not suitably tailored. Even if this Court were to accept the City's two fundamental points—that "two specific groups, the chronically homeless and sexual predators," are not being reached by the City's efforts, (DE 464: 4), and that the solution is to remove them from the Settlement's protections and subject them to involuntary confinement for mental health or substance abuse treatment—there would be no reason to trim the list of life-sustaining conduct misdemeanors, the property protections, the record-keeping requirements, and the protection against being shipped anywhere in Miami-Dade County. Similarly, the City points to no reason to think that any of the very general factors the City points to in claiming a significant change of circumstances in Miami would make record-keeping more burdensome.

Third, given that the *Pottinger* settlement has the legal force of a judgment, no proposed

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modification can be suitably tailored if it is unintelligible. The City's motion is unintelligible in many important instances.

(1) The City offers "mats" as a proxy for "beds," (DE 464: 22), but fails to define "mat,"[42] or describe how or when a "mat" would be appropriate, or explain how adding "mats" would yield "up to 150 additional spaces in shelters" within the City, with "access to medical care, food, toilet facilities, counselors, and other treatment." (*Id.* at 21). Its math is not supported by any facts, relying solely on counsel's "recent conversations with [unnamed] officials at Camillus House." (*Id.* at 8-9). The City equates its proposal to offer "mats" as an equivalent substitute for beds, with "the current *cold weather emergency shelter policy* which allows for temporary placement of the homeless (on mats) when the weather is 50 degrees or below." (*Id.* at 21) (emphasis added). But the City's Motion points to no such emergency in Miami, no dramatic surge in the number of homeless persons (as there was in the wake of Hurricane Andrew) that justifies this modification.

(2) With respect to who may offer services to homeless individuals, the City proposes to *substitute* the phrase "a community outreach specialist" for "an outreach worker" in Sections VII.D.14.A. ("Homeless Person Observed Not Engaging in Any Criminal Conduct") and VII.D.2 ("Homeless Person Observed Violating a Misdemeanor (which is not classified above as 'Life Sustaining Conduct'")). (DE 464: 26-27). Yet the City's explanation of the change suggests it

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[42] Apparently a mat could be as little as a blanket on a concrete floor. App. 14, City of Miami, City Commission, Meeting Minutes, July 26, 2012, at 84 ("And at some point Pottinger or the judges are going to have to recognize a bed may also be a spread on the floor, on a hard surface, that that's going to be acceptable to be a bed because right now, a bed is a bed") (remarks of then Vice-Chair Sarnoff), available at http://egov.ci.miami.fl.us/meetings/2012/7/2386_M_City_Commission_12-07-26_Verbatim_Minutes_(Long).pdf. The City's unexplained plan to provide hotel rooms to those with children, (DE 464: 12 n.11), suggests that neither a mat nor a spread would suffice in such cases, but the City's proposed modifications say nothing about this.

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means to *add* the term to the existing language.[43] Moreover, the City does not propose any change to the reference to "outreach worker" in the property disposition section, VII.F.2.b. (DE 464: 29). On the contrary, even the *new* underlined language the City would add to that section contains a reference to "outreach worker." (*Id.* at 29). Yet the City's explanation of the proposed change to the property disposition section states that it seeks to allow not only "community outreach specialists" but also other unspecified "professionals who address the needs of the homeless on a daily basis" to take custody of a homeless person's property in case of arrest. (*Id.*). This carelessness epitomizes the City's approach to its wholesale redrafting of the Settlement.

(3) The City proposes to allow a police officer to dispense with a Field Information Card in the case of an encounter with a homeless person not engaging in any criminal conduct if that individual "routinely refuses assistance." (DE 464: 27) (regarding Section VII.A.). Where a police officer sees a homeless person committing a non-life-sustaining conduct misdemeanor and offers homeless services rather than arresting the individual (Section VII.D.2), it includes the following in its proposed modification: ". . . the law enforcement officer shall complete a Field Information Card, [except if the homeless person is routinely encountered]." The City's use of brackets is unexplained. Assuming it signals an addition, the City gives no explanation why a police officer should have discretion to dispense with a Field Information Card where the homeless person is "routinely encountered" as opposed to "routinely refuses assistance." (*Id.* at 27).

(4) The City proposes to modify Section VII.B as follows: "Where a homeless person meets the criteria for involuntary examination under Florida Law (currently section 394.463, F.S.), "Baker Act," a law enforcement officer may, in his or her discretion, take the homeless person to

[43] (DE 464: 27) (proposed modifications "expand those who may approach and assist homeless person[] from City workers only to community outreach specialists from the Trust").

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~~a receiving~~ the nearest facility for involuntary examination." (DE 464: 28). It explains this as "allow[ing] the City to take homeless persons to an appropriate mental health facility within Miami-Dade County and not necessarily Jackson Memorial Hospital, which may have overcrowding or not be in a position to treat the homeless person as efficiently as another facility." *Id.* This implies that it currently takes such individuals to Jackson, but wants to be able to take them to a facility anywhere in the County. Yet because Miami police would be picking up such individuals only within the City, it is hard to see how the "nearest" facility would be outside the City limits.

(5) The City proposes to exclude from the definition of homeless persons "any person who is made homeless by his or her own actions, criminal or otherwise, occurring at a shelter that causes the person to be ineligible for placement at a shelter facility." (DE 464: 24). It says simply that this change "would exempt those homeless who cannot be placed in a shelter due to their own in appropriate or illegal actions at the shelter." (*Id.*) Because the City proposes to entirely exclude such individuals from the definition of "homeless person," none of the protections of the Settlement would apply in the first place. It would seem that any individual who was ever excluded from any shelter for violation of its rules would now be entirely outside the protection of the Settlement, even if that had happened only once. It would operate as a "one strike and you're out" provision. Perhaps the City means something different: In a case where the only available shelter bed is at a facility that has previously banned a particular individual for violation of its rules, the individual can be arrested even for a life-sustaining conduct misdemeanor. That is not what the proposed language says, however. Nor does the City provide any information on the policies of shelters, whether it has encountered this alleged problem in practice, or how often, or how it would keep track of such instances.

These shortcomings cannot be attributed to any press of time. The City announced in April of

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this year that it wanted to seek modification of the Agreement. This announcement followed a review of ***Pottinger*** that began as early as February 2010.[44]

C. The City Has Not Acted in Good Faith

In ***Board of Education of Oklahoma City Public Schools v. Dowell***, 498 U.S. 237, 249-50 (1991), the Supreme Court noted that a government body seeking modification of a consent decree must show it has observed its terms in good faith. It is not consistent with good faith to misrepresent to the public what the Settlement does and does not do. Yet since announcing its intention to seek modification, the City has presented ***Pottinger*** as making homeless people practically immune from arrest. The Chairman of the Miami City Commission published an Op-Ed in June stating that "[u]nder Pottinger, the homeless cannot be harassed by police. They 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."[45] In fact, under ***Pottinger***, as the City well knows, a homeless person *can* be arrested for committing a life-sustaining conduct misdemeanor—if there is an available shelter bed and the individual refuses it. The City's Motion continues in the same vein, sprinkling its proposals with inflammatory language and anecdotes.[46] In this respect the City's behavior is the same as it was during the earlier litigation

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[44] App. 15, Minutes of the Board of Directors, Downtown Development Authority, Feb. 19, 2010, at 3, available at http://www.miamidda.com/pdf/021910_DDA-Bd-Min.pdf. Beginning in May, 2013, counsel for Plaintiffs repeatedly asked the City for a redlined copy of the Settlement that would show the specific modifications sought. The City did not do so until filing the Motion on September 11, 2013, for the first time revealing the full breadth of its intentions.

[45] Marc Sarnoff, *On Miami's Homeless, Let's Get Them Beds*, Miami Herald, June 12, 2013, available at http://tinyurl.com/MiamiHerald-2012-06-12.

[46] (DE 464: 20, n.15) (chronically homeless accept shelter only when "their welfare checks"—presumably SSI, which is not "welfare"). Equally pernicious is the City's branding of all registered sex offenders as "sexual predators," even while citing the statutes that clearly differentiate the two categories. *See* p. 11 *supra*. And for all the City's emphasis on isolated instances of public defecation, (DE 464: 19) (public nudity and "going to the bathroom" on a crowded public

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wherein Judge Atkins noted: "City employees have been misusing the Injunction and misrepresenting it to the public in ways the court is shocked to think about." App. 5 at 12.[47]

V. Conclusion

The City has failed to present a prima facie case for modification of the Settlement.

WHEREFORE, plaintiffs respectfully request the Court to issue an order denying the Motion.

Respectfully submitted,

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street), it never stops to consider the predictable consequences of the government's forcing people to become homeless. Charles Rabin et al., *Sex Offenders Forced from Allapattah Trailer Park, Now in Hialeah*, Miami Herald, Aug. 8, 2013, available at http://tinyurl.com/MiamiHerald-2013-08-08 ("Most of the [registered] offenders removed from the trailer park [in Miami] now spend evenings at a warehouse district next to train tracks at Northwest 71st Street and 36th Court, in unincorporated Miami-Dade across the street from Hialeah. They sleep outside without a roof over their heads, urinating and defecating in a nearby field behind some trees.").

[47] App 5 at 12-13 ("City employees have told members of the public that the City could not fix a broken fire hydrant which was spewing water for several days, or take actions to prevent apparently homeless people from telling others that they could not park at public parking meters unless they paid the apparently homeless person money, because of the Injunction").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of October, 2013, 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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