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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 REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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

The Hon. Jeffrey S. White

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

I. INTRODUCTION

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) and 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). This Court issued an order granting in part and denying in part Plaintiffs' motion for a temporary restraining order. (Docket 24). 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 and in Defendants' original moving papers, Plaintiffs have failed to carry their burden. Also, Plaintiffs allege new facts in their Opposition, which is impermissible. (Docket 29, at p.3-4)[1]

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). 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.

Second, as to Plaintiff's complaint for declaratory relief, each of the claims asserted fail to articulate facts sufficient to state a valid claim: (1) Plaintiffs' allegation that Eureka Municipal Code ("EMC") §93.02 constitutes cruel and unusual punishment in violation of the Eighth Amendment

[1] "In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." *Schneider v. California Dep't of Corr*., 151 F.3d 1194, 1197, n. 1 (9th Cir. 1998).

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.

II. PLAINTIFFS' COMPLAINT FOR INJUNCTIVE RELIEF IS MOOT

Plaintiffs argue that their claim is "capable of repetition yet escaping review." (Docket 29 at p. 6, ln. 9-23). This is an exception and does not apply in this case. The exception applies only in "extraordinary cases." *West Coast Seafood Processors Ass'n v. Natural Resources Defense Council, Inc.* 643 F.3d 701, 704 (9th Cir. 2011) *citing Doe v. Madison Sch. Dist. No. 321,* 177 F.3d 789, 798 (9th Cir.1999) (en banc) ("Doe").

The escaping review exception only applies to a certain class of cases that are "of inherently limited duration," and so would "always escape judicial review." *Protectmarriage.com-Yes on 8 v. Bowen,* 752 F.3d 827, 836 (9th Cir. 2014), *cert. denied sub nom. ProtectMarriage.com-Yes on 8 v. Padilla,* 135 S. Ct. 1523, 191 L. Ed. 2d 430 (2015) ("Yes on 8") *citing Doe,* 697 F.3d at 1240. For instance, a woman can only obtain an abortion so long as she is pregnant, and a court can only remedy an invalid election law that prevents a candidate from securing public office so long as the election is ongoing. *Id.* Actions that fit within this exception "will only ever present a live action until a particular date, after which the alleged injury will either cease or no longer be redressible." *Id.* Not so with actions seeking to enjoin future conduct:

> "Actions seeking to enjoin future conduct are different. Such actions only become moot if the challenged conduct actually occurs and causes an injury that cannot be reversed. These actions are not of "inherently limited duration," because the challenged conduct might never occur. And, a court can ensure that a live controversy persists until the action is fully litigated

by enjoining the challenged conduct until the litigation concludes." *Id. citing Doe*, 697 F.3d at 1240–41.

Where the courts can keep the controversy alive through preliminary injunctive relief, the failure of a party to seek such relief may be fatal and make the case moot. *Id.* at 837. This is such a case.

To qualify for the exception, Plaintiffs must meet two requirements: (1) the challenged action is too short to be litigated prior to the cessation or expiration; and, (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

As to the first element, Plaintiffs argue that the challenged removal from the Palco Marsh "lasts only a matter of moments to hours," too short a time for review. (Docket 29 at p. 6, ln. 13). However, just because the duration of the challenged event is short, measured in minutes or hours, does not mean that it automatically falls within this exception; the high school graduation prayer at issue in *Doe* was not so short as to escape review and could hardly have lasted more than "moments to hours." *Doe*, 177 F.3d at 798.[2] Plaintiffs further rely on *Turner v. Rogers*, 564 U.S. 431 (2011), ("Turner") arguing that a 12 month incarceration is a time frame short enough to escape review. (Docket 29 at p. 6, ln. 6). However, in *Turner* the matter had to be fully litigated through the state court system before the plaintiff could reach redress, which formed the basis for ruling that 12 months was too short a time;[3] this case is factually and legally distinct.

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[2] In *Doe*, a high school student and his parents challenged a prayer during the high school graduation ceremony. 177 F.3d 789 (9th Cir. 1999). The Court determined the issue was moot and declined to apply the capable of repetition yet escaping review exception in part because plaintiff failed the first requirement; such graduation prayer controversies are not so short in duration they cannot be litigated. *Id.* at 798.

[3] "Our precedent makes clear that the "challenged action," Turner's imprisonment for up to 12 months, is "in its duration too short to be fully litigated" through the state courts (and arrive here) prior to its "expiration." " *Turner v. Rogers*, 564 U.S. 431, 440 (2011).

In *Turner*, the United States Supreme Court contrasted *Turner's* facts with *St. Pierre v. United States*, a similar case which it had ruled was moot. 319 U.S. 41, 43, 63 S. Ct. 910, 911, 87 L. Ed. 1199 (1943) ("*St. Pierre*"). *St. Pierre* began in federal court, and the high court concluded that the fact *Turner* had begun in state court was significant because unlike *St. Pierre*, the plaintiff in *Turner* could not have sought review until the state court proceedings had concluded:

> "*St. Pierre* was moot because the petitioner (a witness held in contempt and sentenced to five months' imprisonment) had failed to "apply to this Court for a stay" of the federal-court order imposing imprisonment. 319 U.S., at 42–43, 63 S.Ct. 910. […] But this case, unlike *St. Pierre*, arises out of a state-court proceeding. And respondents give us no reason to believe that we would have (or that we could have) granted a timely request for a stay had one been made. Cf. 28 U.S.C. § 1257 (granting this Court jurisdiction to review *final* state-court judgments)."
>
> *Turner*, 564 U.S. at 441, *citing St. Pierre v. United States*, 319 U.S. 41, 43, 63 S. Ct. 910, 911, 87 L. Ed. 1199 (1943).

The court concluded its discussion of mootness by noting *Turner* was similar to *Sibron*. *Id.* In *Sibron*, the plaintiff appealed his state court pretrial motion to suppress, but when the United States Supreme Court granted certiorari the plaintiff had already served a 6 month sentence following conviction. *Sibron v. New York*, 392 U.S. 40, 52, (1968). The high court ruled the case was not moot, noting the plaintiff had no opportunity for appellate review.[4] The logic of *Turner*, when read with *Sibron*, prevents the government from imprisoning someone for a short time, and then releasing them and mooting the issue before appellate review is possible. In essence, the high court could not have injunctive relief to *Turner* before he was released, so the case was not mooted by the fact he had been. *Id.* To rule otherwise would prevent meaningful review of short imprisonments.

[4] "There was no way for *Sibron* to bring his case here before his six-month sentence expired. By statute he was precluded from obtaining bail pending appeal, and by virtue of the inevitable delays of the New York court system[.] […] This was true despite the fact that he took all steps to perfect his appeal in a prompt, diligent, and timely manner." *Id.*

Turner is clearly distinguishable from the facts in Eureka. First, none of the Plaintiffs are being imprisoned. Second, this action began in federal court, not state court. Third, the Plaintiffs could have appealed this court's order[5] to the Ninth Circuit had they wished to do so immediately after the April 29, 2016 hearing, but did not do so.

Plaintiffs similarly cite *Schaefer v. Townsend*, which is distinguishable in that it dealt with an election, where the short time between the filing deadline and the election made review impossible. 215 F.3d 1031, 1033 (9th Cir. 2000). Both *Turner and Schaefer* are distinguishable in that a short sentence in *Turner*, or an election in *Schaefer*, are difficult to delay pending lengthy appellate review. By contrast, the May 2, 2016 relocation could have been stopped by this Court pending the continuing legal process and Plaintiffs indeed sought such a delay at the trial level, but not at the appellate level. (Docket 24).

With regard to the second element, there is no allegation in Plaintiffs' complaint that Defendants intend to conduct another mass relocation similar to May 2 in the future, or that these specific Plaintiffs will be involved if such a hypothetical event were to occur. A mere possibility a plaintiff will be subjected to the same action again, aside from the lack of pleading, is not sufficient. *Murphy v. Hunt* 455 U.S. 478, 482-83 (1982).[6] "Both prongs of the repetition/evasion standard must be met in order to avoid mootness," and where there is no allegation, let alone evidence, under the second prong that the same parties will be similarly impacted again, the claim is moot. *Williams v. Alioto,* 549 F.2d 136, 145 (9th Cir. 1977). The odds of a similar mass relocation involving Plaintiffs is a mere possibility, and so the exception does not apply. *Id.* In sharp contrast to *Turner*,

[5] Docket 24.

[6] "The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test stated in *Weinstein.* If this were true, virtually any matter of short duration would be reviewable. Rather, we have said that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party." *Murphy v. Hunt,* 455 U.S. 478, 482-83 (1982) (quoting *Weinstein v. Bradford, 423 U.S.* 147, 149, (1975)).

where the plaintiff was very likely to be subject to the same penalty again due to his history of failure to pay child support. *See Turner*, 564 U.S. at, 440-41.

Plaintiffs also argue that because they may be cited for EMC §93.02 in the future, their injunctive relief remains a live issue. (Docket 29 at p. 7, ln. 18-20). The Plaintiffs rely on a Florida district court case, *Pottinger v. City of Miami*, in support of this argument.[7] 810 F. Supp. 1551, (1992) ("Pottinger"). *Pottinger* is from another jurisdiction and distinguishable in that it is a class action, and much broader in scope, challenging the City of Miami's policies regarding arresting homeless people generally. Plaintiffs' reasoning might be valid if Plaintiffs stated a facial challenge to EMC §93.02, but they have not. Plaintiffs' suit, however, is an as applied challenge focused on the May 2 relocation from the Palco Marsh area. The facts of the complaint center on Defendants' removal of Plaintiffs from the Palco Marsh on May 2 2016,[8] as does this Court's Temporary Restraining Order.[9] The May 2 relocation that is the basis of this suit has been conducted in accordance with the court's order[10] and Plaintiffs did not appeal this court's order, thus meaningful injunctive relief related to that relocation is now moot. *See Yes on 8*, 752 F.3d at 837.

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

A. Plaintiffs' Fail To Allege Facts Establishing An Eighth Amendment Claim As Discussed In Defendants' Motion.

Plaintiffs' Eighth Amendment claim should be dismissed for the reasons stated in Defendants' motion. (Docket 26 at p. 6-7). Among other arguments, *Robinson v. California*, 370 U.S. 660, 666-667 (1992) held that criminalization of status – not conduct – is unconstitutional, and

[7] Docket 29 at p. 7, ln. 15.
[8] Docket 1 at ¶¶ 93, 96, 99, 103, 112, 113, 183, 184, 197, 202,
[9] Docket 24 at p. 1, ln. 22-26.
[10] Docket 24.

Defendants have not criminalized status. Plaintiffs' opposition relies extensively on *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), in interpreting the holdings of *Robinson* and *Powell v. Texas*, 392 U.S. 514 (1968).[11] Yet, Plaintiffs admit *Jones* has been vacated and is therefore not controlling. (Docket 29 at p. 8, fn. 4). *Spears v. Stewart*, 283 F.3d 992, 1017 fn. 16 (9th Cir. 2002) ("Vacated opinions remain persuasive, although not binding, authority.") Furthermore, the challenged ordinance has already been upheld. See *City of Eureka v. Carr*, California Superior Court, Appellate Division – Humboldt County, Case No. CR1201892. Defendants' motion should thus be granted with respect to Plaintiffs' Eighth Amendment claim.

B. Plaintiffs Fail To Allege Facts Establishing A Claim Under The Uniform Relocation Assistance Act Because They Arrived After The Defendants' Acquisition And Are Not Displaced Persons.

Plaintiffs ask this court to apply the Uniform Relocation Assistance Act ("URAA"), 49 U.S.C. §§4601 et. seq., outside of its intended scope. Plaintiffs rely on 49 C.F.R. §24.2(a)(9)(i)(A),(B) to argue the definition of displaced person includes people relocated as a direct result of rehabilitation or demolition for a project. (Docket 29 at p. 10, ln. 16-18, & 20-23.) Plaintiffs further argue that anyone who must relocate due to demolition or relocation is a displaced person, relying on 49 C.F.R. §203(d). 49 C.F.R. §203(d) defines "notice of intent to acquire" and taken in context the subsection cited by Plaintiffs applies to people who had some interest in the property *at the time of acquisition*:

> "A notice of intent to acquire is a displacing Agency's written communication that is provided to a person to be displaced, including those to be displaced by rehabilitation or demolition activities from property acquired prior to the commitment of Federal financial assistance to the activity, which clearly sets forth that the Agency intends to acquire the property. A notice of intent to acquire establishes eligibility for relocation

[11] Docket 29 at p. 8, ln 13-18.

> assistance prior to the initiation of negotiations and/or prior to the commitment of Federal financial assistance."
>
> 49 C.F.R. § 203(d) (emphasis added).

Furthermore 49 C.F.R. § 24.2(a)(9)(ii) expressly defines persons not considered "displaced" and does so contrary to Plaintiffs' assertions:

> "The following is a nonexclusive listing of persons who do not qualify as displaced persons under this part: […] (B) A person who initially enters into occupancy of the property after the date of its acquisition for the project."
>
> 49 C.F.R. § 24.2(a)(9)(ii) (emphasis added).

Thus, People who entered occupancy *after* the acquisition of property are explicitly *not* eligible for relocation funding.

Plaintiffs also rely on *Kong v. City of Hawaiian Gardens Redevelopment Agency*, 125 Cal. Rptr 2d 1 (2002) ("Kong"), arguing that the plaintiff there was displaced "six years after the Agency's initial acquisition of the premises" yet was eligible for benefits. (Docket 29 at p. 11, ln. 10-12). *Kong* is a state court appellate decision and is obviously not binding on a federal district court, nor does it interpret the statute at issue. *Id.* Furthermore, *Kong* has clearly distinguishable facts; the plaintiff had subleased a property, and plaintiff's interest predated the acquisition by the local agency,[12] which is clearly distinct from the present facts where plaintiffs moved onto the land at issue years after acquisition without any valid legal interest. Finally, the list of groups categorically outside the URAA includes people on the land illegally, showing the act was not intended to apply to the Plaintiffs. *See* 49 C.F.R. § 24.2(a)(9)(ii)(k). Defendants' motion to dismiss Plaintiffs' URAA claim should be granted accordingly.

[12] "In February 1993, by way of assignment, petitioner became the sublessee of a piece of commercial property […] In August 1993, Agency acquired the premises with public funds and for a public purpose." *Kong*, 101 Cal.App.4th at 1319-20.

C. Plaintiffs Fail To Allege Facts Supporting An As Applied Fourth Amendment Challenge In Light Of The Procedural Safeguards In Place To Protect Plaintiffs' Property.

Plaintiffs now allege an as applied challenge under the Fourth Amendment and apparently withdraw any claim of a facial challenge. (Docket 29 at p. 12, ln. 2-6). Plaintiffs claim that because Defendants have not stated they plan to cease all enforcement of EMC §93.02, Plaintiffs' as applied Fourth Amendment claim must stand. (Docket 29 at p. 11, ln. 19-22). Plaintiffs cite *Lavan v. City of Los Angeles*, 797 F. Supp 2d 1005 (C.D. 2011) ("Lavan") in support of this reasoning, yet *Lavan* presented different facts. In *Lavan,* the city seized and destroyed property without notice or opportunity to be heard. *Id.*, at 1032. The lack of safeguards in *Lavan* is quite distinct from the May 2 relocation, wherein notice was provided well in advance, and property is being stored for 90 days. (Docket 1 at ¶198.) A Fourth Amendment analysis involves an assessment of the reasonableness of the seizure. *Id.,* at 1013. Defendants contend the seizures in this case were reasonable given the notice and storage procedures put in place by Defendants.[13] This position is reinforced in the Court's order; "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." (Docket 24 at p. 7-8.) Thus Defendants' motion should be granted with respect to Plaintiffs' Fourth Amendment claim.

D. Plaintiffs Fail To Allege Facts Supporting A Fourteenth Amendment Substantive Due Process Claim Because In Contrast To Cited Cases, Defendants Did Not Act With Deliberate Indifference But Sought To Mitigate Risk.

Plaintiffs argue that they have stated sufficient facts to show the Defendants "exposed them to danger with deliberate indifference"[14] citing *Kennedy v. City of Ridgefield,* but Plaintiffs fail to allege facts meeting that bar. *See* 439 F.3d 1055 (9th Circuit 2006) ("Kennedy"). *Kennedy* created

[13] Docket 1 ¶184-85.
[14] Docket 29 at p.12-13.

a two part test for applying this doctrine; first a government officer left a person in a situation that was more dangerous than the one in which they found him or her, and second, the danger that the defendant exposed the plaintiff to "was known or obvious, and whether [defendant] acted with deliberate indifference to it." *Id.* at 1062.

Kennedy sets a high bar; "deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his actions." *Bryan County v. Brown,* 520 U.S. 397, 410 (1997) (emphasis added). In applying *Kennedy* and this stringent standard, it is not enough that Plaintiffs pled that there is some modest increase in danger or that the Defendants were aware of it. *See Id.* Plaintiffs cite *Sanchez v. City of Fresno* ("*Sanchez")*, wherein a court applied the *Kennedy* standard to a city's motion to dismiss a homeless plaintiff's complaint for destroying his shelter. 914 F. Supp. 2d 1079, 1102 (E.D. Cal. 2012). In *Sanchez,* the court reiterated the extreme facts in *Kennedy*, and the correspondingly high bar plaintiff must meet to survive summary judgment; "[b]ecause plaintiff warned the officer repeatedly about the neighbor's violent tendencies and specifically requested notice, his decision to proceed without such notice was sufficient evidence of deliberate indifference for purposes of summary judgment." *Id., describing Kennedy,* 439 F.3d at 1064–65. In *Sanchez*, the court went on to deny the City of Fresno's motion to dismiss, describing the egregious facts alleged in that complaint "It is alleged that Defendants timed the demolitions of "plaintiff's shelter and property essential to protection from the elements" to occur at "the onset of the winter months that would bring cold and freezing temperatures, rain, and other difficult physical conditions." [citation] It is further alleged that "Defendants kn[ew] or should reasonably [have known] that their conduct threatened plaintiff's continued survival, but nonetheless continued their conduct in a manner that has created substantial risk to his ability to continue to survive and is shocking to the conscience [...]" *Sanchez,* 914 F. Supp. at 1102.

Comparing the facts found in *Kennedy* and *Sanchez* to those found here, it is clear these cases are easily factually distinguishable. Regarding the first element, leaving the Plaintiffs in greater danger than when the Defendants found them, the facts in Eureka pale in comparison to those in *Kennedy* and *Sanchez.* The Defendants removed Plaintiffs from the Palco Marsh, at the beginning of May. (Docket 1 at ¶193). The increases in danger Plaintiffs' allege including "exposure and neglect"[15] are an order of magnitude less than the "freezing" temperatures alleged in *Sanchez*. *Sanchez*, 914 F. Supp. at 1102. Any increase in danger from being "on the street"[16] is further mitigated by the fact that the City offered shelter to the Plaintiffs pursuant to this court's order.[17] Regarding the second element, the Defendant's actions are quite dissimilar from those found to be "deliberate indifference" in *Kennedy* and *Sanchez*. In *Kennedy,* the police were repeatedly warned that they were dealing with a violent person, and that serious danger to the plaintiff would result if word reached that person's ears, but they ignored these warnings and failed to comply with their promise to the plaintiff. 439 F.3d at 1064–65. In *Sanchez,* the plaintiffs alleged that the defendants *timed* demolition of the plaintiffs' shelter to coincide with the cold and freezing temperatures of winter. *Sanchez,* 914 F. Supp. at 1102. Based on the complaint, the Defendants did not destroy Plaintiffs' property at the onset of winter, thereby permanently depriving them of items they needed to survive, as in *Sanchez*, but stored it[18] in May in a way that allowed for it to be reclaimed, and attempted to connect Plaintiffs with various types of assistance through service fairs.[19] In sum, assuming Plaintiffs' allegations are true, there was no increase in danger (but in fact, a decrease) following May 2, and Defendants were not indifferent towards the danger but took steps to mitigate it. Based on Plaintiffs' allegations Defendants' motion to dismiss Plaintiffs'

[15] Docket 1 at ¶201.
[16] Docket 1 at ¶201.
[17] Docket 24 at p. 13, ln.2-6.
[18] Docket 1 at ¶198.
[19] Docket 1 at ¶103.

substantive due process claim should be granted, because the facts do not support either factor of the *Kennedy* analysis, and do not meet the stringent standard of "exposure to danger with deliberate indifference." *See Kennedy*, 439 F.3d at 1064–65.

E. Plaintiffs' Fail To Allege Facts Supporting A Right to Privacy And Instead Stretch Distinguishable Case Law Beyond Its Application.

Defendants' motion to dismiss Plaintiffs' privacy claim should be granted because the cases Plaintiffs rely on are easily and glaringly distinguishable. Plaintiffs argue that they have a privacy right to choose who they live with under *Hill v. NCAA.*, 7 Cal. 4th 1, 24 (1994) ("Hill"). However, the facts of *Hill* and the cases cited by Plaintiffs are quite different than the facts before this court as alleged by Plaintiffs.

In *Hill,* the court addressed a collegiate drug testing program; the NCAA had a policy requiring a monitor to observe urine testing. 7 Cal.4th 1, 24 (1994). Clearly, Defendants were not conducting a drug testing program in which the Plaintiffs had to participate. Plaintiffs instead, in this action, have been provided with emergency shelter options.

Plaintiffs also cite *Coal. Advocating Legal Hous. Options v. City of Santa Monica*, but its facts are likewise distinguishable. 88 Cal. App. 4th 451, 454, (2001) *as modified on denial of reh'g* (Apr. 11, 2001) ("CALHO"). In *CALHO,* the city of Santa Monica passed an ordinance limiting who could live in second units constructed in single-family residential zones. *Id.* The ordinance allowed the creation of "second units" in single-family residential zones, but only if the person occupying the second unit was the property owner or his/her dependent, or a caregiver for the property owner or dependent. *Id.*

Thus, not only are these cases factually distinct from the May 2 relocation, but also legally distinguishable. Both of the cited cases dealt with specific invasions of privacy that the defendant mandated. The Defendants in this case have not established any rule or policy mandating an invasion of Plaintiffs' privacy as was the case in *Hill,* or requiring Plaintiffs to only live with certain

others as was the case in *CALHO*. Any restrictions regarding who the Plaintiffs live with are being imposed, if at all, by third party shelters. In sum, Defendants do not disagree that *Hill* and *CALHO* create privacy rights, but argue Plaintiffs are stretching the logic of *Hill* and *CALHO* beyond the breaking point.

Plaintiffs further cite *Robbins v. Superior Court*, where a County board of supervisors passed a resolution which enabled the department of social welfare to replace cash grants with "in-kind" benefits for single and employable applicants. 38 Cal. 3d 199, 207 (1985) ("Robbins"). In *Robbins* the County required the plaintiffs to choose between living in a specific county run shelter, or receiving cash payments. *Id.* *Robbins* is factually distinct in that the Defendants have not threatened to stop providing any public benefit to the Plaintiffs that they enjoyed prior to May 2. Furthermore, the various shelters available in Eureka differ in their rules, according to the facts in the complaint[20] and the Defendants have not demanded the Plaintiffs submit to the rules of any particular one. Thus, *Robbins* is distinguishable because the Plaintiffs have not required Defendants submit to any particular set of rules or restrictions, nor have Defendants conditioned a public benefit on submission to such rules. The Plaintiffs apparently argue that *Robbins*, taken with *CALHO*, stands for a general right to live with whomever one wishes, even inside a shelter or other collective living environment.[21] This illogical and unreasonable interpretation exceeds the holdings of the relevant case law. The Defendants' motion should be granted because the case law cited as supporting Plaintiffs' privacy claim is distinguishable and does not support it.

F. Defendants' Request That The Court Consider The Prejudice They Will Suffer If Leave To Amend is Granted.

Plaintiffs argue that they should be given leave to amend their complaint if the Defendant's motion is granted in part or whole. (Docket 29 at p. 15, ln. 6-14). Defendants do not dispute that

[20] Docket 1 at ¶119, 120, 124-26.
[21] Docket 29 at p. 14, ln. 9-12.

leave to amend is often liberally granted by the courts. F.R.C.P. 15(a); *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2008). Defendants, however, request that the court consider the potential for prejudice to the Defendants that may arise through adding new or unrelated allegations. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (noting leave to amend is limited by undue prejudice to opposing party, bad faith, and futility). Defendants respectfully request that any leave to amend be limited to the current complaint and that new or unrelated allegations not be permitted.

IV. CONCLUSION

For all the foregoing reasons, Defendants' respectfully request that Defendants' Motion to Dismiss for Failure to State a Claim be granted in its entirety. To the extent leave to amend the complaint is granted, Defendants request that the court consider the potential prejudice to the Defendants and thus, limit any leave to amend to the current complaint and allegations contained therein.

DATED: June 7, 2016

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

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Memorandum of Points and Authorities in Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss for Failure to State a Claim and Defendants' Additional One Page Summary of Argument, with the Clerk of the Court for the United States District Court, Northern District of California by using the CM/ECF system on June 7, 2016. I further certify that all of the participants in the case are registered CM/ECF users.

Dated: June 7, 2016

By: /s/ *Cyndy Day Wilson*

Cyndy Day-Wilson