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Dear Deputy Mayor George:

I write on behalf of the American Civil Liberties Union of Kentucky (“ACLU-KY”) to **urge you not to conduct camp clearings while a citywide White Flag is in effect unless indoor shelter space is available to displaced residents, and inform those displaced residents that they need not find alternative housing during this extreme heatwave.** Displacing encampment residents and confiscating their shelters and other personal property during extreme heatwaves threatens the health of encampment residents and risks violating the constitutional rights of unhoused people.

Background

An [‘excessive heat warning’](#) has been issued by the National Weather Service from Monday to Thursday evening, as heat indexes in Louisville are expected to surpass 100 degrees. Louisville Metro Government (“Louisville”) has regularly issued White Flag alerts for excessive heat during the past month.

Despite the dangerous heat, Louisville cleared two camps on August 18¹ and plans to clear two additional camps on Wednesday, August 23² and Monday, August 28.³ The alert sent to unhoused people does not cite any criminal activity as justification for clearance, points to no imminent public health or safety threats, nor does it describe any available alternative housing or even temporary shelter for displaced residents. In fact, displaced people will need to wait until the day of the clearing to receive a RAVE alert informing them as to whether shelters may have available rooms. And even that assumes the unhoused person has access to a cell phone with RAVE notifications.

Due to a variety of factors, unhoused people have serious health conditions at higher rates relative to the general population.⁴ These health conditions carry the risk of serious illness, hospitalization, and early morbidity. Moreover, homelessness itself *creates* additional health problems, from increased exposure risk to communicable diseases,

¹ See Ex. 1 and Ex. 2.

² See Ex. 3.

³ See Ex. 4.

⁴ Nat’l Health Care for the Homeless Council, Homelessness & Health: What’s the Connection? 1–2 (2019) (noting that unhoused people have diabetes at a rate of 18% relative to 9% among the general population, hypertension at a rate of 50% relative to 29%, and heart attack risk at a rate of 35% relative to 17%).



violence, malnutrition, and harmful weather exposure. Recovery and healing are difficult, at best, for people with unstable housing. But temporary shelter is undoubtedly preferential to being forced onto the street. How is a diabetic supposed to store their insulin in a cool environment if their tent has been confiscated? These are not hypothetical questions. These are questions about life and death.

Legal Analysis

The planned encampment sweeps amount to a state created danger, in violation of the U.S. Constitution.

It is a violation of substantive due process for a state or local official to place a person in a situation of known danger with deliberate indifference to their personal and physical safety. *Phillips v. City of Cincinnati*, 479 F.Supp.3d 611, 648 (S.D. Ohio 2020) (holding that the City of Cincinnati simply threatening to take “tents, tarps, blankets, and clothing” is sufficient to survive a motion to dismiss); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006); *Jeremiah v. Sutter Cty.*, 2018 WL 1367541 at 5 (E.D. Cal. Mar. 16, 2018) (finding a violation where Defendants would “knowingly place the homeless at increased risk of harm if it confiscates and seizes Plaintiffs’ shelters and possessions”).

In order to prevail under this State-Created Danger theory, a plaintiff must show: “(1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.” *Phillips*, 479 F.Supp.3d at 648 (citing *Jones v. Reynolds*, 438 F.3d 685 (6th Cir. 2006)).

Some courts in the Sixth Circuit and elsewhere have permitted State-Created Danger claims to proceed against municipalities for encampment sweeps and destruction or seizure of unhoused individuals’ shelter. *See, e.g., Phillips*, 479 F.Supp.3d at 648; *Jeremiah*, 2018 WL 1367541. One court explicitly held the “sweeping or clearing of encampments in extreme heat to be ‘affirmative conduct’ on the part of the City in placing Plaintiffs in danger,” with “deliberate indifference to the known or obvious danger of extreme heat.” *Sacramento Homeless Union v. Cnty. of Sacramento*, No. 222CV01095TLNKJN, 2022 WL 3019735, at *8 (E.D. Cal. July 29, 2022) (cleaned up).



Here, Louisville creates the same danger by forcing unsheltered individuals out of shade, despite known heat-related dangers and a lack of available beds in local shelters. In fact, the very act of notifying unhoused people of an impending encampment sweep amounts to a state-created danger: notification forces unhoused people to preemptively move their belongings elsewhere during extreme heat or risk losing everything. And once notification has been given, it is difficult to put the toothpaste back into the bottle.⁵

Alternative Solutions

“Evidence overwhelmingly suggests [encampment closures] are expensive exercises in futility. Instead of improving homelessness, [encampment closures] destroy property and disrupt fragile communities often leaving unsheltered people more likely to remain homeless.” Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CAL. L. REV. 559 (2021). “Because this exercise merely disperses, rather than reduces, homelessness, new encampments inevitably reappear.” Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 114 (2019).

We believe Louisville should pursue a path that adheres to constitutional law, resists perpetuating cycles of poverty, and preserves taxpayer resources. For these reasons, we request Louisville Metro Government:

- Cancel any plans to clear encampments of unhoused people until the White Flag period of extreme heat is complete
- Communicate to encampments, definitively, that they will not be cleared, through RAVE alerts, physical signage, and in-person communication
- Establish additional shelters and cooling centers, accessible to unhoused people during both day and night
- Distribute summer care packages containing water, reusable bottles, nonperishable foods, hygiene products, sunscreen, and sun coverage (e.g., hats, umbrellas)

⁵ A newspaper in Portland, Oregon documented how, even when courts intervene to stop unconstitutional encampment destructions, unhoused people may not be adequately notified and may begin moving their belongings anyways. The newspaper interviewed David Bentley who stated, “I don't want to die out here you know ... I don't want to die just another homeless guy, just another number.” ([Link](#))



We hope that we can resolve this matter collaboratively and without the need for further action. I look forward to your prompt response regarding whether your office will agree to implement our modest requests. Given the nature of this letter, if we do not receive your response before any future camps are cleared, we will construe that as unwillingness to resolve this matter informally.

Please feel free to respond via email to: [REDACTED] You may also call me at [REDACTED]. Thank you in advance.

Kindly,

/s/ Kevin Muench
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