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5 IN THE UNITED STATES DISTRICT COURT
6
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
8

9 CLARK SULLIVAN, JAMES BLAIR, TOAN
10 NGUYEN, ARIKA MILES, and ADAM
BREDENBERG,

No. C 17-06051 WHA

11 Plaintiffs,

**ORDER RE MOTION FOR
PRELIMINARY INJUNCTION**

12 v.

13 CITY OF BERKELEY, and SAN FRANCISCO
BAY AREA RAPID TRANSIT DISTRICT,

14 Defendants.
15 _____/

16 **INTRODUCTION**

17 In this action for violation of constitutional rights, plaintiffs move for a preliminary
18 injunction. For the reasons herein, the motion is **DENIED**.

19 **STATEMENT**

20 Plaintiffs are members of an “intentional community of homeless Berkeley residents” that
21 formed in 2015, which refers to itself as First They Came for the Homeless. The group, which
22 consists of both men and women, camps together in various areas around Berkeley, most recently on
23 a parcel of land in Berkeley on the west side of the BART tracks near the intersection of Adeline
24 Street, Stanford Street, and Martin Luther King Jr. Way. This area is sometimes referred to as the
25 “HERE/THERE” encampment due to a large statue on the site bearing those words (Amd. Compl. ¶¶
26 13–17; Dkt. Nos. 26; 37 Exh. K).

27 Since forming, the group has been removed from a number of locations. These removals
28 have been carried out in the early morning by Berkeley Police, who have seized and thrown away
property that is left behind after the removal. Members of the group have been cited, arrested, or

1 jailed for sleeping in public (Amd. Compl. ¶¶ 13–17, 44, 49, 54–62; Dkt. Nos. 23 at 3 n.1; 26; 37
2 Exh. K).

3 The group has been living on the land adjacent to the BART tracks on the Berkeley/Oakland
4 border for approximately the past ten months, although numbers have fluctuated with some new
5 members arriving and others leaving for permanent housing or shelters. The amended complaint
6 alleges that approximately twenty to thirty people stay at the encampment at any given time. The
7 group has received some support from community groups such as Friends of Adeline, who have
8 assisted with the purchase of necessary items for the encampment including a port-a-potty and hand
9 washing station, and helped group members remove trash from the encampment (Amd. Compl. ¶¶
10 19, 65–66, 87; Dkt. Nos. 23 at 2–3; 26 ¶¶ 1, 23).

11 The parcel occupied since December 2016 belongs to defendant San Francisco Bay Area
12 Rapid Transit District (“BART”), which is a municipal utility district. It is one of several parcels
13 (including a parcel on the east side of the BART tracks) that is subject to a sharing agreement with
14 defendant the City of Berkeley pursuant to which Berkeley assumed maintenance and landscaping
15 duties of the parcels, though BART has retained ownership. Plaintiffs never sought or received
16 permission from BART to occupy this land (Dkt. Nos. 52 ¶¶ 6–7, 9, Exh. D; 53 ¶¶ 5, 8–9, 11, Exhs.
17 B, C; Cal. Pub. Util. Code § 28500 *et seq.*).¹

18 BART maintains written procedures regarding how to deal with incidents of trespass on
19 BART property. BART performs a site inspection in the area of the alleged trespass to confirm
20 whether it is occurring on BART property. In the event that BART determines people are
21 trespassing on its property (either by leaving personal items there or being physically present on the
22 land), BART posts a sign notifying them of the trespass and informing the trespassers that they will
23 have at least 72 hours within which to remove their property and vacate the area. If the property is
24 not removed in the allotted time, BART physically removes the property and posts a notice at the
25

26 ¹ Another encampment also sprung up on the east side of the BART tracks at the intersection of 63rd Street and
27 Martin Luther King Jr. Way some time after the plaintiffs’ encampment began to occupy the area on the west side of the
28 tracks. The east side encampment is not affiliated with the west side encampment, and was removed on October 25, after
having been given 72 hours notice from BART police. There were numerous complaints from community members regarding
illegal conduct at the encampment, including violence, drug use, and public sexual acts (*see* Dkt. No. 52 at 3–4, Exh. A).
Furthermore, there was a death at the west side encampment in October, believed to be from a drug overdose.

1 site indicating the date it was removed and contact information for claiming the property. BART
2 documents these incidents, including by taking photographs of the site and creating a log listing the
3 details of interactions with third parties regarding the trespass, and the date that any personal
4 property was removed from the site (Dkt. No. 52 Exh. B).

5 On October 21 at approximately 4:00 p.m., BART Police arrived at the encampment and
6 posted a trespass notice, which stated (Amd. Compl. at ¶ 71; Dkt. No. 37 Exh. B):

7 Notice of Trespass. To all persons using these premises: You are
8 trespassing on private property in violation of California Penal Code
9 602(m) and are hereby ordered to vacate the premises and
PERMANENTLY remove all of your property. All items not removed
within 72 hours of the date of this notice will be removed by BART.

10 BART police also posted a second notice at the encampment informing residents that they
11 were violating California Penal Code Section 647(e), commanding them to leave immediately, and
12 providing contact information for Hub, a Berkeley program that assists the homeless, as well as
13 Dorothy Day House, which provides free meals (Dkt. Nos. 37 Exh. C; 46 ¶ 6).

14 On October 23, three pro se plaintiffs, Clark Sullivan, James Blair, and Toan Nguyen filed
15 this lawsuit, and moved for a temporary restraining order to enjoin their removal — initially
16 scheduled to take place on October 24 — from the west side encampment (Dkt. Nos. 1, 2).

17 A hearing on the TRO was set for October 24. At the hearing, attorneys Dan Siegel, and
18 Emilyrose Johns appeared on behalf of our plaintiffs. The court temporarily enjoined the removal of
19 the west side encampment in order to give counsel for both plaintiffs and defendants an opportunity
20 to brief the issues, and set a new hearing for October 31, candidly acknowledging it was doing so
21 without a showing of probability of success on the merits or even a showing that there were serious
22 questions going to the merits (Dkt. Nos. 11, 13).

23 On October 25, BART police, with the assistance of Berkeley police, removed the
24 encampment located on the east side of the BART tracks, the members of which had no part in this
25 suit. There were no altercations or arrests during the removal, and personal property that was left
26 behind was collected and moved to a storage facility. BART police posted notices explaining where
27 personal items would be stored and how to contact the facility. The notice explained that unattended
28 property would be held by the City of Berkeley for 14 days unless an item “appears from visual

1 observation to have a resale value of \$100 or more, in which case it shall be held for 90 days.” The
2 notice further provided that “[i]tems that are usable for shelter, such as tents, tarps, and sleeping
3 bags shall be retained for 45 days regardless of apparent value” (Dkt. Nos. 37 ¶¶ 1–5; 49 ¶¶ 5–6,
4 Exh. A).

5 On October 26, plaintiffs, now represented by counsel, filed an amended complaint against
6 defendants Berkeley and BART, which alleges violations of the Americans With Disabilities Act, as
7 well as Section 1983 violations based upon violations of the Fourth, Eighth, and Fourteenth
8 Amendments (Amd. Compl. at 14–16). The amended complaint seeks relief on behalf of a putative
9 class of individuals of present and future residents of the First They Came for The Homeless
10 encampment (*id.* at 12). Also on October 26, plaintiffs filed a motion for a preliminary injunction
11 based upon alleged Fourth, Eighth, and Fourteenth Amendment violations. They seek an order
12 prohibiting defendants from removing them from their current location or seizing their property
13 (Dkt. No. 23).

14 Defendants Berkeley and BART filed separate oppositions. This order follows full briefing
15 and oral argument.

16 ANALYSIS

17 To succeed on a motion for preliminary injunction, plaintiffs must show that (1) they are
18 likely to succeed on the merits of their claim; (2) they will suffer irreparable harm in the absence of
19 relief; (3) the balance of hardships tips in their favor; and (4) a preliminary injunction is in the public
20 interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The four-part test is also
21 satisfied if “serious questions going to the merits [are] raised and the balance of hardships tips
22 sharply in the plaintiff’s favor” so long as there is also a likelihood of irreparable harm and an
23 injunction would be in the public’s interest. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
24 1135 (9th Cir. 2011) (citations and quotations omitted).

25 Plaintiffs argue that they have met all the prerequisites set forth in *Winter* and a preliminary
26 injunction is the only way to protect them from violations of the Fourth, Fourteenth, and Eighth
27 Amendments of the United States Constitution.

28 This order, however, holds that our plaintiffs have failed to show that they are likely to

succeed, or that they have raised serious questions going to the merits. Moreover, plaintiffs have not shown that the balance of equities tips in their favor. Accordingly, their preliminary injunction motion must be **DENIED**.

1. NO PROVISIONAL RELIEF AGAINST BERKELEY.

Here, plaintiffs' motion seeks to enjoin their removal from BART property pursuant to BART policy and decision making (*see* Br. at 3–5). It is not enough that Berkeley's police force may provide "assistance" to BART, as alleged in the amended complaint, to subject the City to a preliminary injunction here (*see* Amd. Compl. ¶¶ 24, 77). Nor is it sufficient that Berkeley has been involved in the removal of *other* homeless encampments not at issue on this motion. The present dispute is between plaintiffs and BART, the party seeking to remove plaintiffs from its land. Accordingly, no provisional relief can be granted against Berkeley on the present record.

Even analyzed under the framework for a preliminary injunction, however, the motion for a preliminary injunction against Berkeley regarding removal from BART property would fail, as set forth below.

2. NO LIKELIHOOD OF SUCCESS OR SERIOUS QUESTIONS GOING TO THE MERITS.

A. Eighth Amendment Claim.

The Eighth Amendment prohibits the imposition of cruel and unusual punishment. While generally applied to conditions of post-conviction incarceration, it also "imposes substantive limits on what can be made criminal and punished as such," though this application should be employed "sparingly." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). In *Robinson v. California*, 370 U.S. 660, 661 (1962), for example, the Supreme Court held that a law penalizing the very status of being addicted to drugs amounted to cruel and unusual punishment. It reasoned that laws subjecting people to punishment, not for a particular action, but for their condition of being, were unacceptable under the Eighth Amendment. *Id.* at 678. Plaintiffs urge that the same analysis should apply here.

BART's actions, however, do not amount to the criminalization of plaintiffs' status as homeless. Rather, BART has reasonably invoked California's trespass statute, which prohibits people from "entering and occupying real property . . . without the consent of the owner" to prevent people from camping on its land. Cal. Pen. Code § 602(m). Indeed, the right to be free from

1 trespass is one of the oldest, and most universally recognized features of the law. *See Ben*
2 Depoorter, Fair Trespass, 111 Colum. L. Rev. 1090, 1095 (2011). In the absence of such protection,
3 anyone would be free to live on any property. Plaintiffs have failed to show why, *under these*
4 *circumstances*, they should not be subject to California’s trespass laws.²

5 The caselaw plaintiffs cite is distinguishable. As an initial matter, each decision relied upon
6 by plaintiffs involved a city’s application of an ordinance prohibiting homeless people from camping
7 or sleeping *on city property*. *Bell v. City of Boise*, 709 F.3d 890 (9th Cir. 2013); *Jones v. City of Los*
8 *Angeles*, 444 F.3d 1118 (9th Cir. 2006) *vacated by settlement*, 505 F.3d 1006 (9th Cir. 2007);
9 *Cobine v. City of Eureka*, 250 F. Supp. 3d 423 (N.D. Cal. 2017) (Judge Jeffrey White); *Pottinger v.*
10 *City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992) (Judge Carl Atkins). Here, in contrast, we deal
11 with a transit district. *See* Cal. Pub. Util. Code § 28500 *et seq.* This is an important distinction
12 because, unlike a city, a transit district is not as equipped to remedy the problems associated with
13 homelessness. Clearly, BART is not equipped to provide shelter or housing aid. Requiring that it
14 nevertheless host a homeless encampment on its property would far exceed its statutory
15 authorization.

16 Indeed, recognizing this very incongruity, the court in *Veterans for Peace Greater Seattle,*
17 *Chapter 92 v. City of Seattle*, No. C09-1032 RSM, 2009 WL 2243796, at *5 (W.D. Wash. July 24,

18 2009) (Judge Ricardo Martinez), denied homeless plaintiffs’ motion for a preliminary injunction.
19 There, the plaintiffs had set up a camp on Washington State Department of Transportation
20 (“WSDOT”) property. In finding that they were not likely to succeed in their suit, the court held that
21 “WSDOT is obviously unequipped to manage or otherwise maintain a homeless encampment on its
22 property. Indeed, Plaintiffs repeatedly argue that it is the City’s responsibility to provide adequate
23 shelter for its homeless citizens, and simultaneously fail to show how the WSDOT is responsible for
24 providing adequate housing.” So too here.

25 Moreover, the other decisions cited by plaintiffs have other important factual distinctions.

27 ² BART also invoked Section 647(e) of California’s Penal Code, which likewise prohibits plaintiffs’ from camping
28 on its land. That statute provides that “lodg[ing] in any building, structure, vehicle, or place, whether public or private,
without permission of the owners or person entitled to the possession or in control of it” constitutes disorderly conduct, a
misdemeanor.

1 The injunctions issued in *Jones* and *Pottinger* dealt not with a single instance of removal from
2 property, but widespread policies, and far-reaching ordinances, by which Los Angeles and Miami
3 wholly deprived homeless residents of any place to live or perform necessary daily activities. *See*
4 *Jones*, 444 F.3d at 1132 (enjoining ordinance that punished conduct which was “an unavoidable
5 consequence of being human and homeless . . . in the City of Los Angeles”); *Pottinger*, 810 F. Supp.
6 at 1553 (enjoining “custom, practice and policy of arresting, harassing and otherwise interfering
7 with homeless people for engaging in basic activities of daily life . . . in the public places where they
8 are forced to live”). We do not have a remotely comparable record here.

9 There are other vital distinctions. In *Jones*, 444 F.3d at 1132, for example, our court of
10 appeals upheld a “narrowly tailored” injunction against a Los Angeles ordinance that prohibited
11 sitting, lying or sleeping “in or upon any street, sidewalk or other public way” at all times anywhere
12 in the city. In doing so, it observed that its holding was “a limited one.” *Id.* at 1137. Among other
13 things, it noted that it was *not* confronted with a ordinance that criminalized camping, or one that
14 prohibited lying, sitting, or sleeping only at certain times, or in certain places. *Id.* at 1138. Instead,
15 it was confronted with a total ban on lying or sleeping anywhere within city limits at any time. *Ibid.*
16 Against this backdrop, it found that the “narrowly tailored” injunction, which permitted plaintiffs to
17 sleep “in a small area of the city during nighttime hours” was appropriate. *Id.* at 1127, 1138. The
18 ban in *Jones* was far more stringent and pervasive than the removal at stake here.³

19 *Cobine v. City of Eureka*, 250 F. Supp. 3d 423 (N.D. Cal. 2017) (Judge Jeffrey White) is
20 likewise inapplicable. *Cobine* addressed a challenge in a different procedural posture — on a
21 motion to dismiss — governed by a far different legal standard. It did not grant the “extraordinary
22 remedy” of a preliminary injunction that plaintiffs seek here. *See Winter*, 555 U.S. at 22. *Cobine*
23 merely held that “a determination on the viability of an Eighth Amendment challenge to [the
24 ordinance was] premature.” *Cobine*, 250 F. Supp. at 432. This decision does not support our
25 plaintiffs position that an injunction is warranted on the record provided.

26
27 ³ *Jones* is not binding authority since the decision was later vacated by a settlement, but is nevertheless illustrative
28 of some of the issues in, and their distinction from the instant action. *See Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218
(E.D. Cal. 2009) (Judge Morrison England, Jr.) (“[T]hough the *Jones* opinion is informative, it is not binding, and the Court
will limit the weight given the decision accordingly.”).

1 Here we are confronted with circumstances different from any of the decisions cited by
2 plaintiffs. Plaintiffs want to maintain a city within a city, to reside and to camp, day and night, on
3 BART's property over its objection. Plaintiffs do not seek the narrow dispensation from a total ban
4 on any sleeping, lying, or sitting as in *Jones*. The relief plaintiffs now seek — court approval to
5 settle indefinitely on the land of a municipal transportation district — would be unprecedented.
6 Under these circumstances, they have not shown a likelihood of success or raised serious questions
7 going to the merits of their Eighth Amendment claim.

8 **B. Fourth and Fourteenth Amendment Claims.**

9 Plaintiffs further contend that there is an imminent threat that BART will seize their property
10 without affording them an adequate opportunity to object to the seizure in violation of the Fourth
11 Amendment's prohibition on unreasonable seizures and the Fourteenth Amendment's due process
12 clause.

13 Plaintiffs rely exclusively on *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012).
14 There, our court of appeals declined to overrule a preliminary injunction prohibiting Los Angeles
15 police from seizing property absent an objectively reasonable belief that the property had been
16 abandoned and without providing plaintiffs notice or an opportunity to object. This injunction
17 restrained a police department policy of seizing and destroying homeless persons' property when it
18 was even momentarily left on the street or sidewalk while homeless people stepped away "to
19 perform necessary tasks such as showering, eating, using restrooms, or attending court." *Id.* at
20 1025–26. Finding that the district court properly balanced the invasion of the plaintiffs' possessory
21 interest in their property against the city's need to seize it, our court of appeals found that the
22 preliminary injunction was within the district court's discretion. *Ibid.* It further held that the
23 preliminary injunction's notice requirement, and a requirement that Los Angeles maintain any seized
24 property in a secure location for a least 90 days before destroying it, properly addressed due process
25 concerns. *Id.* at 1024, 1032.

26 We deal here with a far different situation. *First*, our plaintiffs are seeking to prevent a
27 municipal utility from removing their property from BART, not city land. *Second*, unlike the policy
28 under attack in *Lavan*, our plaintiffs have been given notice that their property will be seized and 72

1 hours to make arrangements to move their property. *Third*, BART maintains a policy of storing
2 personal property that is taken after an encampment is removed and providing notice of the
3 property's location and an opportunity to recover the property (*see* Dkt. No. 52 Exh. B). Indeed,
4 BART followed this very policy when it removed the encampment located on the east side of the
5 tracks. BART posted a removal notice informing the residents of that encampment that (Dkt. No. 37
6 at 5):

7 [u]nattended property shall be held in safe-keeping by the City of
8 Berkeley for 14 days, unless it appears to have a resale value of \$100
9 or more, in which case it shall be held for 90 days. Items that are
10 usable for shelter, such as tents, traps, and sleeping bags, shall be
11 retained for 45 days regardless of apparent value. Item[s] shall be
12 secured in a locked, covered, storage container.

13 The notice further provided the location at which the items would be stored, and a phone number to
14 contact the storage location and claim items.

15 This process is not only distinct from the Los Angeles practice enjoined in *Lavan*, but
16 approximately mirrors the requirements imposed by that injunction. Plaintiffs here have been given
17 an opportunity to remove their personal effects from BART property, and, pursuant to BART policy,
18 will be notified of the location of any seized property, which will be stored from anywhere between
19 14 and 90 days.

20 Under these facts, plaintiffs have not shown a likelihood that they will succeed on the merits
21 of their Fourth and Fourteenth Amendment claims, or even raised serious questions going to the
22 merits.

23 **3. BALANCE OF EQUITIES ANALYSIS.**

24 While the foregoing is dispositive, this order further holds that the balance of equities favors
25 defendants. To force BART to host the encampment would open BART to potential liability for
26 failing to police the activities in the encampment. In the other encampment nearby, a drug overdose
27 occurred and a crazed man attacked others with a hammer. Does BART have a duty to provide
28 police services to safeguard the encampments? Victims of hammer attacks might so allege. Parents
of overdose victims might so allege. This alone prevents the balance of equities from tipping
sharply in favor of plaintiffs, indeed, prevents the balance of equities from tipping in favor of
plaintiffs at all.

CONCLUSION


While sympathetic to the plight of plaintiffs, and the problem of homelessness, which is ever more severe, the Court must be faithful to the law. The sad fact is that plaintiffs cannot meet the standard required for the drastic relief sought. The relief requested is far broader than any which has been previously approved.

Although no preliminary injunction will issue, this is not yet the end of plaintiffs' entire case. As stated on the record, all parties may, and should, promptly begin discovery.

BART must give fresh notice of eviction, and permit plaintiffs a minimum of 72 hours to move from the property. This will also give plaintiffs an opportunity to seek a writ from our court of appeals if they choose to do so. Plaintiffs' motion for a preliminary injunction is otherwise **DENIED**.

IT IS SO ORDERED.

Dated: October 31, 2017.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE