Cyndy Day-Wilson (SBN. 135045)
City Attorney
cday-wilson@ci.eureka.ca.gov
CITY OF EUREKA
OFFICE OF THE CITY ATTORNEY
531 K Street, Room 200
Eureka, CA 95501
Telephone: (707) 441-4147
Facsimile: (707) 441-4148

Attorney for CITY OF EUREKA, EUREKA POLICE DEPARTMENT and ANDREW MILLS, in his official capacity as Chief of Police

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

STACY COBINE, NANETTE DEAN, CHRISTINA RUBLE, LLOYD PARKER, GERRIANNE SCHULZE, SARAH HOOD, AARON KANGAS, LYNETTE VERA, AUBREY SHORT, MARIE ANNTONETTE KINDER, and JOHN TRAVIS, Plaintiffs, v. CITY OF EUREKA, EUREKA POLICE DEPARTMENT, and ANDREW MILLS in his official capacity as Chief of Police, Defendants.	Case No. 16-cv-02239-JSW **NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FOR FAILURE TO STATE A CLAIM; MEMORANDUM OF POINTS AND AUTHORITIES** **[Fed.R.Civ.P. 12(b)(6)]** Date: July 1, 2016 Time: 9:00 a.m. Crtrm.: 5 The Hon. Jeffrey S. White

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on July 1, 2016, at 9:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 5 of the above-captioned court, located at 1301 Clay Street, Oakland, CA 94612, Defendants CITY OF EUREKA, EUREKA POLICE DEPARTMENT, and ANDREW MILLS in his official capacity as Chief of Police (collectively "City") will move for an order dismissing Plaintiffs' complaint for failure to state a claim upon which relief could be granted. *Fed.R.Civ.P.* 12(b)(6).

This motion is based on the attached memorandum of points and authorities, all the

pleadings, records and files in this case; and upon such further oral and documentary evidence as may be presented at the hearing on the motion.

DATED: May 17, 2016

CITY OF EUREKA
OFFICE OF THE CITY ATTORNEY

By: */s/ Cyndy Day-Wilson*
Cyndy Day-Wilson, City Attorney

Attorney for Defendants, CITY OF EUREKA, EUREKA POLICE DEPARTMENT, and ANDREW MILLS in his official capacity as Chief of Police

Cyndy Day-Wilson (SBN 135045)
City Attorney
cday-wilson@ci.eureka.ca.gov
CITY OF EUREKA
OFFICE OF THE CITY ATTORNEY
531 K Street, Room 200
Eureka, CA 95501
Telephone: (707) 441-4147
Facsimile: (707) 441-4148

Attorney for CITY OF EUREKA, EUREKA POLICE DEPARTMENT and ANDREW MILLS, in his official capacity as Chief of Police

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

STACY COBINE, NANETTE DEAN, CHRISTINA RUBLE, LLOYD PARKER, GERRIANNE SCHULZE, SARAH HOOD, AARON KANGAS, LYNETTE VERA, AUBREY SHORT, MARIE ANNTONETTE KINDER, and JOHN TRAVIS,

Plaintiffs,

v.

CITY OF EUREKA, EUREKA POLICE DEPARTMENT, and ANDREW MILLS in his official capacity as Chief of Police,

Defendants.

Case No. 16-cv-02239-JSW

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

[Fed.R.Civ.P. 12(b)(6)]

Date: July 1, 2016
Time: 9:00 a.m.
Crtrm.: 5

The Hon. Jeffrey S. White

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

I. INTRODUCTION

A. Historical Overview of the Palco Marsh Homeless Encampment.

This case arises out of Defendants' attempt to remedy a chronic problem with homelessness which has plagued the City of Eureka for years. At one time, as many as 300 homeless individuals were illegally residing in an Environmentally Sensitive Area which is immediately adjacent to Humboldt Bay. This area, commonly known as Palco Marsh, has become known as the "Devil's Playground" to local residents.

Accordingly, on March 18, 2016, the City of Eureka established a deadline of May 2, 2016, for the removal of the homeless encampment. The Eureka Police Department ("EPD") distributed flyers entitled "Notice to Vacate" to homeless individuals living in the Palco Marsh. See Request for Judicial Notice, Exhibit B (Docket 17-1). This Notice indicated that it was a violation of Eureka Municipal Code ("EMC") §93.02 to camp on public or private property within the City of Eureka and that all personal property had to be removed by May 2, 2016, or the City would remove the property. The Notice also indicated that personal property would be stored by the City. *Id.*

In response to the Notice, the census of residents in the Palco Marsh fell from 180 in September of 2015 to 113 in May of 2016, which was below the City's then-current capacity to accommodate 130 additional individuals. See Declaration of Andrew Mills ¶ 24 (Docket 17-1 at ln. 7); Declaration of Cyndy Day-Wilson Dec. ¶ 22 (Docket 17-1 at ln. 8).

B. Plaintiffs' Lawsuit and Their Unsuccessful Attempts to Obtain a Temporary Restraining Order Enjoining the Planned Relocation of the Palco Marsh Homeless Encampment.

In an attempt to halt the City's stated intention to clear the Palco Marsh, 11 Plaintiffs filed a complaint for injunctive and declaratory relief. (Docket 1). In addition, Plaintiffs' filed a motion

for temporary restraining order seeking to enjoin the City from proceeding with its plans to clear the Palco Marsh area on May 2, 2016. (Docket 4).

After extensive briefing by the parties, this Court issued an order granting in part and denying in part Plaintiffs' motion for a temporary restraining order. (Docket 24). Specifically, this order provided that the planned relocation of the homeless individuals in the Palco Marsh Encampment could go forward as Plaintiffs' had not met their burden of demonstrating that they were entitled to injunctive relief on behalf of all individuals camping in the Palco Marsh. (Docket 24 at p. 8, ln. 3-5). Accordingly, the Court allowed the relocation to go forward as to the 11 plaintiffs under a number of terms and conditions, which the City had already planned for. See *Id.* at 12-14.

C. Plaintiffs' Complaint Fails to State a Claim Upon Which Relief Could Be Granted in Numerous Respects.

Now that the Palco Marsh Homeless Encampment has been disbursed, the analysis turns to whether Plaintiffs have articulated facts upon which relief could be granted. As set forth herein, Plaintiffs' have failed to carry their burden in numerous respects.

First, the law is clear that a case should be dismissed as moot where an act which was sought to be enjoyed has already occurred. *Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club*, 97 F.2d 223 (7th Cir. 1938) *citing Mills v. Green* 159 U.S. 651, 654 (1895); *Flynt v. Weinberger*, 762 F.2d 134, 135 (DC Cir. 1985); see also Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial (The Rutter Group 2016) ("*Fed. Rutter Guide*") § 2:4289. Here, in light of the fact that the May 2nd relocation has already occurred pursuant to a Court order, Plaintiffs' complaint for *injunctive relief* is moot and, therefore, the motion to dismiss must be granted as to Plaintiffs' request for injunctive relief, as a matter of law.

Turning to the complaint for declaratory relief, each of the claims asserted fail to articulate facts sufficient to state a valid claim, as follows: (1) Plaintiffs' allegation that EMC §93.02

constitutes cruel and unusual punishment in violation of the Eighth Amendment fails to state a claim given that the statute has been repeatedly held to be constitutional; (2) Plaintiffs' complaint for a violation of the Uniform Relocation Assistance Act ("URAA") is barred because plaintiffs do not constitute "displaced persons" within the meaning of the Act; (3) Plaintiffs' complaint alleging due process violations is barred as they have not – and cannot allege – either a viable property claim or a deprivation of notice; and (4) Plaintiffs' complaint alleging a violation of privacy is barred because Plaintiffs' have not alleged a violation of their rights under either the lower Federal standard or the more expansive state statute.

In sum, Plaintiffs complaint fails to allege facts which would entitle them to either injunctive or declaratory relief. Accordingly, Defendants respectfully request that the motion to dismiss be granted in its entirety, without leave to amend, based on Plaintiffs' failure to allege facts sufficient to state a claim upon which relief could be provided. *Fed.R.Civ.P.* 12(b)(6). Alternatively, if this Court believes that leave to amend is appropriate, Defendants request that this Court direct Plaintiffs to distill their behemoth 81-page complaint down to an appropriate length, jettisoning those facts relating to the prospective – and now moot – claims for injunctive relief so that this case may proceed expeditiously.

II. PLAINTIFFS' COMPLAINT FOR INJUNCTIVE RELIEF IS MOOT

Plaintiffs' complaint seeks both injunctive and declaratory relief. (Docket 1). However, as set forth herein, Plaintiffs' complaint for injunctive relief is moot given that the relocation of the Palco Marsh has already occurred.

The United States Constitution limits the federal judicial power to designated "cases" and "controversies." U.S. Const., Art. III, § 2. Federal courts do not have the power to decide questions of law in a vacuum and may only determine matters as arise in the context of a genuine "case" or "controversy" within the meaning of Article III. *SEC v. Medical Committee for Human*

Rights, 404 U.S. 403, 407 (1972).

A federal court has no authority to give opinions upon moot questions. "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997); *Alvarez v. Smith*, 558 U.S. 87, 92-94 (2009). "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000).

The central issue in making this determination is whether changes in the circumstances existing when the action was filed have forestalled any meaningful relief. *West v. Secretary of Dept. of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000). Unless the prevailing party can obtain effective relief, any opinion as to the legality of the challenged action would be advisory. *City of Erie*, 529 U.S. at 287.

Here, in addition to bringing the complaint for declaratory and injunctive relief (Docket 1), Plaintiffs' sought to enjoin any attempts to clear the Palco Marsh area on May 2, 2016, pursuant to the Notices of Violation which had been served by EPD (Docket 4). After extensive briefing by the parties, this Court issued an order allowing for the relocation of any of the remaining 11 Plaintiffs subject to certain terms and conditions to which the City had already planned for extensively. (Docket 24).

In light of the fact that the May 2, 2016 relocation has already occurred pursuant to a Court order, Plaintiffs' complaint for injunctive relief is moot as the act which they sought to enjoin has already occurred. *Johnson-Kennedy Radio Corp.*, 97 F.2d at 225:

> If a defendant, indeed, after notice of the filing of a bill in equity for an injunction to restrain the building of a house, or of a railroad, or of any other structure, persists in completing the building, the court nevertheless is not deprived of the authority, whenever, in its opinion, justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit, and to compel the defendant to undo what he has wrongfully done since that time, or to answer in damages. **But if the intervening event is owing either to the plaintiff's own act, or to a power beyond the control of either party, the court**

will stay its hand. *Mills v. Green*, 159 U.S. 651, 654 (1895) (emphasis added, internal citations omitted). *See also, Flynt*, 762 F.2d at 135; *Fed. Rutter Guide* § 2:4289.

Based on the facts in this matter, either the Plaintiffs' action (filing the suit) or a power beyond the control of either party (the Court's Order) specified the manner in which the removal would proceed. The City complied with the Court's Order and thus the court should "stay its hand" and dismiss as moot the injunction claims.

Plaintiffs cannot in good faith contest the fact that the Palco Marsh relocation went forward pursuant to the terms of this Court's order and, indeed, as an officer of the Court, Plaintiffs' counsel has a duty to raise issues of mootness without delay. See *Arizonans for Official English*, 520 U.S. at 68.

Accordingly, since this Court can no longer fashion any injunctive relief given that the May 2, 2016 Palco Marsh relocation has already occurred pursuant to this Court's order, Defendants request that the motion to dismiss be granted with respect to Plaintiffs' complaint for injunctive relief.

III. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Plaintiffs' Complaint Fails to Allege Facts Which Would Establish an Eighth Amendment Claim.

Plaintiffs' first cause of action alleges a challenge to EMC §93.02. This claim is based on the notion that EMC §93.02 criminalizes Plaintiffs' status (i.e., homelessness) in violation of the Eighth Amendment. However, challenges of this nature have been repeatedly rejected by both the State and Federal Courts. *See Tobe v. City of Santa Ana*, 9 Cal.4th 1069 (1995); *Lehr v. City of Sacramento*, 624 F.Supp.2d 128 (ED Cal. 2013); *Ashbauer v. City of Arcata*, 2010 US Dist. Lexis 126627 (ND Cal. 2010) (No Eighth Amendment Violation because the statute challenges conduct, not status). Moreover, this particular statute – EMC §93.02 – has been found to be constitutional.

See *City of Eureka v. Carr*, California Superior Court, Appellate Division – Humboldt County, Case No. CR1201892, for which judicial notice is hereby requested pursuant to *Fed.R.E.* 201. Accordingly, as stated herein, Plaintiffs have not – and cannot – articulate a viable Eighth Amendment claim in this case.

The Supreme Court has interpreted the scope of the Eighth Amendment to find that laws which criminalize an individual's status – rather than an individual's specific conduct – are unconstitutional. See *Robinson v. California*, 370 U.S. 660, 666-667 (1962). This notion has been used to strike down a number of a statutes in a number of different contexts.[1]

This Court, however, has already correctly indicated that the status of the 113 residents of the Palco Marsh was not properly before it and it was only concerned with the 11 individual Plaintiffs in this case. Moreover, the Court has already made a finding that sufficient beds were provided to shelter these remaining 11 individual Plaintiffs. (Docket 24 at p. 10).

Simply stated, given that this Court has already found that that sufficient beds exist to house the 11 Plaintiffs in this case, Plaintiffs cannot establish an Eighth Amendment claim, as a matter of law.

B. Plaintiffs' Complaint Fails to Allege Facts Which Would Establish a Violation of the Uniform Relocation Assistance Act.

Plaintiffs' second cause of action alleges a violation of the URAA. 42 U.S.C. § 4601 *et seq.* The URAA states that whenever a program or project by a displacing agency will result in the displacement of any person, the displacing agency must provide certain benefits to the displaced person. 42 U.S.C. § 4622.

The URAA defines a displaced person as one who is forced to move either their person or

[1] For example, in *Robinson*, the Court struck down a statute which made it a criminal offense to be addicted to narcotics. *Id*. at 666. Moreover, in *Powell v. Texas*, 392 U.S. 514 (1968), the High Court concluded that while it would be proper to prohibit that act of being intoxicated in public, it would be improper to criminalize the status of alcohol addiction. *Id.* at 534.

their property based on an *acquisition.* 42 U.S.C. § 4601(6). Indeed, the United States Supreme Court has reviewed the URAA and concluded:

> "[T]he legislative history of the written order clause reveals no congressional intent to extend relocation benefits beyond the acquisition context. Rather, this clause merely ensures that assistance is available for a distinct group of persons directed to move *because of a contemplated acquisition* […] The structure of the Relocation Act confirms our conclusions that Congress did not expect to provide assistance for all persons somehow displaced by Government programs. […] Congress was concerned with burdens related to Government acquisitions of property, as opposed to a broader range of dislocation problems
>
> *Alexander v. U.S. Dept. of Housing and Urban Development,* 441 U.S. 39, 59-60 (1979).

Thus, to qualify as a "displaced person" under the URAA, a person must have been forced to move or issued a written notice to move based upon an *acquisition,* not a project subsequent to an acquisition.

In this case, however, Plaintiffs' complaint does not allege that the City is attempting to acquire the Palco Marsh area and, indeed, they cannot do so given that the Palco Marsh area was purchased in roughly 1985.[2] (Docket 1 at ¶80). Plaintiffs allege in approximately 2002, homeless people began camping at the Palco Marsh (*Id.* at ¶96), and soon thereafter, two of the plaintiffs joined the encampment.[3] Plaintiffs allege planning for the Palco Marsh Trail began in 2005. Thus, Plaintiffs removal is literally decades after the City acquired the land, and unrelated to the acquisition. Indeed, this Court recognized as much when it ruled on the Motion for Temporary Restraining Order.[4] (See Docket 24 at p. 11, ln. 6).

---

[2] Although Plaintiffs' do not specifically state an exact date of purchase in their allegations, presumably they allege the purchase occurred soon after October of 1985 based on funding provided to the City at that time.

[3] Plaintiff Kinder has resided in Humboldt County for 15 years, during which she has resided off and on at the Palco Marsh. (Docket 1 at ¶55). Plaintiff John Travis has been a resident of Humboldt County since 2005, and has allegedly resided at the Palco marsh for 10 years. (*Id.* at ¶59).

[4] "The Court does not find that Plaintiffs' have met their burden to raise serious questions with regard to their second claim for relief for violation of the Uniform Relocation Assistance Act. 42

Accordingly, since Plaintiffs have not carried the burden of setting forth facts which would demonstrate that they qualify as "displaced persons" within the meaning of the URAA, Defendants' request that the motion to dismiss be granted with respect to Plaintiffs' second cause of action in its entirety.

C. Plaintiffs' Due Process Claims Fail to Allege Facts Which Would Establish a Claim Under the Fourth and Fourteenth Amendment.

Plaintiffs' third through fifth causes of action allege various and confusing due process claims under the Fourth and Fourteenth Amendments. Specifically, Plaintiffs allege that Defendants' conduct violated their rights to be secure from government seizure and destruction of their personal property without due process and substantive due process. However, Plaintiffs have again failed to articulate sufficient facts supporting any of these claims.

1. Plaintiffs Fail to State Facts Sufficient to Support a Facial Challenge Under the Fourth Amendment.

A facial challenge to a law is one that holds all possible applications of a given law invalid based only upon its text. To prevail in a facial challenge the plaintiff has the heavy burden of establishing the challenged law is unconstitutional under most or all circumstances. *U.S. v. Salerno*, 481 U.S. 739, 745 (1987) [107 S.Ct. 2095, 2100, 95 L.Ed.2d 697] ("the challenger must establish that no set of circumstances exists under which the Act would be valid.") See *Foti v. City of Menlo Park* 146 F.3d 629, 635 (9th Cir. 1998), as amended on denial of reh'g (July 29, 1998).

In contrast to a facial challenge, to prevail in an as applied challenge the plaintiff must only show the law is unconstitutional as applied to their specific facts or some subset of its application that would include them. *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011); *Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 608 F.3d 1084, 1096 (9th Cir.2010) ("[f]acial and as-applied

U.S.C. § 4601 et seq. On this record, the Court is not persuaded that Plaintiffs qualify as displaced persons under the statute."

challenges differ in *the extent to* which the invalidity of a statute need be demonstrated.")

Plaintiffs have alleged that the enforcement of EMC §93.02 will likely result in the seizure and destruction of *their* property, and the violation of *their* constitutional rights. Rather than argue the text of EMC §93.02 renders it invalid in all circumstances, Plaintiffs' complaint is extremely specific, including roughly sixty pages of facts. Plaintiffs' own complaint implies that under different facts, if the City only created more housing or followed the recommendations of outside groups, [5] this challenge would never have been brought. Therefore, Plaintiffs have not alleged sufficient facts for a facial challenge, but appear to have pursued an as applied challenge.

2. Plaintiffs' Complaint Fails to Allege Facts That Support a Violation of Substantive and Procedural Due Process Under the Fourteenth Amendment.

Plaintiffs allege a violation of both substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution, and Article 1, Section 7 of the California Constitution. (Docket 1 at p. 74 (third claim for relief), p. 76 (fifth claim for relief) respectively).

a. Substantive Due Process Under The Federal Constitution

The Court in *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1079, 1102 (9th Cir. 2006) ("*Kennedy*"), laid out a two-part test for violations of substantive due process: **(1) official (state) action that affirmatively placed an individual in danger; and (2) deliberate indifference to that danger.**[6] In *Kennedy*, the 9th Circuit explained each element.[7] The first element is met if a government officer left the person is in a situation that was more dangerous than the one in which

[5] Docket 1 ¶141, ("Eureka has followed an approach 180 degrees removed from Focus Strategies' recommendations…"); *Id.* at ¶180 (referencing the City's failure to launch a 30/60 campaign as suggested by Focus Strategies).

[6] It should be noted that there is no general federal right to housing under substantive due process law. *Lindsey v. Normet* 405 U.S. 56, 74 (1972) [92 S.Ct. 862, 874, 31 L.Ed.2d 36].

[7] The facts of *Kennedy* were that Kimberly Kennedy complained to police about her neighbor, a 13-year-old boy. She stated that her neighbor was violent. A police officer promised she would be given notice prior to any police contact. This promise was not honored. Less than ten hours after police contacted his mother, the boy shot and killed Mrs. Kennedy's husband, and grievously wounded her. *Kennedy v. City of Ridgefield* 439 F.3d 1055, 1057 (9th Cir. 2006).

they found him or her. *Id.* at 1062-65.

The second prong is met only if the danger that the defendant exposed the plaintiff to "was known or obvious, and whether [defendant] acted with deliberate indifference to it." (*Id.*) Deliberate indifference is a "stringent" standard requiring proof that a municipal actor disregarded a known or obvious consequence of his actions. *Board of County Com'rs of Bryan County, Okl. v. Brown* 520 U.S. 397, 410 (1997).

In essence, the Plaintiffs allege Defendants' will expose Plaintiffs' to "the dangerous condition of living on the streets without shelter" and do so with deliberate indifference. (Docket 1 at ¶233-35). Plaintiffs allege Defendants' will expose them to include vulnerability to "assault, theft, harassment, and worse," (*Id.* at ¶201) and health problems from living on the street such as "exposure and neglect." (*Id.*) It is unclear why these dangers would be worse if the Plaintiffs' are removed from the Palco Marsh, given the Plaintiffs, by their own admission, have been homeless for some time. The Plaintiffs' allegation of living "in an unfamiliar area, without the support of community" (*Id.*) is deficient. All the Plaintiffs have lived in Humboldt County for years, and most have spent less than half that time in the Palco Marsh.[8] This suggests they would be neither

[8] Plaintiffs' familiarity with the local area, and the low likelihood of them being "without the support of community" is clear based on the Plaintiffs' own description of the parties. Stacy Cobine has lived in Humboldt County for nearly twenty years, less than one year at the Palco Marsh. (Docket 1 at ¶11). Nanette Dean was born and raised in Humboldt, lived in the Palco Marsh since November 2014, and the remainder of her life presumably elsewhere in Humboldt. (*Id.* at ¶6). Christina Ruble has resided in the Humboldt for 27 years, and the Palco Marsh for 6 years. (*Id.* at ¶22). Lloyd Parker has lived in Eureka his entire life, and at the Palco Marsh for more than 1 year. (*Id.* at ¶27). Gerrianne Schulze has lived in Humboldt her entire life, and has lived at the Palco Marsh for about 2 years. (*Id.* at ¶31). Aaron Kangas has lived in Humboldt for 19 years, and at the Palco Marsh for about 2.5 years. (*Id.* at ¶42). Lynette Vera has been a resident of Humboldt for 32 years, and has been at the Palco Marsh for 2.5 years. (*Id.* at ¶46). Aubrey Short has been a resident of Humboldt for approximately 27 years, and at the Palco Marsh for about 2.5 years. (*Id.* at ¶52). Sarah Hood has lived in Humboldt for only 2 years, and at the Palco Marsh since 2014. (*Id.* at ¶37). Marie Kinder has resided in Humboldt for 15 years, all of it off and on at the Palco Marsh. (*Id.* at ¶55). John Travis has been a resident of Humboldt for about 15 years, and has resided at the Palco marsh for 10 years. (*Id.* at ¶59).

socially isolated, nor in an unfamiliar environment elsewhere. Furthermore, Plaintiffs' allegations show Defendants' gave them significant notice (*Id.* at ¶184), provided for their property (*Id.* at ¶185) and held service fairs to connect plaintiffs to assistance (*Id.* at ¶103), showing that Defendants' were anything but "deliberately indifferent."

In conclusion, several gaps in Plaintiffs' allegations provide a basis for a 12(b)(6) motion including, (1) dubious assertions that Plaintiffs would be in greater danger due to being cut off from their community and in an unfamiliar area and (2) allegations showing Defendants' were not "deliberately indifferent." Thus, Plaintiffs cannot support a cause of action based on violation of their substantive due process rights under the federal constitution.

b. Plaintiffs' Procedural Due Process Claim Under the Federal Constitution.

To frame a cause of action for a violation of procedural due process, a plaintiff must show two elements: (1) a protectable liberty or property interest; and (2) a denial of adequate procedural protections." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir.2005).

The same test was applied by the United States Supreme Court, stating:

> "Determining if the Fourteenth Amendment was violated by a seizure is a two stage analysis: "We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property'; if protected interests are implicated, we then must decide what procedures constitute 'due process of law.'"

Ingraham v. Wright, 430 U.S. 651, 672 (1977), 97 S.Ct. 1401, 51 L.Ed.2d 711.

Plaintiffs have not sufficiently alleged the second element, whether adequate procedural protections were in place. Plaintiffs allege that before the cleanup they were told their property would not be destroyed, but instead stored, and they would have an opportunity to reclaim it for 90 days prior to disposal. (Docket 1 at ¶198). Based on Plaintiffs' own allegations, Defendants' distributed "notices to vacate," notifying residents of the marsh of the May 2, 2016 operation on March 22, 2016, a full month before the May 2, 2016 clean out. (*Id.* at ¶184) This surely provided

Plaintiffs with notice for purposes of due process. This same notice, a month before May 2, 2016, informed readers that property would be stored for 90 days, and how it could be claimed, noting that abandoned property or health hazards would be destroyed. (*Id.* at ¶185).

The Court even noted in its May 2, 2016 order that:

> Here, however, the ordinance includes several safeguards to prevent the erroneous or unconstitutional deprivation of Plaintiffs' property. Plaintiffs received notice of the plan to remove them and their property from the public property on March 22, 2016, well in advance of the May 2, 2016 eviction date. The notice provides that any property that is removed may be reclaimed by calling to schedule a date and time for pick up within 90 days of removal. (RJN, Ex. B.) In addition, the Police Department's procedures provide for the collection, retention and release of property. (Mills Decl., Ex. D.) The City's Notice to Vacate further indicates that it only intends to dispose of items that pose a risk to public health or safety "as was permitted by the injunction in *Lavan*." *Martin v. City and County of Honolulu*, 2015 WL 5826822, at *7 (D. Hawaii Oct. 1, 2015) (citing *Lavan*, 693 F.3d at 1026). The Court concludes, based on the representations made at oral argument and the record in this case, that the City has provided sufficient due process through advance notice and will provide adequate post-seizure remedies.
>
> With these provisions in place, the Court finds that Plaintiffs have not met their burden to demonstrate that there is cause for injunctive relief pursuant to the Fourth and Fourteenth Amendment claims for the treatment of their property.

Plaintiffs have thus failed to allege facts supporting the second element that insufficient process was provided and their complaint alleging a violation of procedural due process must be dismissed.

D. Plaintiffs' Complaint Fails to Allege Facts Which Would Establish a Violation of Their Right to Privacy.

Finally, Plaintiffs' sixth cause of action alleges a violation of Plaintiffs' rights to privacy. Specifically, Plaintiffs allege that they are being denied the right to make intimate personal decisions regarding their personal decision to establish a residence in the Palco Marsh. However, like the previous claims, Plaintiffs have not – and cannot – allege facts which would establish a viable claim. Legally recognized privacy interests are generally of two classes:

> (1) interest in precluding the dissemination or misuse of sensitive and confidential information ("informational privacy"); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion,

or interference ("autonomy privacy"). *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 35 (1994).[9]

Under California law, a violation of autonomy privacy such as the one alleged in this case involves three-prongs: (1) the plaintiff must possess a legally protective privacy interest; (2) the plaintiff's expectations of privacy must be reasonable; and (3) the plaintiff must show that the intrusion is so serious in nature, scope, and actual or potential impact as to constitute an egregious breach of the social norms. *Hernandez v. Hillsides, Inc.*, 47 Cal.4th 272, 287-288 (2009). However, an individual's privacy concerns are not absolute; where a defendant's intrusion is justified by a competing interest, no violation of a plaintiff's privacy rights exist. *Hill*, 7 Cal.4th at 38. Such strong competing interests are those that derive from legally authorized and socially beneficial activities of government and private entities. *Id.*

The facts here are distinguishable from those of *Hill* and its progeny.[10] In addition, this claim is not sufficiently specific to allow Defendants to respond as it is unclear what theory Plaintiffs are advancing. Moreover, even if Plaintiffs arguably had set forth sufficient allegations, they have not addressed the issue of the City's competing interests derived from its legally

[9] Under Federal law, the right to privacy is not based on a specific enumerated right, but upon the penumbras of the Bill of Rights. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Because the California constitution provides broader privacy rights than that of the federal constitution, see *Leonel v. American Airlines, Inc.*, 400 F.3d 702, 711 (9th Cir. 2005), this claim will be analyzed under State law.

[10] See *Hernandez v. Hillsides, Inc*. 47 Cal.4th 272, 287-88 (2009) [97 Cal.Rptr.3d 274, 286, 211 P.3d 1063, 1073] (Finding no privacy claim where employees sued employer for setting up hidden camera in work space that was only used outside of business hours and so did not record or observe plaintiffs); *Hill v. National Collegiate Athletic Assn.* 7 Cal.4th 1, 24 (1994) [26 Cal.Rptr.2d 834, 848, 865 P.2d 633, 647] ("University students brought action challenging intercollegiate athletic association's drug testing program as violated of the Privacy Initiative of the State Constitution"); *Leonel v. American Airlines, Inc.* 400 F.3d 702, 712 (9th Cir. 2005) opinion amended on denial of reh'g, (9th Cir., Apr. 28, 2005, No. 03-15890) (Applying test where prospective flight attendants allege airline violated their rights to privacy under the California Constitution by conducting complete blood count tests on their blood samples without notifying them or obtaining their consent); *In re iPhone Application Litigation* 844 F.Supp.2d 1040, 1063 (N.D. Cal. 2012) (Applying test where plaintiffs allege iPhone applications illegally disclosed personal information to third parties).

authorized and socially beneficial activities. *Hill*, 7 Cal.4th at 38. Indeed, it is beyond dispute that both the City and society in general have a compelling interest in providing alternative shelter for the individuals who were illegal squatting in an environmentally sensitive area, engaging in criminal activity, and seriously jeopardizing federal funding.

Given these facts, Plaintiffs simply have not and cannot demonstrate a violation of their privacy interests. Accordingly, Defendants request that the motion to dismiss be granted as to this claim as well. *Fed.R.Civ.P.* 12(b)(6).

IV. CONCLUSION

In sum, the proper resolution of the motion to dismiss Plaintiffs' complaint for injunctive and declaratory relief calls for the following:

(1) Plaintiffs' complaint for injunctive relief should be denied as moot given that the relocation of the homeless encampment at Palco Marsh has already occurred;

(2) As to Plaintiffs' complaint for declaratory relief:

(a) Plaintiffs' first cause of action alleging an Eighth Amendment violation is barred because EMC §93.02 does not criminalize conduct or status;

(b) Plaintiffs' second cause of action alleging a violation of the URAA is barred because Plaintiffs' do not constitute "displaced persons" within the meaning of the act;

(c) Plaintiffs' third through fifth causes of action alleging Fourth and Fourteenth Amendment violations are barred because Plaintiffs' cannot state sufficient facts to allege a violation of either *substantive* of *procedural* due process in this *as applied* challenge; and

(d) Plaintiffs' sixth cause of action for invasion of privacy is barred because Plaintiffs' have not alleged a violation under either the lower Federal

standard or the more expansive State standard.

Moreover, assuming *arguendo that* this Court were to determine that one or more of these claims continued to be viable, Plaintiffs should be directed to file an amended complaint which sets forth the allegations in a "short and plain" terms which are "simple, concise, and direct." *Fed.R.Civ.P.* 8; *Fed. Rutter Guide* § 8:20. Such a pleading should distill down their behemoth 81-page complaint, omit any reference to a prospective relocation which has been rendered moot, and be mindful of any attempts to include improper claims which have already been waived by the Plaintiffs.

DATED: May 17, 2016

CITY OF EUREKA
OFFICE OF THE CITY ATTORNEY

By: ___*/s/ Cyndy Day-Wilson*
Cyndy Day-Wilson, City Attorney

Attorney for Defendants, CITY OF EUREKA, EUREKA POLICE DEPARTMENT, and ANDREW MILLS in his official capacity as Chief of Police