

1 PETER J. ELIASBERG (SB# 189110)
peliasberg@aclusocal.org
2 ACLU FOUNDATION OF SOUTHERN CALIFORNIA
Los Angeles Office
3 1313 W. 8th Street, Suite 200
Los Angeles, CA 90017
4 Telephone: (213) 977-9500
Facsimile: (213) 977-5299

5 DAVID M. HERNAND (SB# 162733)
davidhernand@paulhastings.com
6 ANDREW B. GROSSMAN (SB# 211546)
andrewgrossman@paulhastings.com
7 KATHERINE F. MURRAY (SB# 211987)
katherinemurray@paulhastings.com
8 PAUL HASTINGS LLP
9 515 South Flower Street
Twenty-Fifth Floor
10 Los Angeles, CA 90071
Telephone: (213) 683-6000
11 Facsimile: (213) 627-0705

12 *Attorneys for Plaintiffs*

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 SOUTHERN DIVISION

16 KENNETH GLOVER, et al., and on
behalf of all others similarly situated,

17 Plaintiffs,

18 vs.

19 CITY OF LAGUNA BEACH; THE
LAGUNA BEACH POLICE
20 DEPARTMENT, a California charter
city,

21 Defendants.

CASE NO. 8:15-CV-01332-AG-DFM

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Date: December 5, 2016
Time: 10:00 a.m.
Courtroom: 10D

The Honorable Andrew J. Guilford

[Filed and served concurrently with
Notice of Motion and Motion for
Summary Judgment; Statement of
Uncontroverted Facts; Declaration of
Peter J. Eliasberg; Declaration of Richard
Owens; Declaration of Michael Newman;
Declaration of Peter J. Eliasberg;
Declaration of Manda Robinson;
Declaration of Benjamin Henwood and
[Proposed] Order]

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1 **I. PRELIMINARY STATEMENT**

2 Plaintiffs Michael Newman, Richard Owens, and David Sestini, individually
3 and on behalf of those similarly situated (collectively, “Plaintiffs”),¹ bring this class
4 action to rectify the illegal and discriminatory treatment of disabled, homeless
5 individuals living in Laguna Beach by Defendants, the City of Laguna Beach
6 (“City”) and its police department (“LBPD”) (collectively, “Defendants”).²
7 Defendants’ homelessness program (the “Program”) leaves Plaintiffs—all of whom
8 suffer from mental disabilities, including bipolar disorder, schizophrenia, post-
9 traumatic stress disorder, depression, and/or physical disabilities—with no legal
10 place to be in the City, and thereby violates the Eighth Amendment’s proscription
11 against cruel and unusual punishment and the Americans with Disabilities Act
12 (“ADA”) and Rehabilitation Act (“RA”).

13 The Program comprises a single, often-overcrowded emergency shelter for
14 homeless persons, coupled with heavy law enforcement, harassment, and scrutiny
15 of those who are forced to sleep outside. If a disabled, homeless person cannot
16 access the City’s Alternative Sleeping Location (“ASL”) due to the unique
17 difficulties they experience in accessing or tolerating the conditions of such, he or
18 she is at risk of criminal sanctions and police harassment for merely sleeping or
19 resting with their belongings in the City. Yet, Defendants unlawfully rely on the

20 ¹ On August 1, 2016, Defendants filed a stipulation whereby Plaintiffs Jeffrey
21 Aiken, Katrina Aune, Douglas Frederes, Jr., Kenneth Glover, Lisa Holbrook, John
22 Miller, and James Scott Rudolph dismissed their individual claims against
23 Defendants without prejudice, but remain eligible to be considered as putative class
members. (Dkt. 118.)

24 ² On October 3, 2016, the Court issued a tentative ruling GRANTING Plaintiffs’
25 Motion for Class Certification (Dkt. 136). As such, Plaintiffs move for Summary
26 Judgment on behalf of themselves and the putative class, as contemplated by the
27 Motion for Class Certification (Dkt. 112). However, if the Court does not issue a
28 ruling in accordance with its tentative, Plaintiffs request that the Court construe this
Motion for Summary Judgment to be brought by individual Plaintiffs Michael
Newman, Richard Owens, and David Sestini.

1 existence of the ASL to justify criminalizing disabled, homeless individuals, who
2 are repeatedly precluded from accessing shelter.

3 **II. STATEMENT OF RELEVANT FACTS**

4 Plaintiff David Sestini is homeless and suffers from bipolar disorder,
5 depression, anxiety, alcoholism, traumatic brain injury, and Chronic Obstructive
6 Pulmonary Disease (“COPD”). (Declaration of David Sestini (“Sestini Decl.”), ¶¶
7 2, 3, 4.) Plaintiff Richard Owens is homeless and suffers from bipolar disorder,
8 manic depression, seizures, anxiety, intermittent explosive disorder, emphysema,
9 high blood pressure, and COPD. (Declaration of Richard Owens (“Owens Decl.”),
10 ¶¶ 2, 3, 4.) Plaintiff Michael Newman is homeless and suffers from bipolar
11 disorder, depressive disorder, alcoholism, sleep apnea, a hernia, hypertension, and
12 chronic back pain. (Declaration of Michael Newman (“Newman Decl.”), ¶¶ 2, 3, 4.)
13 The City’s homeless population is comprised largely of persons deemed
14 “chronically homeless,” living with mental and/or physical disabilities who
15 experience “long-term or repeated homelessness.”³ (Declaration of Peter J.
16 Eliasberg of Oct. 31, 2016 (“Eliasberg Decl. 1”), Ex. E at pp. 3–4, Ex. F at p. III-9,
17 Dkt. 112-8.)

18
19 This is the *second* time that disabled, homeless individuals in Laguna Beach

20 ³ Individuals who are or have been homeless in Laguna Beach suffer from a host of
21 physical and mental disabilities. *See, e.g.*, Declaration of Katrina Aune, ¶ 3, Dkt. 33
22 (indicating that formally homeless Katrina Aune suffers from depression, Post
23 Traumatic Stress Disorder (“PTSD”), and Obsessive Compulsive Disorder);
24 Declaration of Jeffrey Aiken, ¶ 3, Dkt. 35 (stating that homeless veteran Jeffrey
25 Aiken suffers from schizophrenia, depression, brain damage, a knee injury, and
26 arthritis); Declaration of John Miller, ¶ 3, Dkt. 36 (indicating that homeless man
27 John Miller suffers from depression, Chronic Obstructive Pulmonary Disease,
28 chronic back pain, neuropathy, Parkinson’s Disease, and PTSD); Declaration of
Lisa Holbrook, ¶ 3, Dkt. 37 (indicating that formerly homeless woman Lisa
Holbrook suffers from anxiety and bipolar disorder); Declaration of Kenneth
Glover, ¶ 2, Dkt. 38 (indicating homeless man Kenneth Glover has been suicidal,
and suffers from depression, alcoholism, and anxiety).

1 have had to bring suit to vindicate their rights. *Siprelle v. City of Laguna Beach*,
2 No. 08-01447 (C.D. Cal. Dec. 23, 2008). In December 2008, several disabled,
3 homeless individuals challenged the City’s policy of enforcing what was then
4 Laguna Beach Municipal Code (“LBMC”) § 18.04.020, which criminalized
5 sleeping in public at night. *Id.* Plaintiffs in that case similarly alleged that the
6 LBPD was conducting “sweeps” of beaches, parks, and other public areas at night
7 and early morning to wake, harass, and specifically target sleeping, homeless
8 persons. *Id.* The plaintiffs in *Siprelle* asserted that the City’s practices violated due
9 process, the Eighth Amendment, and Title II of the ADA. (Dkt. 112-8, Ex. G at pp.
10 17–20.) The parties quickly settled. (*Id.*, Ex. H.) As a result, the City repealed the
11 portions of LBMC § 18.040.020 that prohibited camping and sleeping in public,
12 and agreed to limit enforcement of Cal. Penal Code § 647(e), which proscribes the
13 same. (*Id.* at pp. 2–3.)

14 Shortly after the *Siprelle* settlement was finalized, the City implemented a
15 new, more damaging homelessness policy, which consists of two parts: (1) the
16 creation of a single, often-overcrowded emergency shelter with a 45-bed capacity
17 for homeless persons; and (2) heavy law enforcement of new anti-camping and
18 anti-sleeping ordinances. (*Id.*, Exs. A, J.) Though disabled, homeless individuals
19 are often precluded from accessing the ASL, the City uses the facility’s existence to
20 justify heavy-handed enforcement of its anti-camping and anti-sleeping ordinances.
21 (*Id.*, Ex. A.) As detailed below, these changes exacerbate the debilitating mental
22 and physical conditions plaguing the City’s chronically homeless population.

23 **A. The ASL**

24 The City opened the ASL on November 12, 2009. (*Id.*) The ASL is the only
25 public homeless shelter in the City.⁴ (*Id.*, Ex. J.) This makeshift facility consists of
26

27 ⁴ The ASL is partially funded by the City through federal Community Development
28 Block Grant funds received through Orange County. Since at least 2012, the City
has applied for and received federal Community Development Block Grant funds

1 a single large room, plus restroom facilities, where individuals sleep side-by-side
2 on the floor. (Dkt. 75, Declaration of Emma Ferreira (“Ferreira Decl.”), ¶ 7.)

3 The ASL is not equipped to accommodate the needs of the City’s homeless.
4 On average, there are more than 100 individuals who seek homeless services per
5 month in the City, yet the ASL’s capacity is only 45 persons. (SUF 3, 4.) Thus, the
6 ASL fills up nightly, and many are turned away due to lack of space. (SUF 5.)

7 Access to the ASL is based on priority. The City gives priority to whom it
8 designates as “local Laguna Beach residents.” (Dkt. 112-10, Ex. U at p. 14, ¶ 6.)
9 This residency requirement has a high bar—individuals must demonstrate that: (1)
10 an immediate family member currently lives in Laguna Beach, (2) they attended K-
11 12 school in Laguna Beach, (3) they leased or paid utilities for residential property
12 in Laguna Beach, or (4) that the LBPD knows them to have been members of the
13 Laguna Beach homeless community for at least 18 months. (*Id.*, Dkt. 112-9, Ex. J at
14 p. 2.) Moreover, these criteria are not applied evenly. In spite of multiple
15 interactions over an 18-month period, Defendants do not consider many disabled,
16 homeless persons who have lived in Laguna Beach for more than 18 months to be
17 “local Laguna Beach residents.” (*See, e.g.*, Sestini Decl. ¶ 6; Owens Decl., ¶ 10;
18 Dkt. 33, Declaration of Katrina Aune ¶¶ 5, 9; Dkt. 35, Declaration of Jeffrey Aiken
19 ¶¶ 6, 8.) Consequently, these individuals are wrongfully denied access to the ASL,
20 forced to sleep in public, and subjected to police scrutiny.

21 An individual who does not meet the City’s residency requirement can only
22 obtain shelter at the ASL by entering a lottery. (Ferreira Dep. 34:11.) The

23 through Orange County’s consolidated application to the Department of Housing
24 and Urban Development and has used these funds to support the operations of the
25 ASL, an integral part of Defendants’ homelessness policy. (Dkt. 112-7-11, Ex. F at
26 p. IV-10; *id.* at Ex. K at p. 13 (indicating that the City received \$50,000 for ASL in
27 2012–2013 fiscal year); Ex. L at pp. 48–49 (same); Ex. M at p. 8 (\$48,500 in 2013–
28 2014 fiscal year); Ex. N at pp. 66–67 (same); Ex. O at p. 11 (\$92,150 in 2014–2015
fiscal year); Ex. P at pp. 47–48 (same); and Ex. Q at pp. 117–8 (\$92,150 in 2015–
2016 fiscal year).)

1 uncertainty of the lottery system can be stressful, and particularly harmful to
2 disabled persons. (Sestini Decl. ¶ 10; Dkt. 38, Declaration of Kenneth Glover ¶ 6;
3 Declaration of Benjamin Henwood pp. 17–19; Declaration of Manda Robinson p.
4 9–10.) Individuals who are not selected through this lottery cannot stay at the ASL
5 and are left with no legal place to sleep within the City and, on many nights, no
6 means of transportation outside the city. (SUF 6; Farris Dep. 96:3, Ex. A to
7 Eliasberg Decl.; Dkt. 33 ¶ 8; Dkt. 35 ¶ 6; Sestini Decl. ¶ 9.)

8 If granted access to the ASL, persons are subject to rules and procedures that
9 fail to accommodate the disabilities of those seeking shelter. For instance,
10 individuals may only enter the shelter between 6:15 p.m. and 8:00 p.m. (Dkt. 112-
11 10, Ex. U at p. 14.) Once inside, they cannot leave the facility “without good
12 cause,” lest they lose their spot for the night. (*Id.*) Lights out is at 10:30 p.m., and
13 individuals are restricted to their sleeping areas after this time. (*Id.* at p. 15.) There
14 is a wakeup call at 5:00 a.m., and all occupants must leave the shelter by 7:30 a.m.
15 (*Id.*) Disabled, homeless occupants are expected to behave in a courteous manner at
16 all times, meaning that loud or disruptive behavior can “result in immediate
17 expulsion.” (*Id.*) However, the disabilities of the chronically homeless often render
18 them incapable of conforming to the rules of the ASL.⁵ Individuals who cannot
19 conform their behavior to the ASL rules are expelled and offered no recourse to
20 appeal the decision. (Dkt. 112-10, Ex. U.)

21 Disabled, homeless individuals who do obtain a bed at the ASL for the
22 evening are often unable to tolerate the environment, worsening their mental and/or
23

24
25 _____
26 ⁵ (*See* Ferreira Dep. 45:13, 51:10, 54:24 (indicating that all named Plaintiffs have
27 been told to leave the ASL for alleged rule-breaking), 49:10–21 (stating that the
28 decision to ask an individual staying at the ASL to leave is up to the total discretion
of the ASL staff); Sestini Decl. ¶12, Ex. 2 (stating plaintiff has been permanently
banned from the ASL); Newman Decl. ¶ 22 (stating the same).)

1 physical health. (Henwood Decl. pp. 21–26; Robinson Decl. pp. 12–13.)⁶

2 **B. Police Enforcement**

3 In October 2009, the City enacted LBMC §§ 8.30.030 and 18.05.020, which
4 prohibit camping on public property and sleeping in beaches and parks. Soon after
5 the ASL opened, Defendants began enforcing these ordinances, as well as Penal
6 Code section 647(e), against disabled, homeless individuals, based on its “belief
7 and expectation . . . that by providing an alternative location for homeless persons
8 to sleep at night, the City can enforce laws against lodging or camping on public
9 properties.” (Eliasberg Decl. Ex. C at pp. 2–4; Dkt. 112-8 Ex. V.) During the first
10 five months of the ASL’s operations, Defendants issued 34 misdemeanor citations
11 for alleged violations of LBMC § 8.30.030 and Cal Penal Code § 647(e). (SUF 7.)
12 In 2011 Defendants issued a total of 160 misdemeanor citations and between
13 January 2012 and June 2014, Defendants issued a total of 225 misdemeanor
14 citations for alleged violations of the same.⁷ (*Id.*)

15 Despite assurances that the LBPD has adopted a “best practice” to avoid
16 ticketing homeless persons for illegal lodging (Farris Dep. 122:4–10, 150:2–24),
17 rigorous enforcement of these laws continues to this day. (*See, e.g.*, SUF 7.) Many
18 disabled, homeless individuals have been cited for violating these laws, including
19 two of the three named plaintiffs. (*See, e.g.*, SUF 7; Dkt. 33, Ex. A; Dkt. 35, Ex. A;
20 Dkt. 38, Exs. A, B, C; Dkt. 39 Declaration of Douglas Frederes Jr., Exs. A–N; Dkt.

21 _____
22 ⁶ (*See* Owens Decl. ¶¶ 10, 11 (stating that the ASL’s crowded conditions exacerbate
23 his anxiety and finds it difficult to follow the rules of the ASL due to his disability,
24 as he often feels “caged in” when he is not allowed to leave the facility after 8:00
25 p.m.); Newman Decl. ¶¶ 9–11 (stating that he finds that his mental and physical
26 disabilities are aggravated when he stays at the ASL and that the bedding of the
27 ASL exacerbates his back condition, as it consists of only a thin mat on the floor.;
28 *see, e.g.*, Sestini Decl. ¶¶ 10–11, Ex. 2; Dkt. 33 ¶ 6; Dkt. 35 ¶ 7; Dkt. 37 ¶¶ 6–7;
Dkt. 38 ¶¶ 5–7.)

⁷ The City also imposes a beach curfew under Laguna Beach Municipal Code §§
18.05.010 and 18.05.02, pursuant to which the beaches are closed from 1:00 a.m. to
5:00 a.m. each night. (*Id.*)

1 40, Declaration of Joshua Oldham, Ex. A.) In fact, between January 2012 and June
2 2014, officers issued at least 44 citations to individuals in the ASL parking lot,
3 knowing those individuals had been turned away from the shelter. (Farris Dep.
4 70:13–25; Dkt. 112-11 ¶ 28 and Ex. X.)

5 Individuals who cannot access the ASL have few options for finding a place
6 to sleep, none of which complies with the law—sleeping in the ASL parking lot, in
7 the canyon near the ASL, or undertaking a long and dangerous trek back to the
8 downtown area and beaches. (Sestini Decl. ¶ 7; Dkt. 33 ¶¶ 8–10; Dkt. 35 ¶ 8; Dkt.
9 37 ¶¶ 9–11; Dkt. 38 ¶¶ 7–8.) Such criminalization and stigmatization leads to a
10 serious deterioration in mental health. (Henwood Decl. p. 27; Robinson Decl. pp.
11 19–21); Sestini Decl. ¶ 16; Owens Decl. ¶ 15; Dkt. 33 ¶¶ 9–10; Dkt. 38 ¶ 8.)

12 On May 4, 2016, Plaintiffs filed their Second Amended Complaint, alleging
13 violations of Title II of the Americans with Disabilities Act (42 U.S.C. § 12132),
14 Section 504 of the Rehabilitation Act (29 U.S.C. §§ 706, 794), the Eighth and
15 Fourteenth Amendments to the United States Constitution (42 U.S.C. § 1983); and
16 Article I, sections 7 and 17 of the California Constitution. (Second Am. Compl.,
17 Dkt. 109, ¶¶ 29–36.) On November 23, 2015, Plaintiffs moved for preliminary
18 injunction and provisional class certification. (Dkt. 29.) The Court denied the
19 Motion on February 10, 2016. (Dkt. 99.) On June 27, 2016, Plaintiffs moved for an
20 order certifying the following class:

21 All homeless persons who reside or will reside in the geographic
22 area of Laguna Beach who have a mental and/or physical disability
23 as defined under section 504 of the Rehabilitation Act and
24 Americans with Disabilities Act and who have been, or are likely to
be, cited for violations of California Penal Code section 647(e),
Laguna Beach Municipal Code section 8.30.030 and/or Laguna
Beach Municipal Code section 18.05.020.

25 (Mot. to Certify Class at 3, Dkt. 136.) The Court has yet to rule on this Motion. For
26 the purposes of the Motion for Summary Judgment, Plaintiffs’ Statement of Facts is
27 intended to present facts on behalf of the proposed class.
28

1 **III. STANDARD FOR SUMMARY JUDGMENT**

2 Federal Rule of Civil Procedure 56 (“Rule 56”) requires the entry of
3 summary judgment “if the pleadings, the discovery and disclosure materials on file,
4 and any affidavits show that there is no genuine issue as to any material fact and
5 that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c);
6 *Tarin v. Cnty. of L.A.*, 123 F.3d 1259, 1263 (9th Cir. 1997). Summary judgment is
7 useful in that it allows a court to avoid unnecessary trials in cases that lack
8 genuinely disputed material facts. *See Northwest Motorcycle Ass’n v. U.S. Dep’t of*
9 *Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). In evaluating “whether the evidence
10 presents a sufficient disagreement to require submission to a jury or whether it is so
11 one-sided that one party must prevail as a matter of law,” Rule 56 serves to screen
12 the latter cases from those which actually require resolution at trial. *Anderson v.*
13 *Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986), *see also Celotex*, 477 U.S. at 323.

14 **IV. ARGUMENT**

15
16 Construing the evidence in the light most favorable to the Defendant, the
17 Plaintiffs have established that the Defendant has violated: (A) the prohibition
18 against Cruel and Unusual Punishment, under the Eighth and Fourteenth
19 Amendment and analogous provisions of the California Constitution and (B) Title
20 II of the ADA and Section 504 of the RA. Therefore, Plaintiffs seek and are entitled
21 to summary judgment as to those claims.

22 **A. Defendants’ Homelessness Policy Violates the Eighth**
23 **Amendment**

24 The City’s anti-camping ordinances constitute cruel and unusual punishment,
25 in violation of the Eighth Amendment to the United States Constitution. “[T]he
26 Cruel and Unusual Punishments Clause . . . imposes substantive limits on what can
27
28

1 be made criminal and punished as such.”⁸ *Ingraham v. Wright*, 430 U.S. 651, 667
2 (1977).

3 As many courts have found, where shelter space is otherwise unavailable,
4 compliance with said ordinances becomes impossible for the homeless, especially
5 the disabled, such that their enforcement amounts to the criminalization of
6 homelessness.⁹ *See, e.g., Jones v. City of Los Angeles*, 444 F.3d 1118, 1134 (9th
7 Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (finding anti-camping
8 ordinance violated Eighth Amendment because it criminalized sleeping in public
9 when homeless individuals had no other choice but to sleep in public); *Johnson v.*
10 *City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev’d on other grounds*, 61
11 F.3d 442 (5th Cir. 1995) (same); *Pottinger v. City of Miami*, 810 F. Supp. 1551,
12 1563 (S.D. Fla. 1992) (same). When Plaintiffs are precluded from staying at the
13 ASL because it is inaccessible, intolerable, or overcrowded, they have no other
14 legal place to sleep within the City.

15 The Ninth Circuit squarely addressed the issue of criminalization of
16

17 ⁸ Plaintiffs submit evidence that two named Plaintiffs have been cited or convicted
18 and other disabled, homeless individuals face constant threat of the same. (SUF 7).
19 Accordingly, Plaintiffs have standing to raise this Eighth Amendment claim. *See*
20 *Anderson v. City of Portland*, No. CIV 08-1447-AA, 2009 WL 2386056, at *4 (D.
21 Or. July 31, 2009); *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218 (E.D. Cal.
2009); *Joyce v. City & Cnty. of San Francisco*, 846 F. Supp. 843, 852 (N.D. Cal.
1994).

22 ⁹ Some courts have avoided the discussion of the criminalization of homelessness
23 altogether by deciding the case on factual grounds, as the Court is free to do here.
24 *See, e.g., Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000) (not
25 deciding the legal issue of whether the Eighth Amendment reaches conduct that is
26 inextricably linked to status because Orlando proved the voluntary nature of public
27 sleeping by “present[ing] unrefuted evidence” that the city’s large homeless shelter
28 “has never reached its maximum capacity and that no individual has been turned
away because there was no space available or for failure to pay the one dollar
nightly fee”); *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 59 (2015)
(upholding an anti-camping ordinance because the plaintiffs failed to “allege why
[they] had no shelter”).

1 unavoidable acts like sleeping or camping in public such that the status of
2 homelessness is criminalized in *Jones v. City of Los Angeles*, but withdrew the
3 opinion upon settlement. 444 F.3d 1118, *vacated as moot*, 505 F.3d 1006. Although
4 the Ninth Circuit’s opinion in *Jones* is not binding, the Court should give the
5 reasoning therein persuasive effect because it was vacated for reasons unrelated to
6 the merits, is the most factually similar to the case at hand, and is the most recent
7 authority on the matter. *See id.* Indeed, the Ninth Circuit has found that decisions
8 vacated for reasons unrelated to the merits may be considered for the
9 persuasiveness of their reasoning.¹⁰

10 Under the *Jones* framework, if sufficient shelter space is unavailable because
11 a) there are inadequate beds for the entire population, or b) there are restrictions on
12 those beds that disqualify certain groups of homeless individuals (e.g., due to a
13 inaccessibility or intolerability), it is impossible for some homeless individuals to
14 comply with an anti-camping ordinance, and the enforcement of such effectively
15 amounts to the criminalization of homelessness, in violation of the Eight
16 Amendment. *See* 444 F.3d at 1136–7. The majority’s decision in *Jones* turned
17 almost entirely on an analysis of two Supreme Court cases, *Robinson v. California*,
18 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968).

19 First, the Supreme Court in *Robinson* addressed a California statute that
20 made it a “criminal offense for a person to ‘be addicted to the use of narcotics.’”
21 370 U.S. 660. The Court struck down the ordinance as it made an addicted person
22 “continuously guilty of [the] offense, whether or not he has ever used or possessed
23 any narcotics within the State.” *Id.* at 666. Such a statute would be akin “mak[ing]

24
25 ¹⁰ *See Rosenbloom v. Pyott*, 765 F.3d 1137, 1154 (9th Cir. 2014) (following as
26 persuasive authority a decision vacated on the grounds of collateral estoppel); *In re*
27 *Taffi*, 68 F.3d 306, 310 (9th Cir. 1995) (following as persuasive authority a decision
28 vacated by the Supreme Court on other grounds); *Orhorhaghe v. INS*, 38 F.3d 488,
493 n. 4 (9th Cir. 1994) (following as persuasive authority a decision vacated by the
Supreme Court as moot).

1 it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with
2 a venereal disease,” and would “be universally thought . . . an infliction of cruel and
3 unusual punishment.” *Id.* As such, the Supreme Court held that laws criminalizing
4 an individual’s status, rather than specific conduct, are unconstitutional. *Id.*

5 Six years later, in *Powell v. Texas*, the Court addressed whether certain acts
6 that are unavoidable consequences of one’s status can be subject to punishment
7 under the Eighth Amendment. 392 U.S. 514 (1968). *Powell* considered the
8 constitutionality of a statute that criminalized public intoxication. *See id.* at 516. A
9 four-Justice plurality read *Robinson* narrowly to forbid the criminalization of status
10 and noted that the statute at issue in *Powell* criminalized conduct—being intoxicated
11 in public—rather than the status of alcohol addiction. *See id.* at 532–37. Four
12 dissenting Justices understood the statute to criminalize a pattern of behavior
13 characteristic of the disease of alcoholism, and which the defendant “had no
14 capacity to change or avoid,” *id.* at 568 (Fortas, J., dissenting). Justice White, the
15 crucial fifth vote for the conviction, based his concurrence on his understanding that
16 there was insufficient evidence to definitively say the defendant was *incapable* of
17 avoiding public intoxication: “[N]othing in the record indicates that he could not
18 have done his drinking in private or that he was so inebriated at the time that he had
19 lost control of his movements and wandered into the public street.” *Id.* at 553
20 (White, J., concurring). Justice White, however, disavowed criminalization of
21 “irresistible urge[s],” *id.* at 549, and explicitly noted that the ability to stay off the
22 streets would not apply to the homeless, those “unfortunates” who have “no place
23 else to go” such that “avoiding public places [would be] impossible,” *id.* at 551. In
24 essence, *Powell* represents a five-Justice agreement that if sufficient evidence is
25 presented showing that the prohibited conduct was involuntary due to one’s
26 condition, criminalization of that conduct would be impermissible under the Eighth
27 Amendment. *See id.* at 521–25.

28 *Jones* agreed with the five Justices in *Powell*—that the Eighth Amendment

1 prohibits punishing unavoidable conduct resulting from one’s status. *See* 444 F.3d
2 at 1136–7. The *Jones* Court considered the enforcement of a Los Angeles ordinance
3 prohibiting sitting, lying, or sleeping in public. *See id.* at 1120. There, like here,
4 appellants did not ask for the ordinance to be declared facially unconstitutional,
5 they sought only to have its enforcement enjoined. *See id.* at 1127. And, there, like
6 here, appellants presented evidence showing that there were an inadequate number
7 of shelter beds available for homeless individuals, leaving them with no choice but
8 to sleep in public. *See id.* at 1138. The Court held that the constant enforcement of
9 an anti-camping ordinance was unconstitutional under the Eighth Amendment
10 because the inadequate and restrictive shelter space left plaintiffs with no legal
11 place to sleep, such that sleeping in public was “involuntary and inseparable from”
12 the condition of being homeless. *Id.* at 1136.

13 Notably, in a factually indistinguishable case, *Bell v. City of Boise*, the
14 United States Department of Justice filed a Statement of Interest “to make clear”
15 that the *Jones* framework is the proper legal approach for analyzing plaintiffs’
16 Eighth Amendment claims. No. 1:09-cv-540-REB (D. Idaho Aug. 6, 2015), Dkt.
17 276, Statement of Interest of the United States (“SOI”), p. 4. In *Bell*, plaintiffs
18 similarly argue that criminalizing public sleeping in a city with inadequate shelter
19 constitutes criminalizing homelessness, in violation of the Eighth Amendment. 834
20 F. Supp. 2d 1103 (D. Idaho 2011), *rev’d*, 709 F.3d 890 (9th Cir. 2013).

21 In its Statement of Interest, the United States explains that adopting the *Jones*
22 Court’s approach would not implicate the concerns raised by the *Powell* plurality.
23 *See* SOI, p. 12. The United States explains that the Justices in the *Powell* plurality
24 declined to extend the Eighth Amendment prohibition to the punishment of
25 involuntary conduct because they feared doing so would allow violent defendants to
26 argue that their conduct was “compelled” by any number of “conditions.” *Powell*,
27 392 U.S. at 534; *see* SOI, p. 12. The United States clarifies that these concerns are
28 not at issue when, as here, they are applied to conduct that is essential to human life

1 and wholly innocent, such as sleeping. *See* SOI, p. 13

2 Read together, *Robinson*, *Powell*, and *Jones* stand for the proposition that if
3 homeless, disabled Plaintiffs are not capable of conforming to the City’s anti-
4 camping ordinance, given the current homeless population, available shelter space,
5 and restrictions on shelter beds, enforcement of such violates the Eighth
6 Amendment. Plaintiffs here cannot obtain shelter within the City for two reasons:
7 (1) their disabilities effectively preclude them from accessing, remaining, or
8 tolerating the conditions of the ASL, and (2) there is a substantial shortage of beds
9 at the ASL.¹¹ Unlike the defendant in *Powell* who submitted insufficient evidence
10 to definitively say that he was *incapable* of avoiding *public* intoxication, Plaintiffs
11 here have submitted evidence that they have “no place else to go” and no legal
12 place to sleep once they are denied access to the ASL. *Powell*, 392 U.S. at 553;
13 (*see, e.g.*, Owens Decl. ¶ 16; Dkt. 35 ¶ 6.)

14 The Court in *Powell* contemplated that with a greater showing of compulsion
15 or involuntariness of such prohibited conduct, an individual could challenge a
16 statute punishing conduct that was compelled by a disease under the Cruel and
17 Unusual Punishment Clause. *See* 392 U.S. at 521–25. Here, there is a greater
18 showing of compulsion or involuntariness than was shown in *Powell*. Here,
19 Plaintiffs suffer from serious mental disabilities, including bipolar disorder,
20 schizophrenia, post-traumatic stress disorder, depression, and/or various physical
21 disabilities. (Sestini Decl. ¶¶ 2, 3, 4; Owens Decl. ¶¶ 2, 3, 4; Newman Decl. ¶¶ 2, 3,
22 4.) The record also establishes that once precluded from the ASL due to their
23 disability or mass overcrowding, Plaintiffs are not provided with any means of
24 transportation, housing assistance, or a legal option to sleep in the City. (Farris Dep.
25 96:3, 146:19–21; Owens Decl. ¶ 16; Dkt. 35 ¶ 6.) Nor are Plaintiffs provided with
26

27 ¹¹ (Henwood Decl. pp. 21–26; Robinson Decl. pp. 12–13; Owens Decl. ¶¶ 10, 11;
28 Newman Decl. ¶¶ 10–11; Sestini Decl. ¶¶ 10–11, Ex. 2; Dkt. 33 ¶ 6; Dkt. 35 ¶ 7;
Dkt. 37 ¶¶ 6–7; Dkt. 38 ¶¶ 5–7; Ferreira Dep. 34:4–5; SUF 3–5.)

1 a mechanism of recourse if the ASL decides to ban them from the shelter. (Dkt.
2 112-10, Ex. U.)

3 The ASL fills up nightly, and many are turned away due to lack of space.
4 (SUF 5.) In fact, people seeking shelter at the ASL are turned away “most nights”
5 because of a lack of capacity. (*Id.*) The City, which determines who is granted a
6 bed for the night at the ASL, applies its authority in an arbitrary and selective
7 manner that disproportionately impacts disabled individuals. (*See, e.g.,* Sestini
8 Decl. ¶¶ 6, 7; Owens Decl. ¶ 12; Dkt. 35 ¶¶ 6, 8; Dkt. 37, ¶ 5.) Therefore, it is
9 impossible for said individuals not only to obtain temporary shelter at the ASL, but
10 to remain in its occupancy. (*See, e.g.,* Newman Decl. ¶ 11, 14–22; Sestini Decl.
11 ¶10.)

12 Even when Plaintiffs are able to obtain a place at the ASL for the night, some
13 can only stay in this environment for a short period of time before experiencing
14 deterioration in their mental condition that forces them to leave. (*See, e.g.,* Sestini
15 Decl. ¶¶ 10–12, Ex. 2; Owens Decl. ¶¶ 10, 13; Newman Decl. ¶¶ 10–11.) Others
16 are expelled because their disabilities prevent them from being able to conform to
17 the rules of the shelter. (*See, e.g.,* Newman Decl. ¶¶ 11, 14–22; Sestini Decl. ¶10–
18 12.)

19 It should be uncontroversial that punishing conduct that is a “universal and
20 unavoidable consequence[] of being human” violates the Eighth Amendment.
21 *Jones*, 444 F.3d at 1136. It is a “foregone conclusion that human life requires
22 certain acts, among them . . . sleeping.” *Johnson*, 860 F. Supp. at 350. Once an
23 individual becomes homeless, by virtue of this status, certain life necessities (such
24 as sleeping) that would otherwise be performed in private must now be performed
25 in public. *Pottinger*, 810 F. Supp. at 1564; *see also Johnson*, 860 F. Supp. at 350
26 (“they must be in public” and “they must sleep”).

27 Indeed, the Eighth Amendment analysis is not limited to a reading of the
28 plain language of the statute in question. Rather, the practical implications of

1 enforcing the statute’s language are of equal significance. *See Jones*, 444 F.3d at
2 1136. Such implications are clear, for where there is insufficient shelter space to
3 accommodate the homeless population, it becomes impossible for the homeless to
4 conform their conduct to the law. *See id.*

5 Plaintiffs here do not ask for the City’s anti-camping ordinances to be
6 declared facially unconstitutional; they seek only to have its enforcement enjoined
7 in all public locations at night. Plaintiffs have demonstrated both past injuries and a
8 real and immediate threat of future injury: namely, they have been and are likely to
9 be fined, arrested, incarcerated, prosecuted, and/or convicted for involuntarily
10 violating LBMC §§ 8.30.030 and 18.05.020 and Cal Pen. Code § 647(e). In the
11 absence of any indication that the enormous gap between the number of available
12 beds and the number of homeless individuals in Laguna Beach has closed, Plaintiffs
13 are certain to continue sitting, lying, and sleeping in public thoroughfares and, as a
14 result, will suffer direct and irreparable injury from enforcement of the City’s anti-
15 camping ordinances. Plaintiffs should therefore prevail on their Eighth Amendment
16 claim because Defendants’ homelessness program, which criminalizes the status of
17 being disabled and homeless in Laguna Beach, and also criminalizes conduct
18 inseparable from this status, constitutes cruel and unusual punishment.

19 **B. The City Violated the ADA and RA and Must Modify its**
20 **Homelessness Program to Address these Violations**

21 Congress enacted the ADA to provide a “clear and comprehensive national
22 mandate for the elimination of discrimination against individuals with disabilities.”
23 42 U.S.C. §12101(b). With the exception of the RA’s limitation to cover only those
24 entities receiving federal funding, the statutory mandates of the ADA and RA are
25 substantially the same.¹² Plaintiffs have established that there is no genuine dispute
26

27 _____
28 ¹² Compare 42 U.S.C. §12132 with 29 U.S.C. § 794(a). The Ninth Circuit construes
these acts consistently. *See, e.g., Bay Area Addiction Research & Treatment, Inc. v.*

1 regarding those facts which establish (1) that the ADA and RA apply to the
2 Program; (2) that Plaintiffs are qualified individuals with disabilities for purposes
3 of the Program; and (3) that Plaintiffs were excluded from participating in or denied
4 the benefits of services, programs, or activities of the Program or otherwise
5 discriminated against due to their disabilities. 42 U.S.C.A. §12132; 29 U.S.C.
6 §794(a); 28 C.F.R. §35.130(a).¹³ See also, *McGary v. City of Portland*, 386 F.3d
7 1259, 1264-65 (9th Cir. 2004). There is also no genuine dispute regarding those
8 facts which establish (4) that Defendant must remedy these violations and make the
9 Program readily accessible to individuals with disabilities.

10 **1. The ADA and RA Apply to the Homelessness Program**

11 The ADA and RA impose obligations on the City's operation of the Program.
12 The ADA applies to "any . . . local government" or "any department . . . of a . . .
13 local government." 42 U.S.C. §12131(1). It extends directly or via "contractual . . .
14 arrangements." 28 C.F.R. §35.130(b)(1). The RA applies only to "[a]ny program or
15 activity receiving Federal financial assistance" but includes any "operations of . . . a
16 local government" receiving such funding and covers entities, "any part of which is
17 extended Federal financial assistance." 29 U.S.C. §794(a)-(b). "Quite simply, the
18 ADA's broad language brings within its scope anything a public entity does." *Lee*
19 *v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001).¹⁴

20 The undisputed facts demonstrate that the ADA and RA apply to the Program
21 regardless of whether aspects of the Program are carried out directly by the City,

22 *City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999). Thus, when Plaintiffs refer to
23 the ADA, they are implicitly including the RA also, and vice-versa.

24 ¹³ Department of Justice Regulations interpreting the ADA and RA are entitled to
25 substantial deference. See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581,
597-98 (1999).

26 ¹⁴ Courts have applied the ADA and/or the RA to an extremely broadly range of
27 government programs. See, e.g., *Pa. Dept. of Corrs. v. Yeskey*, 524 U.S. 206 (1998)
28 (prisons); *McGary*, 386 F.3d at 1268-70 (municipal ordinances); *Gorman v. Bartch*,
152 F.3d 907 (8th Cir. 1998) (transportation after arrest); *Hunter on behalf of A.H.*
v. D.C., 64 F.Supp. 3d 158, 168-69 (D.D.C. 2014) (emergency homeless shelter).

1 the LBPB, or by private contractors. Laguna Beach is a local government; the
2 LBPB is a local government entity and/or department. (SUF 42-43.) Friendship
3 Shelter contracts with the City to operate the ASL, and all aspects of the Program
4 are carried out by the City, the LBPB and/or Friendship Shelter. (SUF 44-46.) The
5 City and Friendship Shelter receive federal funding for the operation of the ASL
6 and other federal housing funding. (SUF 47.) Thus, the City must comply with the
7 ADA and RA. *See, e.g., McGary*, 386 F.3d at 1268-69; *Hunter on behalf of A.H. v.*
8 *D.C.*, 64 F.Supp.3d at 166, 172 (examining city shelter for compliance with ADA
9 and RA).

10 **2. Plaintiffs are Qualified Individuals with Disabilities for**
11 **Purposes of the Homelessness Program**

12 Plaintiffs are individuals with disabilities and are among those the City seeks
13 to serve through the Program. The ADA defines disability to include a physical or a
14 mental impairment¹⁵ that substantially limits¹⁶ one or more major life activities¹⁷.
15 42 U.S.C. § 12102(1). The term disability must be “construed broadly” and “in
16 favor of expansive coverage to the maximum extent permitted by the terms of the
17 ADA.” 28 C.F.R. § 35.101(b).

18 Plaintiffs Sestini, Newman, and Owens are individuals with both physical
19 disabilities and mental disabilities. (SUF 48-50.) Owens qualifies for and receives
20

21 ¹⁵ This includes any physiological disorder or condition, any mental or
22 psychological disorder, as well as contagious and noncontagious diseases. 28
C.F.R. §35.108(b)(1).

23 ¹⁶ This is “not meant to be a demanding standard” and may include such
24 impairments as intellectual disability, diabetes, epilepsy as well as those disorders
25 which substantially limit brain function such as major depressive disorder, bipolar
disorder, post-traumatic stress disorder, traumatic brain injury, obsessive
compulsive disorder, and schizophrenia. *See* 28 C.F.R. §35.108(d).

26 ¹⁷ This includes such things as caring for oneself, performing manual tasks,
27 concentrating, communicating, as well as the operation of a major bodily function
28 and is “not determined by reference to whether it is of central importance to daily
life.” 28 C.F.R. §35.108(c)(1)-(2).

1 Supplemental Security Income as an individual with a disability. (SUF 51.) The
2 substantial majority of individuals experiencing homelessness in Laguna Beach are
3 individuals with disabilities. (SUF 52.) Finally, the Putative Plaintiff Class is
4 expressly limited to individuals with disabilities as defined by the ADA and RA.

5 The ADA and RA protect “qualified” individuals with disabilities: those
6 “who . . . meet[] the essential eligibility requirements” for the benefits, programs, or
7 services provided. 42 U.S.C. § 12131(2). There is no genuine dispute regarding
8 whether the Plaintiffs meet the essential eligibility requirements of the City’s
9 Program: that an individual is physically present in Laguna Beach and that he or
10 she is deemed to be experiencing homelessness. (SUF 43-54.) These requirements
11 permit qualified individuals to access or benefit from a range of services, programs
12 or benefits that together make up the Program. (SUF 45-46.) The City recognizes
13 Plaintiffs Newman, Owens, and Sestini are or have been present in Laguna Beach
14 and experiencing homelessness during the pendency of this action, meeting the
15 requirements of the Program. (SUF58-60.) The Proposed Class is similarly defined
16 with reference to homelessness and presence or future presence in Laguna Beach.

17 **3. The Homelessness Program is Inaccessible to Homelessness**
18 **Individuals with Disabilities**

19 “Discrimination against [individuals with disabilities] was perceived by
20 Congress to be most often the product, not of invidious animus, but rather of
21 thoughtlessness and indifference – of benign neglect.” *Alexander v. Choate*, 469
22 U.S. 287, 295 (1985). There are at least three circumstances in which differential
23 treatment of individuals with disabilities violates the ADA and RA: (1) exclusion
24 from participation; (2) lack of access; or (3) a failure to accommodate disability.

25 An individual with disabilities is excluded from participation when
26 “eligibility criteria” “screen out or tend to screen out” them from “fully and equally
27 enjoying any service, program, or activity.” 28 C.F.R. §35.130(b)(8). Government
28 programs, services, and activities must be “readily accessible” to individuals with

1 disabilities. 28 C.F.R. §35.149, 151(a)(1). Access that is not equal or equally
2 effective violates the ADA. *Crowder v. Kitagawa*, 81 F.3d 1480, 1484-85 (9th Cir.
3 1996). The mere fact that an individual with a disability was able in some way to
4 access a government program does not mean it complies with the ADA. *See Shotz*
5 *v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001). Courts have also held that
6 enforcement of municipal laws or codes may violate the ADA when it fails to
7 accommodate an individual’s disability and harms them. *See McGary*, 386 F.3d at
8 1268-70; *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998).

9 The Program involves the enforcement of laws and rules against homeless
10 individuals – including by the LBPD and by contractors for the City at the ASL.
11 SUF 45, 68. The Program also includes affirmative provision of such things as
12 overnight shelter and bathrooms. UF5. The City developed and operates the
13 Program knowing that many of the City’s homeless population have physical and
14 mental disabilities. (SUF 52.) Yet, the City’s Program violates the ADA and RA
15 because, it (1) excludes homeless individuals with disabilities from participation,
16 (2) is not readily accessible and/or (3) fails to accommodate disabilities.

17 **a. Discriminatory Operation of the ASL**

18 The sleeping space at the ASL is a single large area without divisions,
19 permitting only congregate sleeping, for as many as 45, on thin mats on the floor a
20 short distance apart, frequently at full capacity. (SUF 61-64.) Congregate living is
21 more difficult for individuals with disabilities to cope with than it is for individuals
22 without disabilities. (SUF 65.) As nationally-recognized expert Dr. Henwood states,
23 the “chaos and crowded living conditions” of congregate shelters like the ASL
24 increase stress and anxiety, which can trigger a manic cycle for those with bipolar
25 disorder, cause hyper-vigilance in those with schizophrenia; and limit sleep, all with
26 severe negative consequences. (Henwood Decl., ¶44.) *See also* Robinson Decl.,
27 ¶27.
28

1 Individuals with mental disabilities frequently need a temporary escape from
2 this kind of environment. However, the ASL rules do not permit individuals to
3 leave and then return during the night. (SUF 66.) Individuals with anxiety disorders
4 experience “severe discomfort with being confined to small spaces.” (Henwood
5 Decl., ¶43.) Paranoia associated with schizophrenia and bipolar disorder causes
6 individuals to experience “difficulty with not being able to control their
7 environment.” (*Id.*) Thus, “not being able to go outside after being admitted . . . is
8 likely to be difficult” and cause an individual to avoid sleeping at the ASL as a
9 result.” (*Id.*)

10 The congregate nature of the ASL and the inability to leave and return during
11 the night are likely to exacerbate mental health conditions and cause individuals to
12 be unable to tolerate or to avoid the ASL. (SUF 67.) This creates a downward
13 spiral: “putting people together who experience . . . symptoms of serious mental
14 health problems will create an even more unmanageable and anxiety-producing
15 environment for people with disabilities, that will in turn lead to further
16 deterioration of their mental health.” (Henwood Decl., ¶45.)

17 For those who nonetheless subject themselves to the ASL, the restrictive
18 rules and discretionary enforcement of those rules can be unbearable and harmful as
19 a result of their disabilities. The ASL has rules governing the conduct of those in
20 the shelter that are enforced by the staff, but there is no training curriculum for staff
21 in how to enforce shelter rules. (SUF 68-71.) Not all staff are trained in how to
22 interact with individuals with disabilities. (SUF 72.) Nonetheless, ASL staff are
23 empowered to eject or “exit” or even prematurely ban an individual at any time,
24 preventing them from sleeping at the ASL for the duration of the “sentence”— set
25 at the staff’s discretion. (SUF 73, 74.) Individuals who are “exited” or banned are
26 prohibited from eating food provided to other homeless individuals at the ASL by
27 volunteers. (SUF 75.) ASL staff do not uniformly apply the rules and there are no
28 written procedures that determine the circumstances in which application of the

1 rules will be waived. (SUF 76-77.) Finally, there is no formal complaint or appeals
2 mechanism for challenging an improper “exit” or “sentence.” (SUF 78.)

3 Individuals with serious mental health conditions, including severe
4 depression, bipolar disorder, schizophrenia, and anxiety disorder, experience
5 symptoms that make them substantially less able to consistently conform to
6 restrictive rules at the ASL. (SUF 79.) Both strict and inconsistent application of
7 rules can exacerbate symptoms like anxiety, paranoia, hyper-vigilance, and cause a
8 loss of motivation and energy. (Henwood Decl., ¶¶64-68.) Individuals with
9 disabling physical conditions are also likely to have greater difficulty complying
10 with ASL rules. (SUF 79.) Individuals with such disabilities are thus more likely
11 than those who do not have disabilities to be found to be violating ASL rules, be
12 forced to leave the ASL, and to be unable to tolerate the ASL. (SUF 80-81.)

13 The City designates certain individuals to be “locals.” SUF82. “Locals” can
14 stay at the ASL unless punished. Individuals who are not designated “local” are
15 eligible to sleep at the ASL unless it is at capacity. (SUF 83.) When the ASL
16 reaches capacity, which it frequently does, “non-locals” are only eligible through an
17 evening lottery procedure. (SUF 43.) The chance inherent in the lottery and the real
18 risk of being turned away is likely to make a person with severe depression less
19 likely to seek shelter; the lack of predictability is likely to cause those with
20 schizophrenia, post-traumatic stress disorder, and anxiety disorder to feel
21 persecuted, and increase anxiety, paranoia, hyper-vigilance, and obsessive thoughts.
22 (Henwood Decl., ¶¶49-51.) The restrictive access and lottery procedures are more
23 difficult for individuals with disabilities to cope with than individuals without
24 disabilities and are likely to exacerbate mental health conditions and cause
25 individuals to be unable to tolerate or to avoid the ASL. (SUF 85-86.)

26 The operation of the ASL is likely to harm individuals with disabilities in
27 violation of the ADA and RA. Plaintiffs Sestini, Newman, and Owens have been
28 repeatedly “exited” and Plaintiffs Newman and Sestini are now banned from the

1 ASL. UF46-48. The ASL is not *readily accessible* to individuals with disabilities,
2 as the law requires. 28 C.F.R. § 35.149, 151(a)(1). Its operation burdens individuals
3 with disabilities more than those without disabilities and serves as a barrier to
4 access the Program. *Crowder*, 81 F.3d at 1484-85. That some have stayed in the
5 ASL does not diminish the existence of these barriers or their illegality. *See Shotz*,
6 256 F.3d at 1080. Further, ASL access policies and procedure tend to screen out
7 individuals with disabilities, excluding them from participation. 28 C.F.R. §
8 35.130(b)(8). Yet it is clear that operating the ASL in a manner that permits private,
9 non-congregant sleeping; provides a cool-off area: allows individuals to freely
10 leave and return; eliminates the “local”/“non-local” distinction; reforms the lottery;
11 and adopts rules, regulations, policies, and procedures that reflect the rights of
12 homeless individuals to receive non-discriminatory, safe, humane, and respectful
13 services are among those modifications likely to reduce harm and discrimination
14 and make the shelter readily accessible. (*See, e.g.*, Henwood Decl., ¶¶118-122;
15 Robinson Decl., ¶¶78-98.)

16 **b. Discriminatory Conditions at the ASL**

17 The ASL provides only a thin mat on a hard floor to sleep, which is likely to
18 cause harm to individuals with physical disabilities, like the Plaintiffs. (SUF 63,
19 67.) As expert Manda Robinson states, those with disabling conditions frequently
20 experience chronic pain and limited range of motion and strength, making it
21 difficult to “effectively lower themselves to or raise themselves from the thin mat
22 on the floor.” (Robinson Decl., ¶¶25-26.) Thus, the absence of raised cots is likely
23 to cause individuals with disabilities pain and harm that is greater than anything
24 experienced by those without disabilities and render it far more difficult for people
25 with disabilities to benefit from the ASL. (SUF 65, 67.)

26 The ASL has only one bathroom designed to be accessible to individuals
27 with physical disabilities. (SUF 90.) The ASL limits the time during which
28 individuals can use the bathrooms when the ASL is open. (SUF 91.) Those limits

1 are likely to cause anxiety or paranoia for those with conditions such as
2 schizophrenia, anxiety disorder, and bipolar disorder and be much more difficult for
3 those with disabling mobility impairments. (SUF 92.) The ASL is closed during
4 much of the day; homeless individuals are not permitted into the ASL when it is
5 closed. (SUF 93-94.) Individuals who remain in the parking lot of the ASL during
6 the day are regularly told by LBPD that they will be ticketed if they remain there.
7 (SUF 96-97.) No toilets or potable water are made available in the parking lot.
8 (SUF 96-97.) Regular food and water are necessary to assist with both symptoms
9 and treatment of disabilities. (Robinson Decl., ¶59.) Limiting access to toilets,
10 potable water, or food in or near the shelter is likely to cause harm and deny access
11 to individuals with disabilities in manner greater than anything experienced by
12 individuals without disabilities. (SUF 98-99.)

13 The City provides storage at the ASL to designated “locals” but not to those
14 individuals who are “non-local”. (SUF 100.) Being forced to carry one’s
15 possessions can cause harm or exacerbate symptoms associated with mental and
16 physical disabilities. (SUF 101.) Individuals with disabling conditions that limit
17 range of motion and strength or that limit pulmonary capacity can be worsened by
18 such exertion. (Robinson Decl., ¶¶ 52-55.) Limiting the ability of individuals with
19 disabilities to store any property is thus likely to cause harm to individuals with
20 disabilities greater than anything experienced by individuals. (SUF 101-102.)

21 The conditions at the ASL violate the ADA and RA because they render the
22 shelter not *readily accessible* and burden individuals with disabilities more than
23 those without disabilities. 28 C.F.R. § 35.149, 151(a)(1); *Crowder*, 81 F.3d at 1484-
24 85. That some Plaintiffs have stayed in the ASL or used the bathrooms or storage
25 does not diminish this. *See Shotz*, 256 F.3d at 1080. But expert testimony shows
26 that making certain that bathrooms and potable water are available 24 hours a day
27 and making storage available to all homeless individuals are among those necessary
28 modifications likely to reduce harm and discrimination and make the shelter readily

1 accessible. (*See, e.g.*, Henwood Decl., ¶¶118-122; Robinson Decl., ¶¶78-98.)

2 **c. Discriminatory Transportation in the Program**

3 The van used by the ASL to transport individuals has bench seats and is not
4 equipped with ramps or lifts. (SUF 103.) Individuals with disabilities associated
5 with limited mobility and those who use mobility aids must either abstain from
6 using the van or be carried or assisted into the van without the use of a lift or ramp.
7 (SUF 104.) Having to move in ways that are difficult for those with disabling
8 physical conditions can cause pain and new injuries. (Robinson Decl., ¶67.) The
9 Putative Plaintiff Class includes individuals with such disabilities. (*See, e.g.*, Porto
10 Decl., ¶¶24-26.) Use of a van without a lift or a ramp is likely to cause new injuries
11 and/or exacerbate physical disabilities. (SUF 105.) This harm is likely to be greater
12 than anything experienced by those without disabilities and renders it far more
13 difficult for people with certain disabilities to access the City’s Program. (SUF106.)

14 The limited transportation burdens individuals with disabilities, is not *readily*
15 *accessible* and violates the ADA and RA. 28 C.F.R. § 35.149; *Crowder*, 81 F.3d at
16 1484-85. That some Plaintiffs have nonetheless been able to use the van. *See Shotz*,
17 256 F.3d at 1080; *Gorman*, 152 F.3d at 907. A ramp or lift for the ASL van is
18 among the necessary modifications to reduce harm and discrimination and make the
19 shelter readily accessible. (*See, e.g.*, Henwood Decl., ¶¶118-122; Robinson Decl.,
20 ¶¶78-98.)

21 **d. The Criminalization of Homelessness**

22 Threats of enforcement and enforcement of anti-sleeping and anti-camping
23 laws and ordinances against those who have failed to gain access to the ASL in the
24 lottery, been “exited” or banned from the ASL, or otherwise have no legal place to
25 sleep violates the ADA and RA and denies individuals with disabilities the benefit
26 of safety and security in interactions with the LBPD. (*See* SUF 4.) Individuals with
27 disabilities find the Program to be harmful and inaccessible – often leading them to
28 avoid the ASL. If they attempt nonetheless to risk health and well-being in the

1 ASL, they risk losing the lottery, being “exited,” or being banned for life.

2 Individuals manifesting severe symptoms of psychiatric conditions are least
3 likely to be able to leave the ASL parking lot or find a legal place to sleep when
4 turned away from the ASL, putting them at greater risk of citation. (SUF 107.)
5 exertion, like walking with all of one’s possessions, when searching for a place to
6 sleep is more difficult for those with physical disabilities and exacerbate symptoms.
7 (SUF 101.)

8 Being under constant threat of citation, and actually being cited by police, is
9 likely to worsen symptoms associated with mental disabilities, including
10 schizophrenia, anxiety disorder, and severe depression, and can exacerbating
11 “hyper-vigilance, anxiety, paranoia, lethargy, low self-worth and irritability.”
12 (Henwood Decl., ¶80; SUF 109.) Sleep deprivation that comes from worrying about
13 the threat of citation and being awakened by LBPD during the night is likely to
14 exacerbate the symptoms associated with such conditions. SUF109. The
15 criminalization of homelessness is likely to have long-lasting and serious
16 consequences for those with physical and mental disabilities more than those
17 without disabilities. (SUF 109-110.)

18 Failure to accommodate sleeping or resting in public, which is unavoidable
19 due to the inaccessibility of the Program, violates the ADA and RA. The City has
20 cited Plaintiff Newman for sleeping in public after being banned for life from the
21 ASL and Plaintiff Sestini after he found the ASL inaccessible. (SUF 111-112.)
22 Treatment by LBPD has harmed certain individual Plaintiffs and members of the
23 Putative Plaintiff Class. (SUF 113.) LBPD action under the Program makes
24 inaccessible the safe and secure treatment by law enforcement that remains
25 otherwise accessible to the general public. *See Crowder*, 81 F.3d at 1484-85. This
26 further renders the Program not *readily accessible* to individuals with disabilities.
27 28 C.F.R. § 35.149, 151(a)(1). The harmful failure to accommodate such
28 individuals with disabilities further establishes a violation of the ADA and RA. *See*,

1 *e.g.*, *Gorman*, 152 F.3d at 907; *McGary*, 386 F.3d at 1268-70 (construing failure to
2 provide accommodation in the enforcement of municipal nuisance ordinance as a
3 denial of a benefit). Plaintiffs’ experts have established that ceasing enforcement, in
4 particular against homeless individuals with disabilities is among those necessary
5 modifications likely to reduce harm and discrimination and make the shelter readily
6 accessible. (*See, e.g.*, Henwood Decl., ¶¶118-122; Robinson Decl., ¶¶78-98.)

7 **4. The City Must Make Their Program Readily Accessible**

8 Plaintiffs and Putative Plaintiff Class are therefore entitled to a readily
9 accessible the Program as a matter of law; Laguna Beach must remedy its violations
10 of the ADA and RA. *See* 28 C.F.R. § 35.149, 151. Courts have construed the
11 remedial obligation to ensure accessibility broadly. *See, e.g., Willits v. City of Los*
12 *Angeles*, 925 F.Supp.2d 1089, 1094-95 (2013). Plaintiffs’ experts have provided a
13 list of reasonable modifications necessary that would reduce harm and ensure that
14 the Program is readily accessible, along with examples of emergency shelters which
15 are run in an accessible manner. (Henwood Decl., ¶¶118-122; Robinson Decl.,
16 ¶¶78-98.) These include a comprehensive ADA assessment of the City’s Program
17 and appointing an ADA coordinator and providing adequate training in any and
18 all improvements made and in evidence-based best practices for interacting
19 with individuals with disabilities. (SUF 114, 115.) Plaintiffs have also identified
20 that adopting a “Housing First” approach that prioritizes providing permanent
21 housing as quickly as possible and providing supportive services is the most
22 effective way to eliminate the legal violations identified in Sections (3). (SUF 116.)

23 **V. CONCLUSION**

24 As such, the Court should grant Plaintiffs’ Motion for Summary Judgment,
25 and order that Defendants cease enforcement of all anti-camping and anti-sleeping
26 laws against disabled, homeless individuals at night in public. The Court should
27 also order that Judgment on the Eighth Amendment, Americans with Disabilities
28

