

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, WHEELING DIVISION**

HEATHER CORN,	)	
HOUSE OF HAGAR CATHOLIC	)	
WORKER HOUSE,	)	
Plaintiffs on behalf of themselves	)	
and those similarly situated,	)	Civil Action No. _____
	)	
v.	)	Hon. _____
	)	
CITY OF WHEELING,	)	
ROBERT HERRON,	)	
Defendants.	)	
	)	

**PLAINTIFFS’ VERIFIED COMPLAINT SEEKING DECLARATORY AND  
INJUNCTIVE RELIEF**

Wheeling, West Virginia is a community of approximately twenty-six thousand people. Every day each of those twenty-six thousand residents has the same basic human needs; everyone in the City of Wheeling eats food, drinks water, and sleeps. In passing the habitation ban at issue in this lawsuit, the City of Wheeling has made those unavoidable trappings of human existence illegal for at least two hundred of its residents – those who are homeless. This action on the part of the Defendants violates the protections that are ensured through the Constitution of the United States and the West Virginia Constitution. Plaintiffs respectfully seek declaratory and injunctive relief through this Court.

**PARTIES**

- 1. Plaintiff Heather Marie Corn is a forty-five-year-old woman who resides in the City of Wheeling. Plaintiff Corn is homeless, and therefore will be subjected to the penalties of the City of Wheeling’s Habitation Ban.
  
- 2. Plaintiff House of Hagar Catholic Worker House (hereinafter “House of Hagar”) is an intentional faith community in Wheeling which lives out the corporal and spiritual works of mercy by being in community with marginalized and suffering neighbors. House of Hagar asserts

that it has *jus tertii* standing to make claims regarding the constitutional rights of third parties pursuant to *Kanawha Cnty. Pub. Libr. Bd. v. Bd. of Educ. of Cty. of Kanawha*, 231 W. Va. 386, 398, 745 S.E.2d 424, 436 (2013).

3. Defendant City of Wheeling is a municipality which, through a vote of its City Council, passed the habitation ban at issue in this lawsuit. Defendant City of Wheeling has a listed mailing address of 1500 Chapline Street, Wheeling, West Virginia.

4. Defendant Robert Herron is the City Manager of Wheeling, West Virginia. The habitation ban tasks the City Manager with the responsibility of issuing permits and designating locations in which camping is permitted in Wheeling. Defendant Herron is being named in his official capacity related to his role of City Manager.

#### **JURISDICTION**

5. Jurisdiction for Plaintiffs' First, Third, Fifth, Sixth, and Eighth Claims is proper pursuant to 28 U.S.C. §1331.

6. Jurisdiction for Second, Fourth, and Seventh Claims is proper pursuant to 28 U.S.C §1367(a).

7. Venue is proper in this forum pursuant to 28 U.S.C §1391(b)(2) as the acts giving rise to Plaintiffs' claims arose in this judicial district.

#### **STATEMENT OF FACTS**

8. The City of Wheeling is a municipality located in West Virginia's Northern Panhandle that is home to over twenty-six thousand people.

9. On information and belief, of those twenty-six thousand people, at least two hundred residents are homeless. It is likely that the number of homeless residents in Wheeling is much higher than the two hundred identified by service providers.

10. There are four shelters in the City of Wheeling that provide refuge for those experiencing homelessness – Winter Freeze/Life Hub (hereinafter referred to as “Winter Freeze”),

YWCA, Northwood, and the Salvation Army. On information and belief, between these four institutions there is a maximum of one hundred and sixteen total beds available in shelters in Wheeling.

11. A number of these shelters have significant barriers to entry, and not everyone qualifies for their services. The YWCA has eighteen beds that are limited to individuals who have experienced domestic violence or human trafficking. Other shelters require identification, require that an individual not be suffering from untreated mental illness, or restrict access based on previous criminal history.

12. Wheeling has one low-barrier shelter, Winter Freeze. Winter Freeze currently has a capacity of forty beds, nine of which are available for women.

13. Winter Freeze is Wheeling's only low-barrier shelter, and for those who are experiencing homelessness and who do not have identification, Winter Freeze is their only option if they would like to sleep indoors.

14. Winter Freeze, as its name implies, is only open during the winter months, and is set to close for the year on March 15, 2024. After Winter Freeze closes, the number of available shelter beds in Wheeling will decrease dramatically.

15. The Northwood shelter is a high-barrier shelter, and those who would like to stay there need to have identification, not have a history of violent crime, and cannot have an active substance use disorder. Northwood has twenty-three total beds, eight of which are reserved for women.

16. The nine beds at Winter Freeze, eight beds at Northwood, and eighteen beds at the YWCA are the only beds available for women experiencing homelessness. If there are more than thirty-five women experiencing homelessness in Wheeling there would not be enough beds to

house them in shelters, even setting aside barriers to access. After Winter Freeze closes in March, there will only be twenty-six female beds available.

17. The only shelter in Wheeling that permits a parent to come with their child is the YWCA; if more than eighteen women with children are homeless, there would not be enough beds to house them in shelters in Wheeling.

18. If a person is homeless and has a history of assault or has been convicted of a violent crime, the only shelter they would be able to stay at is Winter Freeze. After Winter Freeze reaches capacity each night, they do not have an indoor place to sleep. After Winter Freeze closes, these people will not have a shelter whose services they qualify for.

19. If every shelter bed in Wheeling had no barriers to access, and every person experiencing homelessness in Wheeling had the means to seek out those services, there would still not be enough beds for every homeless person in Wheeling to have nighttime shelter. This insufficiency is exacerbated by the requirements for shelter access.

20. These barriers, along with a number of others, disqualify a significant portion of Wheeling's homeless population from accessing beds in shelters.

21. Given the already insufficient number of beds and the impact of the restrictions which shelters impose, there are fewer beds in homeless shelters than there are people experiencing homelessness in Wheeling.

22. As a result, every day in Wheeling there are members of the community for whom indoor shelter is not available.

23. Prior to January 1, 2024, these homeless community members could engage in the unavoidable acts associated with being human – including eating and sleeping – on public property in the City of Wheeling. For many, the act of living outdoors in public communicates an important

message – that homelessness exists, impacts real people, and causes unnecessary hardship and suffering.

24. On January 1, 2024, Wheeling, West Virginia, Municipal Code § 533.18 (hereinafter referred to as the “habitation ban”) went into effect, restricting the right of these community members to exist in Wheeling.

*The Habitation Ban*

25. On October 31, 2023, the City of Wheeling, through its City Council, voted to pass the habitation ban at issue in this case.

26. The text of the ban reads:

**Section I. 533.18 Prohibited Camping on Public Property**

- a.) Definitions: “Camping” shall mean setting up, remaining in, or at property for the purpose of sleeping, making preparations to sleep, storing personal property, and/or performing cooking activities for habitation purposes.
- b.) Camping Prohibited: Except as may be permitted by the City Manager or upon location(s) specifically identified per subsection (e) below, no person shall engage in camping in or upon any street, sidewalk, alley, easement, nature preserve, conservation park, parking lots, public grounds, public right of way or under any bridge or viaduct.
- c.) Permits: The City Manager may issue permits, including but not limited to, persons or entities who seek to engage in camping for historical, cultural, or educational purposes and shall be limited to time reasonably necessary to accomplish such purposes.
- d.) Penalty: Any person who violates any provision of this Section shall be fined not less than Ten Dollars (\$10.00) or more than Five Hundred Dollars (\$500.00), Community Service may be imposed in lieu of monetary fines.
- e.) Exceptions for Approved Camping Locations: The City Manager may designate one or more specific locations within City limits that are exempt from the prohibitions and penalties of Section 533.18 provided, however, that any such location(s) shall be subject to such rules and regulations as set forth by the City Manager.

**Section II.** All other sections and subsections of Article 533 shall remain in full force and effect.

27. At the time of filing, the City Manager had not made any exceptions to the habitation ban as permitted by 533.18(e).

28. On information and belief, at the time of filing, the City Manager had not issued any permits as permitted by 533.18(c)

*Plaintiff Heather Marie Corn*

29. Plaintiff Heather Marie Corn (hereinafter referred to as “Heather”) is a forty-five-year-old woman who resides in the City of Wheeling.

30. Heather has resided in Wheeling since March 2022. Heather is homeless, and therefore does not have a physical address within the City of Wheeling.

31. Heather had a job and an apartment in Wheeling, but lost both after she was the victim of a theft. Due to the theft, she was evicted, being unable to pay her rent and unable to continue to hold down her job after becoming homeless.

32. Heather has repeatedly attempted to stay at indoor shelters within the City, with varying levels of success. Throughout Heather’s time in Wheeling, there have been a number of times in which she was not able to secure a bed in a shelter because of limited availability.

33. As a result, Heather has regularly had to sleep and eat outside. At the time of filing, Heather had been routinely living outside in an encampment within the City of Wheeling.

34. On January 3<sup>rd</sup> at approximately 9:00 a.m. bulldozers arrived at Heather’s encampment. On information and belief, the individuals tasked with destroying the camp called out to see if there was anyone inside of Heather’s tent.

35. Heather’s partner was sleeping in the tent at the time, and called out to inform the bulldozer operators that there was someone inside the encampment. He then called Heather to return to her camp.

36. After returning to her camp, Heather was confronted by City workers and by the police concerning her encampment. Heather called a number of advocacy organizations, including Plaintiff House of Hagar, who came to the site of her encampment to help.

37. Heather was told by a police officer at the scene “The City Manager called. You have four hours, right now, to get all your stuff out. Anything that’s left behind gets thrown out and you’re down here bugging them you’ll probably get arrested, alright? Four hours from right now.”

38. Four hours was not enough time for Heather to gather all of her belongings and move them to another location. Even if it were enough time, given the habitation ban there was no legal location for Heather to move her items to.

39. Heather and the advocates who had assembled to help presented representatives of the City with a copy of this Court’s prior order regarding the City of Wheeling’s destruction of homeless encampments in 2020, in the case styled 5:20-cv-192. The City of Wheeling, through its agents, first maintained that they did not need to comply with the Order, but ultimately agreed to provide Heather with two weeks’ notice, and to post notices at other encampments which they planned to destroy.

40. On information and belief, a number of such notices have been placed around Wheeling at locations where people experiencing homelessness regularly stay.

41. When the September 16, 2020, Court Order was entered, Wheeling’s habitation ban had not yet been passed, and a person who received notice that their encampment was to be cleared was able to move to a different location. That is no longer the case. Because of Defendants’ unconstitutional habitation ban, there is no lawful outdoor space where Heather can sleep, cook, or store her items.

42. Heather now faces a paradox - she needs to sleep, and yet there are no places to do so outdoors in Wheeling and she is not consistently able to secure a bed in a shelter because of their limited availability.

43. Heather needs to prepare and eat food, and yet she is not permitted to do so outdoors, notwithstanding the fact that the availability of resources is significantly decreased during the day. As a result, the number of people who will need to cook and eat outside is substantially higher than the already consistent number of people who will need to sleep outside each night.

44. As a result of her homelessness, Heather is not meaningfully able to comply with Defendants' habitation ban.

*House of Hagar*

45. House of Hagar is an intentional faith community in Wheeling which lives out the corporal and spiritual works of mercy by being in community with marginalized and suffering neighbors.

46. The corporal works of mercy in the Catholic faith include feeding the hungry, giving drink to the thirsty, to clothe the naked, to harbor the harborless, to visit the sick, to ransom the captive, and to bury the dead.

47. The individuals who make up the community of the Hagar House practice their faith by living these values with respect to their neighbors who are suffering – including those who are unhoused.

48. House of Hagar has assisted the unhoused in advocating for their rights, including providing support to Plaintiff Heather Corn when the Defendants threatened her encampment with destruction.

49. House of Hagar will be materially negatively impacted by the habitation ban. It will have to provide more assistance to unsheltered neighbors who need help moving their property from location to location, it will need to have more availability to provide crisis intervention, and



it will likely see more guests ask to use their home for basic human needs such as using the restroom.

50. House of Hagar pays for their neighbors to get copies of documents, such as birth certificates and other forms of identification, and also will help materially if their neighbors need school supplies or other resources. If these items are routinely destroyed by the Defendants, the House of Hagar will need to spend more money and time to furnish members of the community with these resources.

51. House of Hagar is an association of community members of faith who have a close relationship to Wheeling's homeless population. They invite them into their home as guests, help them as they would help a friend or family member who is struggling, and live their faith through their relationship to the most marginalized in their community.

#### *Enforcement of the Ban*

52. As previously described, on January 3rd, shortly after the habitation ban went into effect, the Defendant attempted to destroy Heather's property with no prior notice and in violation of her constitutional rights.

53. After being presented with the September 16, 2020, order in the case styled *Sturgeon v. City Manager Robert Herron et al*, which required that Defendant provide two-week notice before clearing an encampment, Defendant gave Heather two weeks' notice that her encampment was to be cleared.

54. However, with fewer beds in shelters than homeless residents, even two weeks' notice can't provide Heather, or other homeless residents of Wheeling, time to comply with the law. When there are not sufficient legal places for the homeless population of Wheeling to exist, they are not able to comply with the law whether they have one day's notice or one month's notice.

55. On information and belief, Defendants placed notices warning of encampment destruction at a number of locations around the City and have imminently threatened to displace a large number of homeless residents.

56. If Defendants do not halt the enforcement of the habitation ban, community members will be in violation of the law each day, with no opportunity for compliance.

*Failure to Provide Alternative Locations*

57. The habitation ban establishes that “[t]he City Manager may designate one or more specific locations within City limits that are exempt from the prohibitions and penalties of Section 533.18 provided, however, that any such location(s) shall be subject to such rules and regulations as set forth by the City Manager.” Wheeling, West Virginia, Municipal Code § 533.1(b).

58. While the habitation ban permits the creation of locations exempt from the ban, it does not mandate the creation of such sites.

59. The Defendants’ decision to enforce the ban without the creation of an alternative location that is accessible to those impacted by the ban impermissibly criminalizes the status of homelessness and presents no alternatives to compliance for members of the putative class.

**CLASS ALLEGATIONS**

60. Class treatment in the present matter is appropriate pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure as the Defendant has acted in ways that apply generally to the putative class – namely the homeless residents of Wheeling - as a whole and the declaratory and injunctive relief requested by Plaintiffs respects the putative class as a whole.

61. At present, Plaintiffs are aware of no less than two hundred potential members of the putative class. Additionally, there could be many more putative class members who remain

unidentified because of the additional difficulties presented by adequately quantifying the number of people experiencing homelessness at any given time.

62. The joinder of all members is particularly impracticable in the current litigation, given the practical difficulties of participation in numerous lawsuits by parties who possess no physical address.

63. The questions of fact and law in the present litigation are uniform among the class.

64. The claims and defenses of Plaintiff Heather Marie Corn are identical to the claims and defenses of the class as a whole.

65. Plaintiff House of Hagar meets the requirements to establish *jus tertii* standing to sufficiently show that it can adequately represent the interests of the third party class.

66. The proposed class representatives will fairly and adequately protect the interests of the class.

### **CLAIMS FOR RELIEF**

Having described the facts above, Plaintiffs allege the following claims on a class-wide basis or, in the alternative should class certification not be awarded, on an individual basis on behalf of the named Plaintiffs.

#### **First Claim**

##### ***Unlawful Restriction of Freedom of Speech in Violation of the First Amendment to the Constitution of the United States of America***

67. All paragraphs of this Complaint are herein incorporated by reference.

68. The United States Supreme Court has held that, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397 (1989).

69. The Supreme Court has further established that the First Amendment “does not end at the spoken or written word,” *Id.* at 404 (1989).

70. To determine whether conduct is communication protected by the First Amendment, the Supreme Court has guided Courts to consider “the nature of [the plaintiff’s] activity, combined with the factual context and environment in which it was undertaken . . . .” *Spence v. Washington*, 418 U.S. 405, 409–10 (1974). Conduct as speech must “[convey] a particularized message” and be sufficient to show that “the likelihood is great that the message will be understood by those who view it.” *Id.* at 411.

71. “This burden is “not a difficult one,” and the Supreme Court has clarified that “a narrow, succinctly articulable message is not a condition of constitutional protection.” *Id.* (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995)) same, make this a direct quote of the case that it’s quoting.

72. In the present case, the Defendants acknowledge that there may be expressive elements to the conduct of sleeping outdoors in public, as the challenged ordinance allows the City Manager to “issue permits, including but not limited to, persons or entities who seek to engage in camping for historical, cultural, or educational purposes and shall be limited to time reasonably necessary to accomplish such purposes.” Wheeling, West Virginia, Municipal Code § 533.18.

73. Plaintiffs have established that for at least some of those homeless individuals impacted by the habitation ban, namely Plaintiff Corn, the act of living outdoors in public communicates an important message – that homelessness exists, impacts real people, and causes unnecessary hardship and suffering.

74. “Content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, Ariz 576. U.S. 155 (2015).

75. Wheeling's habitation ban is not narrowly tailored to serve a compelling state interest.

76. As such, Defendants have unlawfully restricted the rights of the named Plaintiffs as well as the putative class in violation of the First Amendment.

### **Second Claim**

#### ***Unlawful Restriction of Freedom of Speech in Violation of the First Amendment to the West Virginia Constitution***

77. All paragraphs of this Complaint are herein incorporated by reference.

78. "No law abridging the freedom of speech, or of the press, shall be passed." W. Va. Const. art III, pt. VII.

79. The West Virginia Supreme Court of Appeals has repeatedly held that the West Virginia Constitution should be interpreted to award equal, if not greater, rights when compared to the United States Constitution. The Court has stated, "[w]e agree with the principle that 'we may interpret our own Constitution to require higher standards of protection than afforded by comparable federal constitutional standards.'" *Morrisey v. W. Virginia AFL-CIO*, 842 S.E.2d 455, 470 (2020) citing *Pauley v. Kelly*, 162 W. Va. 672, 679, 255 S.E.2d 859, 864 (1979).

80. Given the previously described Federal Court holdings, West Virginia's Constitution provides at least equal, if not greater, rights for those whose speech is unlawfully restricted.

81. As such, Defendant's conduct is an unlawful restriction of speech in violation of the West Virginia Constitution.

### **Third Claim**

#### ***Cruel and Unusual Punishment in violation of the Eighth Amendment to the Constitution of the United States of America***

82. All paragraphs of this Complaint are herein incorporated by reference.

83. As described herein, the number of beds available in Wheeling shelters is less than the number of known putative class members experiencing homelessness in Wheeling.

84. As a result, just by virtue of being homeless a number of Wheeling residents will be in violation of the habitation ban each day, with no avenue for compliance with the law.

85. The habitation ban therefore criminalizes the putative class members' status as people experiencing homelessness, rather than any voluntary action on their part.

86. The Eighth Amendment ensures that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” [eighth amendment citation].

87. The Eighth Amendment prohibits the infliction of cruel and unusual punishments post-conviction, but also restricts what may be appropriately criminalized to begin with. *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S. Ct. 1410, 51 L. Ed. 2d 711 (1977). (“These decisions recognize that the Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such”)(citations omitted).

88. A foundational principle of our criminal system that “a state’s power to punish is not boundless, as the Supreme Court made clear more than fifty years ago” *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 279 (4th Cir. 2019).

89. The Fourth Circuit has held that Plaintiffs may bring an Eighth Amendment challenge without having been convicted. *See Id.* At 284; *See also Phillips v. City of Cincinnati*, 479 F.Supp.3d 654, 655( S.D. Ohio 2020) (“This Court agrees with the Ninth and Fourth Circuits’ approach, that plaintiffs bringing an Eighth Amendment claim on the basis that the state has unconstitutionally exceeded its power to criminalize need not show that they have been convicted, but rather, must allege harm in the form of subjection to the “criminal process.” *Martin*, 920 F.3d at 614; *accord Manning*, 930 F.3d at 284.”)

90. The criminal process certainly starts prior to conviction. In determining whether potential Defendants are at a critical stage of the criminal process for purposes of the Sixth and Fourth Amendments, Courts have routinely held that the criminal process starts long before sentencing or trial - the criminal process is underway before an arrest, before charges are brought, and even before a suspect is brought in for questioning. *Lafler v. Cooper*, 566 U.S. 156, 165 (2012).

91. In the context of the Eighth Amendment, Courts have held that “[a Plaintiff]’s subjection to the criminal process may occur at citation, arrest, or even earlier.” *Phillips v. City of Cincinnati*, No. 1:18-CV-541, 2020 WL 4698800 (S.D. Ohio Aug. 13, 2020).

92. The habitation ban at issue in this case was enacted as [ordinance cite 533.18]. That section, titled “Offenses Relating to Property,” includes under “Cross-References” a citation to W. Va. Code Art. 61-3, the portion of the Code, the Chapter establishing “Crimes and their Punishment.”

93. Further, the penalties associated with a violation of the habitation ban include monetary fines as well as compelled community service.

94. The Supreme Court of Appeals of West Virginia has previously held “[l]ike probation, community service is a sentencing alternative that a court has the discretion to impose... Again, community service is an alternative or a substitute for a statutory sentence.” *State v. Bennett*, 233 W. Va. 346, 352, 758 S.E.2d 273, 279 (2014).

95. The Plaintiffs in this matter have been provided notice, the sufficiency of which is challenged in this action, that they are subject to the habitation ban and will face penalties if they do not comply with the impossible requirement placed upon them by Defendants: stop existing in public when there is no other place to turn.

96. Plaintiffs therefore have standing to bring an Eighth Amendment challenge based on the substantive limits on the government's right to criminalize status pursuant to *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 284 (4th Cir. 2019).

97. In the alternative, Plaintiffs assert that they are exposed to a substantial risk of future harm sufficient to entitle them to a claim for prospective relief. *See Phillips* at 650.

98. "We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds." *Powell v. State of Tex.*, 392 U.S. 535, 536 (2001). When no moral culpability exists for an act which has been made illegal, no punishment can be just; as the Supreme Court has previously held, "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California*, 370 U.S. 667 (1962).

99. The Fourth Circuit has previously held that it is a violation of the Eighth Amendment for the government to criminalize a status, in that case analyzing the criminalization of illness and the involuntary manifestations of that illness. *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 284 (4th Cir. 2019).

100. The facts at hand more starkly contrast guidance in *Robinson* and *Powell* than the facts which formed the basis of the successful Eighth Amendment challenge in *Manning* – here the Defendants have not merely criminalized the involuntary manifestations of an illness, they have criminalized the involuntary manifestations of human existence.

101. The Ninth Circuit considered a similar set of facts in *Martin v. Boise*, in which it held "...that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter... whether sitting, lying, and sleeping are defined as acts or conditions, they are universal and



unavoidable consequences of being human... Moreover, any conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping... As a result, just as the state may not criminalize the state of being “homeless in public places,” the state may not “criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets.” *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019))(internal quotations and citations omitted).

#### **Fourth Claim**

##### ***Cruel and Unusual Punishment in violation of Article III, Section 5 of the West Virginia Constitution***

102. All paragraphs of this Complaint are herein incorporated by reference.

103. Article II, Section 5 of the West Virginia Constitution establishes “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”

104. The West Virginia Supreme Court of Appeals has repeatedly held that the West Virginia Constitution should be interpreted to award equal, if not greater, rights when compared to the United States Constitution. The Court has stated, “[w]e agree with the principle that ‘we may interpret our own Constitution to require higher standards of protection than afforded by comparable federal constitutional standards.’” *Morrissey v. W. Virginia AFL-CIO*, 842 S.E.2d 455, 470 (2020) citing *Pauley v. Kelly*, 162 W. Va. 672, 679, 255 S.E.2d 859, 864 (1979).

105. Given the previously described holdings of the United States Supreme Court and the Fourth Circuit, West Virginia’s Constitution provides at least equal, if not greater, rights for those impacted by the criminalization of an involuntary status.

106. As such, Defendants’ conduct is in violation of the West Virginia Constitution.

#### **Fifth Claim**

##### ***Void for Vagueness in Violation of the Fifth Amendment to the Constitution of the United States of America***

107. All paragraphs of this Complaint are herein incorporated by reference.

108. Amendment Five of The United States Constitution demands that “No person shall be . . . deprived of life, liberty, or property, without due process of law.”

109. A criminal statute is unconstitutionally vague in violation of due process if it "fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Johnson, 135 S. Ct. at 2556.

110. The habitation ban at issue is unconstitutionally vague as it does not provide adequate notice of what is prohibited and as a result is so broad that any enforcement will be arbitrary.

111. As such, Defendants’ conduct is in violation of the United States Constitution.

**Sixth Claim**  
***State Created Danger***

112. All paragraphs of this Complaint are herein incorporated by reference.

113. “... State actors may not disclaim liability when they themselves throw others to the lions.” *Pinder v. Johnson*, 54 F.3d 1169, 1177 (4th Cir. 1995).

114. As described above, there are not enough beds in shelters to house Wheeling’s homeless population. The habitation ban requires that Wheeling’s homeless residents remain outside without the benefit of shelter, personal items such as blankets, and without cooking themselves warm food.

115. By criminalizing these basic human activities, the Defendants have “throw[n] others to the lions” as contemplated in *Pinder*, in violation of Wheeling residents’ constitutional rights.

**Seventh Claim**  
***Violation of Right to Substantive and Procedural Due Process in Violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America***

116. All paragraphs of this Complaint are herein incorporated by reference.

117. The Constitution prohibits the government from depriving people of life, liberty,

or property interests without sufficient due process. U.S. Const. Amend XIV.

118. The Constitution prohibits the government from having undue interference with certain fundamental rights, those which may be considered beyond the reach of the government's right to lawfully regulate. *Id.*

119. Defendants' anticipated destruction of Plaintiffs' encampments unlawfully violates these constitutional protections.

### **Seventh Claim**

#### ***Violation of Right to Substantive and Procedural Due Process in Violation of Article III, Section 10 of the WV Constitution***

120. All paragraphs of this Complaint are herein incorporated by reference.

121. "Although applicable standards for procedural due process outside criminal area may depend upon particular circumstances of given case, fundamental principles of procedural due process are that more safeguards will be interposed as more valuable right is sought to be deprived, that due process must generally be given before deprivation occurs unless compelling public policy dictates otherwise, and that temporary deprivation of rights may not require as large measure of procedural due process protection as permanent deprivation." *North v. W. Va. Bd. of Regents*, 160 W.Va. 248 (1977).

122. The West Virginia Supreme Court of Appeals has repeatedly held that the West Virginia Constitution should be interpreted to award equal, if not greater, rights when compared to the United States Constitution. The Court has stated, "[w]e agree with the principle that 'we may interpret our own Constitution to require higher standards of protection than afforded by comparable federal constitutional standards.'" *Morrisey v. W. Virginia AFL-CIO*, 842 S.E.2d 455, 470 (2020) citing *Pauley v. Kelly*, 162 W. Va. 672, 679, 255 S.E.2d 859, 864 (1979).

123. Given the previously described holdings of the United States Supreme Court and the Fourth Circuit, West Virginia's Constitution provides at least equal, if not greater, rights for those impacted by the criminalization of an involuntary status.

124. As such, Defendants' conduct is in violation of the West Virginia Constitution.

**Eighth Claim  
Violations of 42 U.S.C. § 1983**

125. All paragraphs of this Complaint are herein incorporated by reference.

126. Defendants have acted in such a way as to deprive citizens their rights protected by the Constitution of the United States of America. As a result, Defendants are subject to liability pursuant to 42 U.S.C. § 1983.

**PRAYER FOR RELIEF**

**WHEREFORE**, the Plaintiffs request that Court enter judgment in their favor and against Defendants and award the following relief:

- (a) Issue an injunction barring the enforcement of Wheeling's habitation ban, 533.18;
- (b) Issue declaratory relief finding that the habitation ban is unconstitutional, and further that the enforcement of the ban is unconstitutional;
- (c) Certify a class consisting of homeless individuals in Wheeling pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure;
- (d) Award Plaintiffs all the costs and reasonable attorney fees incurred in this action; and
- (e) Grant such other relief as this Court may deem just and proper.

Respectfully submitted,  
HEATHER MARIE CORN  
HOUSE OF HAGAR  
*By Counsel,*

/s/ Aubrey Sparks  
Aubrey Sparks (WV Bar No 13469)  
American Civil Liberties Union of West  
Virginia Foundation  
1614 Kanawha Blvd. E.  
Charleston, West Virginia 25311  
(p) (304) 202-3616  
(f) (304) 404-2033

/s/ Nicholas Ward

Nicholas Ward (WV Bar No. 13703)  
American Civil Liberties Union of West  
Virginia Foundation  
1614 Kanawha Blvd. E.  
Charleston, West Virginia 25311  
(p) (304) 202-3616  
(f) (304) 404-2033

/s/ F. Alex Risovich

F. Alex Risovich (WV Bar No. 10866)  
Risovich Law Offices, PLLC  
3023 Pennsylvania Ave.  
Weirton, West Virginia 26062  
(p) (304) 723-2588

IN THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA  
WHEELING DIVISION

FIRST NAME LAST NAME 1,  
FIRST NAME LAST NAME 2,  
HOUSE OF HAGAR CATHOLIC  
WORKER HOUSE,  
Plaintiffs on behalf of themselves  
and those similarly situated

Petitioners,

v.

CITY OF WHEELING,  
ROBERT HERRON,

Defendants.

Civil Action No. \_\_\_\_\_

Judge: \_\_\_\_\_

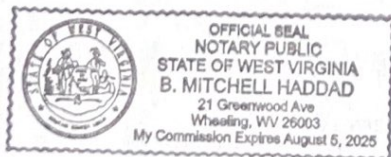
VERIFICATION

I, KATHLEEN MARSHALL FOR HOUSE OF HAGAR named in the foregoing Verified Complaint, having been duly sworn, state and affirm that the facts and allegations contained in the Verified Complaint are true, except insofar as they are stated to be upon information and belief, in such case they are believed to be true.

Kathleen Marshall  
NAME

In the State of West Virginia, in the County of SAVO,

SWORN TO AND subscribed before me on this 16<sup>th</sup> day of January, 2023.



B. Mitchell Haddad  
Notary Public  
Com. exp 8-5-2025

IN THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA  
WHEELING DIVISION

_____	)	
FIRST NAME LAST NAME 1,	)	
FIRST NAME LAST NAME 2,	)	
HOUSE OF HAGAR CATHOLIC	)	
WORKER HOUSE,	)	
Plaintiffs on behalf of themselves	)	
and those similarly situated	)	
	)	
Petitioners,	)	
	)	
v.	)	Civil Action No. _____
	)	
CITY OF WHEELING,	)	Judge: _____
ROBERT HERRON,	)	
	)	
	)	
Defendants.	)	
_____	)	

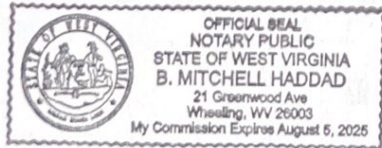
VERIFICATION

I, Heather Marie Corn named in the foregoing Verified Complaint, having been duly sworn, state and affirm that the facts and allegations contained in the Verified Complaint are true, except insofar as they are stated to be upon information and belief, in such case they are believed to be true.

*Heather Marie Corn*  
NAME

In the State of West Virginia, in the County of OHIO,

SWORN TO AND subscribed before me on this 16<sup>th</sup> day of January, 2023.



*B. Mitchell Haddad*  
Notary Public  
Com Exp 8-5-2025