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March 26, 2024

Sent via Email and U.S. Mail to:
MayorToddGloria@sandiego.gov; jennifercampbell@sandiego.gov

CITY OF SAN DIEGO
Attn: Mayor Gloria and Councilmember Campbell
202 C Street, 10th and 11th Floor
San Diego, CA 92101

Re: LETTER #2: SUSPEND SPENDING ON NTC-H-BARRACKS HOMELESS PROJECT PENDING SUPREME COURT'S GRANT OF CERTIORARI IN THE CASE OF CITY OF GRANTS PASS V. JOHNSON
Project: NTC H-Barracks Homeless Compound ("**Homeless Project**")
CIP #: S-24010
Letter #: 2 of 16

Dear Mayor Gloria and Councilmember Campbell,

As you know, our law firm represents Point Loma CARES, a neighborhood and community-based nonprofit association ("**PL CARES**") located near the Barracks H site where the City of San Diego ("**City**") intends to create a facility for a significant number of unhoused residents of San Diego. This is another letter supporting our belief there are better options and solutions for the City and its residents than creating the Homeless Project. At this point, the city should be looking at one of its other available 14 sites or looking for new sites within the City limits.

This military-like compound – which as proposed would be the largest of such projects in the State of California ("**Homeless Project**") — is located only a few short yards from the San Diego International Airport, the airport parking and waiting structure, hotels, and across a pedestrian bridge from playgrounds, schools, and a large and well-established residential community of homes and military housing ("**Surrounding Community**").

This is the second of what will be numerous letters expressing our concerns and opposition to the Homeless Project and is a follow up to our initial correspondence to you from March 14, 2024.[1] The people in the Surrounding Community have acknowledged the urgent need to address

[1] Before we delve into the complexities of the Supreme Court's recent grant of certiorari in the case of *City of Grants Pass v. Johnson*, we again implore you to reconsider the broader implications of transforming a site mired in environmental toxicity into a shelter for the homeless. The H-Barracks area, a site already entangled in litigation due to it hazardous conditions, should not be repurposed in a manner that puts any person at risk, let alone hundreds of our most vulnerable citizens. Ignoring the site's troubled past—which has prompted legal action from previous occupants—disregards public health and subjects the City to substantial liability by the people affected and those people who are advocates for them.

homelessness in our City driven by factors such as drug and alcohol addiction, mental illness, and soaring housing costs.

However, the ongoing legal debate and impending Supreme Court decision necessitate a thorough evaluation of the City's approach. Like the Pacific Legal Foundation, which also filed an amicus brief in *City of Grants Pass* our client shares the sentiment that "the plight of the homeless calls out to anyone with a heart. Drug and alcohol addiction, mental illness, and the outsized cost of housing have driven a sharp uptick in the number of homeless livings in tents and makeshift camps in public places. The spiraling crisis—in all our big cities but particularly in the West—has led to cities and homeless advocates disagreeing about what the government can or should do to solve the problem versus what it must do as a matter of federal constitutional law." But this Homeless Project is not and will never be the solution.

As such, the immediate catalyst for this letter is the Supreme Court's recent grant of certiorari in the case of *City of Grants Pass v. Johnson*. This case raises crucial constitutional questions regarding the government's responsibility to mitigate homelessness and whether cities can enforce anti-camping ordinances without providing adequate shelter. The City should exercise caution and postpone any imminent efforts and expenditures related to the Project until the Supreme Court issues its decision this summer.

As you know, *City of Grants Pass v. Johnson* involves an ordinance in Grants Pass, Oregon prohibiting camping on public property. The Ninth Circuit had held the ordinance violated the Eighth Amendment and declared that a city cannot enforce a camping ordinance unless the city had "**adequate**" homeless shelter beds in excess of the number of "**involuntary**" homeless people living in the city limits. If this ruling stands, the City will be required to spend money on housing and social services. It will need to survey each person to find out the nature of their respective homelessness. And if accepted, each person will need to then be thoroughly vetted as to medical, social, and related health concerns.

This Ninth Circuit opinion is undoubtedly the reason the City of San Diego is trying to build the Homeless Project. By July 2024, this reason may not exist, since the U.S. Supreme Court will provide clarity that was not provided by the Ninth Circuit's opinion. Any detailed planning or construction at Barracks H before the Supreme Court issues its decision will either be inadequate or superfluous.

In granting certiorari, the Supreme Court has guaranteed it will either overturn *Grants Pass v. Johnson* or else clarify its metes and bounds so cities know what constitutes "adequate" shelter, how to count beds accurately, and what process is required by the Constitution to determine if a class of people is "voluntarily" or "involuntarily" homeless. We urge you not to start spending the more than $17 million necessary to build the Homeless Project until the Supreme Court provides guidance on what is necessary. You need only wait until July for an answer that might alleviate *any* need to spend millions of dollars into a temporary shelter solution.

Until the Supreme Court rules, this question – a very expensive and perilous one for the City – will remain: "Do cities owe the homeless a bed or place to sleep, as some argue? Or can cities fine and remove the homeless from city streets in the name of public order without providing

them with some version of a public homeless shelter"?[2]

As Petitioner, City of Grants Pass explains on page 8 of its brief, the Ninth Circuit held that a city "*could not enforce its public-sleeping ordinance 'so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters.*'" In calculating the available beds, the Ninth Circuit "*excluded open beds in religiously affiliated shelters*," which was probably an error – but we won't know until the Supreme Court rules. The Ninth Circuit left open the possibility of enforcement against "*individuals who do have access to adequate temporary shelter*" but "*choose not to use it*" – but failed to define what constitutes "*adequate*" shelter. From our perspective, it is unlikely that a tent, RV, car, or military style barracks will not be considered "adequate housing.

The Ninth Circuit also failed to pass judgment on cities' ability to prohibit public sleeping "at particular times or in particular locations," and failed to elaborate on what restrictions might comport with its interpretation of the Eighth Amendment. All of these issues are raised in the merits of the brief and will likely be decided by the Supreme Court in its opinion this summer.

Even if the Respondents prevail, the Supreme Court's decision will probably allow the City to enforce its anti-camping ordinance without building additional shelters. In the Ninth Circuit decision, "the court did not count 138 beds at Gospel Rescue Mission" toward the number of beds because of the religious nature of the organization providing the beds, as explained in *Petitioner's brief at pages 9-10*. This exclusion conflicts with the Supreme Court's First Amendment jurisprudence, including COVID-era case law invalidating California's statewide prohibitions on religious gatherings during the pandemic. It is inconceivable that this exclusion would survive Supreme Court review. Once this is decided in only four short months from now, it will enable the City to count beds in churches, synagogues, Father Joe's, etc. when making its enforcement decisions. The Ninth Circuit also failed to count nearby campgrounds on federal land because they are outside the City's borders, an arbitrary and nonsensical exclusion that will also probably fall to Supreme Court review.

Right now, it is impossible for the City to comply with the Ninth Circuit's decision in *City of Grants Pass* and related cases. So why spend any more funds, time or more resources on the solution now? The Constitution does not define "**adequate**" shelter, and the Ninth Circuit doesn't explain how the city is supposed to figure out if its shelter is adequate under the Eighth Amendment.

As the Petitioner's brief says: "Because the Amendment itself does not speak to voluntariness or public camping, judges also have struggled to articulate workable metes and bounds for this unprecedented constitutional rule— with the predictable result being confusion and paralysis." *Petition's brief at p. 14*. "Governments have heard claims that shelter is inadequate because a person cannot bring her pets, must follow a curfew, or must sleep in sex-separated quarters." Id. at p. 46. "The Ninth Circuit's decisions have proved practically unworkable. Because nothing in the Eighth Amendment speaks to whether and when the government can prohibit public camping, the traditional toolkit of constitutional interpretation does not guide courts in expounding a voluntariness principle." *Petitioner's brief at p. 43*.

[2] Miller, Mark, *SCOTUS agrees to hear important case about homelessness,* Pacific Legal Foundation, January 23, 2024.

Moreover, the San Diego County District Attorney filed an amicus brief supporting the Petitioner in *Grants Pass v. Johnson*, raising additional practical considerations. Attorney Summer Stephan notes that under current law, the City of San Diego might have to allow the use of stoves or open fire in its shelters, posing health and safety concerns. See Amicus Brief of San Diego County District Attorney at p. 5:

> "It is of great concern that the majority panel decision in this case contemplates that a municipal ordinance prohibiting the use of stoves or even open fire in public encampments "may or may not be permissible" under the Ninth Circuit's novel construction of the Eighth Amendment in *Martin*. Intruding on the traditional role of local government in policymaking to protect its community, the panel majority subjects Petitioner's eminently reasonable fire prevention ordinance to an unprecedented and standardless Eighth Amendment balancing test against the interests of homeless individuals occupying public encampments."

The Supreme Court will either clarify the Ninth Circuit's decision or reverse it. Either way, the City should take a "**wait and see**" approach while the law is in flux. Otherwise, the Homeless Project will likely be a gross waste of government funds, precious human talent, and related resources[3] and should be put on hold until the Supreme Court decides whether it's even necessary.

Thank you for your time and your prompt attention to this matter. We know you will spend whatever is needed to properly, fairly, and in good faith analyze all aspects of any proposed solutions, concerns, or issues put forth by your constituency.

Sincerely,

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[3] Excluded from the objections in this letter is any preparatory work strictly and solely to provide for the Pure Water Program Pump Station.

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