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15 UNITED STATES DISTRICT COURT  
16 FOR THE CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION

17  
18 HOUSING IS A HUMAN RIGHT  
19 ORANGE COUNTY, et al.,  
20 Plaintiffs,  
21 v.  
22 THE COUNTY OF ORANGE, et al.,  
23 Defendants.

Case No.: 8:19-cv-00388-PA-JDE  
*Assigned to the Honorable Percy  
Anderson, 1<sup>st</sup> Courthouse, Crtm 9A*

**PLAINTIFFS’ OPPOSITION TO  
DEFENDANT CITY OF SAN  
CLEMENTE’S MOTION TO  
DISMISS THE SECOND  
AMENDED COMPLAINT**

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1 **I. INTRODUCTION**

2 In their Second Amended Complaint, Plaintiffs removed all claims for  
3 prospective relief, the class allegations, and pursue only damages claims on behalf of  
4 Plaintiffs Nichols, James, HHROC and the Emergency Shelter Coalition. The court  
5 should not dismiss the remaining causes of action as Plaintiffs have standing to  
6 pursue them. The complaint sufficiently alleges that Mr. James and Mr. Nichols were  
7 woken up by law enforcement and threatened with arrest and that Mr. James’  
8 property was taken by the City of San Clemente pursuant to its policies and  
9 protocols. If the Court believes that the amended complaint is not sufficient, leave to  
10 amend, as set forth herein, should be given, including to refine the allegations for the  
11 Fourteenth Amendment “liberty” cause of action for the repeated orders to move  
12 along from public places as an alternative to the Eighth Amendment claim. See  
13 Opposition to County at pp. 2-3.

14 **II. STANDARD OF REVIEW**

15 In deciding a motion to dismiss, the court must construe the complaint in the  
16 light most favorable to the plaintiffs and must accept all factual allegations as true.  
17 *N.M. State Inv. Council v. Ernst & Young L.L.P.*, 641 F.3d 1089, 1094 (9th Cir.  
18 2011). The court must also accept as true all reasonable inferences to be drawn from  
19 the material allegations in the complaint. *Barker v. Riverside County Office of Educ.*,  
20 584 F.3d 821, 824 (9th Cir. 2009).

21 **III. PLAINTIFFS HAVE SUFFERED HARM AS A RESULT OF THE  
22 CITY’S ACTIONS**

23 Organizational Plaintiffs, HOUSING IS A HUMAN RIGHT (“HHROC”) and  
24 EMERGENCY SHELTER COALITION OF SAN CLEMENTE (“ESC”), have  
25 dedicated missions that are adversely impacted by the City’s failure to provide shelter  
26 to individuals experiencing homelessness and the City’s exacerbation of  
27 homelessness through the criminalizing of homeless individuals’ life sustaining  
28 actions. As a result of these actions, Organizational Plaintiffs are forced to divert



1 valuable resources, such as time and money, from advocating for appropriate shelter  
2 to directly serving homeless individuals. SAC ¶¶65-66.

3 Additionally, Plaintiffs Duane Nichols and Darren James were both  
4 immediately affected by law enforcement harassment. Mr. Nichols has significant  
5 disabilities and is a resident of San Clemente. SAC ¶¶69. Mr. Nichols was unable to  
6 find shelter in the city, and the options offered outside the city were insufficient as  
7 both shelters offered operate at or over capacity each night and require a referral for  
8 admission or give priority to local residents. SAC ¶¶69. Moreover, it was difficult for  
9 Mr. Nichols to travel there with his physical and visual disabilities. SAC ¶ 70.  
10 Despite the inadequate and insufficient shelter options Mr. Nichols was awakened on  
11 multiple occasions by deputies threatening arrest if he did not leave the public space  
12 where he was sleeping. SAC ¶71.

13 Plaintiff DARREN JAMES, currently housed in San Clemente, experienced  
14 similar policing and was told to either move or be arrested. SAC ¶¶73, 75.  
15 Additionally, in early February 2019, his property was taken from the location where  
16 he left it daily for two years. SAC ¶74. He was informed by a person he believed to  
17 be a City employee that the City did not retain the property. SAC ¶74.

18 **a. The Organizational Plaintiffs Have Standing to Claim Damages from**  
19 **the Frustration of Mission and Diversion of Resources They**  
20 **Experienced**

21 Plaintiffs have met their burden to establish the standing of the organizations.  
22 The Complaint adequately describes the frustration of mission and redirection of  
23 resources of both organizational Plaintiffs. SAC ¶¶ 64-67. An organization has  
24 standing when there is a drain on its resources from a frustration of mission and  
25 diversion of resources. *Comite de Jornaleros de Redondo Beach v. City of Redondo*  
26 *Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc). An organization has  
27 “direct standing to sue [when] it show[s] a drain on its resources from both a  
28 diversion of its resources and frustration of its mission.” *Fair Hous. Council of San*  
*Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir.2012)

1 (quoting *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir.2002)). This  
2 standing includes a claim for damages for past diversion of resources and frustration  
3 of mission. *Fair Hous. of Marin*, 285 F.3d at 906; *S. California Hous. Rights Ctr. v.*  
4 *Krug*, 564 F. Supp. 2d 1138, 1152 (C.D. Cal. 2007) (“Diversion of resources  
5 damages are equivalent to ‘opportunity costs’ for activities [the organization] had to  
6 forego to address defendant’s action”).

7       The unlawful ordinance in San Clemente and the allegations of the Second  
8 Amended Complaint offer support that the organizations were forced to divert their  
9 resources. SAC ¶¶65-67. Defendant City does not allege that resources were not  
10 diverted, simply that the City believes the criminalization of poverty does not violate  
11 the Constitution and disagrees with the allegations regarding disabilities in the  
12 homeless community. Before any discovery has commenced, Defendant has no basis  
13 to dispute Plaintiff Organizations’ statements that their ability to carry out their  
14 missions have been impaired. “Because the organizational plaintiffs have shown that  
15 their missions have been frustrated and their resources diverted as a result of the  
16 Defendant actions, they have standing to challenge it.” *Valle del Sol Inc. v. Whiting*,  
17 732 F.3d 1006, 1018–19 (9th Cir. 2013) (citing *Fair Hous. Council of San Fernando*  
18 *Valley*, 666 F.3d at 1219 (holding Plaintiff FHC had organizational standing based on  
19 having “divert[ed] resources independent of litigation costs and frustrated their  
20 central mission” in preliminary injunction stage due to education and outreach  
21 campaigns targeted at discriminatory roommate advertising), *Smith v. Pac. Props &*  
22 *Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (reversing dismissal of complaint  
23 based on lack of standing where an organization alleged that “in order to monitor the  
24 violations and educate the public regarding the discrimination, has had ... to divert its  
25 scarce resources from other efforts ... to benefit the disabled community in other  
26 ways”)).

27       ESC: The Emergency Shelter Coalition’s mission is to create safe shelter for  
28 homeless individuals. SAC ¶¶66. This mission necessarily requires long term

1 advocacy to assist in coordinating numerous private and public entities to install a  
2 shelter. ESC engaged the City of San Clemente in litigation as early as 2014, to bring  
3 the City into compliance with Government Code Section 65588(e). SAC ¶67.  
4 However, when those individuals are under the threat of arrest, the organization is  
5 forced to redirect resources to advocate against criminalization of unavoidable  
6 behaviors delaying the progress toward shelters. SAC ¶67. The Supreme Court held  
7 that where the defendants’ “practices have perceptibly impaired [the organizational  
8 plaintiff’s] ability to provide [the services it was formed to provide] ... there can be no  
9 question that the organization suffered injury in fact.” *El Rescate Legal Servs., Inc. v.*  
10 *Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991) quoting  
11 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Defendant City’s  
12 violations have unarguably impaired Emergency Shelter Coalition’s ability to  
13 allocate resources toward advancing its goals of providing safe shelter for homeless  
14 individuals. The Emergency Shelter Coalition’s mission was frustrated as it was  
15 forced to allocate resources to advocate against criminalization of homeless  
16 individuals rather than advocating on creating safe shelters for homeless individuals.  
17 *Animal Legal Def. Fund v. United States Dep’t of Agric.*, 223 F. Supp. 3d 1008, 1014  
18 (C.D. Cal. 2016) (explaining that “the frustration of an organization’s mission is the  
19 personalized injury that “forces” the organization to spend money to alleviate the  
20 frustration.”).

21 HHROC: Finally, Housing is a Human Right Orange County has a primary  
22 mission of achieving supportive, affordable, and permanent housing for homeless  
23 individuals. SAC ¶64. But when individuals are under threat of arrest they are forced  
24 to redirect resources to provide support and assistance with survival including food  
25 and transporting individuals to medical appointments and services. SAC ¶64-65.  
26 Similar to ESC, HHROC is devoted to long-term advocacy for the purpose of  
27 creating a shelter. SAC ¶64-65. Although providing food and tending to the daily  
28 needs of homeless individuals is essential, it forces members to use their limited

1 personal funds and time towards providing food and other items rather than towards  
2 advocacy for long-term housing solutions. SAC ¶65. Had it not been for Defendant  
3 City's conduct, "these resources would have been used on other projects" *Georgia*  
4 *State Conference of NAACP v. Kemp*, 841 F.Supp.2d 1320, 1336 (N.D.Ga.2012),  
5 namely to achieve permanent housing for homeless individuals, and therefore  
6 "plainly satisfy the injury prong of the Article III test for standing" *Id.*

7 If the organizations ignored the ongoing actions, they would continue to suffer  
8 harm as the exact population they aim to serve would be left in jails and forced into  
9 hiding in dangerous places to avoid arrest simply because they cannot afford housing.  
10 Because Plaintiffs are harmed by the frustration of their missions and diversion of  
11 their resources, there is standing. *Fair Hous. of Marin*, 285 F.3d at 905.

12 **b. The Threats of Arrest Also Give Rise to Claims for Damages as They**  
13 **Created an Immediate Harm to Plaintiffs' Health**

14 Plaintiffs ask the court to reconsider its finding that there are no damages for  
15 unlawful threats under the Eighth and Fourteenth Amendments in circumstances such  
16 as these, where Plaintiffs were repeatedly woken up, threatened with immediate  
17 arrest and harassed by law enforcement while attempting to sleep. The repeated  
18 harassment gives the threats in this case an immediacy due to the physical and mental  
19 harm inflicted on plaintiffs that was lacking in the cases cited in the district court's  
20 first opinion. *See In re Eichorn*, 69 Cal. App. 4th 382, 389-390 (1998) (explaining  
21 that "sleep is a physiological need, not an option for humans. It is common  
22 knowledge that loss of sleep produces a host of physical and mental problems").  
23 Plaintiffs can establish "garden variety" pain and suffering as a result of the repeated  
24 harassment and threats of arrest.

25 The cases Defendant relies on are cases where retaliation was threatened but  
26 not carried out. *Gaut v. Sun*, 810 F.2d 923, 925 (9th Cir. 1987) (threat of violence);  
27 *Corales v. Bennett*, 567 F.3d 554, 565 (9th Cir. 2009) (threat of school discipline);  
28 *Butitta v. Garbajal*, 1997 WL 345719, at \*1 (9th Cir. 1997) (threats made to  
unlawfully seize plaintiff without any legal process) (unpublished decision referenced

1 in a table of decisions at 116 F.3d 1485). In *Gaut*, the court found that while Gaut  
2 received physical beatings from defendants, when they threatened him with violence  
3 if he reported the beatings, that was not cause of action under §1983. That case has  
4 been distinguished by later cases on the grounds that the threats in *Gaut* were not of  
5 immediate action and thus not immediately terrifying or harmful to the plaintiff. *See*  
6 *Lopez v. Bollweg*, No. CV 13-00691-TUC-DCB, 2017 WL 4679409, at \*4 (D. Ariz.  
7 Aug. 1, 2017) (threat that deputy “would not act to stop the harm that Plaintiff was  
8 already suffering” is actionable; *Parker v. Asher*, 701 F. Supp. 192, 195 (D. Nev.  
9 1988) (threat to shoot inmate with taser while holding taser is actionable).

10 Here, as the act of repeatedly waking plaintiffs to threaten them and forced  
11 them to move or face immediate arrest in fact injured them, the threat is more  
12 immediate than the threat in *Gaut*. *See In re Eichorn*, 69 Cal. App. 4th 382, 389-390  
13 (1998); *see also* Alice Park, *Why Interrupted Sleep is Worse than Short Sleep*, Time  
14 Mag. Oct. 30, 2015, available at <https://time.com/4094734/interrupted-sleep-mood/>  
15 (finding that interrupted sleep is more damaging to health than shortened sleep). It is  
16 also more immediate than the threats in *Buttita*. In that case, the police officers made  
17 threats of arrest over the phone, rather than waking and harassing the plaintiff in  
18 person. *Buttita*, 1997 WL 345719 at \*1. Similarly, in *Corales*, the “harsh lecture”  
19 given to the students did not involve waking them up during the night or harassing  
20 them. *Corales*, 567 F.3d at 564.

21 Where an unconstitutional ordinance is used to harass and intimidate Plaintiffs,  
22 Plaintiffs have claimed damage from the ordinance. As discussed above, both Mr.  
23 James and Mr. Nichols have been repeatedly told by San Clemente’s law enforcement  
24 agency to move along. Mr. James has been repeatedly woken up at night and asked to  
25 move. SAC ¶¶73, 75. This is a cognizable harm resulting from an ordinance that  
26 violates the Eighth and Fourteenth Amendments. If the court finds that the Fourteenth  
27 Amendment does not support claims for being woken up, but that the First and Fourth  
28

1 Amendments would, Plaintiffs request leave to substitute First and Fourth Amendment  
2 claims. *See Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 10 (2014).

3 Plaintiffs allege that Defendant has created an ordinance system that  
4 encourages arbitrary enforcement of law based on what law enforcement officer  
5 Plaintiffs interact with. SAC ¶¶78-80, 82-83, 90. Homeless individuals are  
6 perpetually threatened with arrest if they refuse to move. SAC ¶¶69, 71, 73, 75, 78,  
7 87-88. Mr. Nichols alleges that the Orange County Sheriff's Department deputies  
8 repeatedly threatened him with jail if he refused to move from a place where he had a  
9 right to be or refused an insufficient shelter placement in another City.

10 SAC ¶69. Each of the plaintiffs suffers from disabilities that make it difficult for  
11 them to relocate themselves. SAC ¶¶70, 72-73. Thus, they must either expend  
12 extraordinary effort to move to another city that may or may not enforce similar  
13 quality-of-life ordinances or remain in San Clemente subjected to the whims of the  
14 officer who may choose to enforce an ordinance. SAC ¶¶78-80, 82-83, 90.

15 Plaintiffs recognize that the court found in the minute order that there were no  
16 damages for threats in this context. Dkt. 98 at 16. However, Plaintiffs urge the court  
17 to reconsider this ruling. Unlike in the case the court relied on, *Gaut*, 810 F.2d at  
18 925, the threat of arrest is not the mere hypothetical threat but, rather, consists of  
19 repeated harassment that harms the plaintiffs by preventing them from sleeping on  
20 the streets in San Clemente. Nichols and James alleged that they were woken up in  
21 the middle of the night to be threatened with enforcement of this unconstitutional  
22 ordinance. ¶90. Unlike threats in other contexts, this form of threat has impacts on  
23 their health and creates cognizable damages.

24 **IV. PLAINTIFF DARREN JAMES HAS SUFFICIENTLY ALLEGED A**  
25 **DUE PROCESS CLAIM AGAINST SAN CLEMENTE**

26 Defendant San Clemente argues that Plaintiff Darren James fails to state a  
27 claim for a violation of his right to due process for the unlawful seizure of his  
28 property because (1) the factual allegations do not plausibly suggest a claim for relief

1 and (2) Plaintiff does not state a claim for *Monell* liability against the City. Both  
2 arguments fail.

3 First, the factual allegations surrounding the unlawful seizure of Plaintiff's  
4 essential property plausibly suggest that the City violated his right to due process.  
5 The right of a homeless person to due process in the protection of their property  
6 against unannounced seizure and immediate destruction is firmly established. The  
7 Ninth Circuit has held that homeless individuals have a Fourth Amendment property  
8 interest in their unattended property even when it is left on public sidewalks. *See*  
9 *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012). "The Fourth  
10 Amendment protects against unreasonable interferences in property interests  
11 regardless of whether there is an invasion of privacy." *Miranda v. City of Cornelius*,  
12 429 F.3d 858, 862 (9th Cir. 2005) (emphasis added). Moreover, the United States  
13 Supreme Court has held that personal property located in a public area is protected by  
14 the Fourth Amendment, despite the fact that the property is in a public space. *See*  
15 *Soldal v. Cook Cnty*, 506 U.S. 56, 68 (1992). In short, homeless individuals retain an  
16 "interest in the continued ownership of their personal possessions." *Lavan*, 693 F.3d  
17 at 1031. In the facts alleged in the Second Amended Complaint, Mr. James has a  
18 claim for damages for the seizure and destruction/loss of his property.

19 "[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual  
20 content,' *and reasonable inferences* from that content, must be plausibly suggestive  
21 of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962,  
22 969 (9th Cir. 2009) (emphasis added). "Asking for plausible grounds to infer  
23 [unlawful conduct] does not impose a probably requirement at the pleading stage; it  
24 simply calls for enough fact to raise a reasonable expectation that discovery will  
25 reveal evidence of [unlawful conduct]." *Bell Atlantic Corp. v. Twombly*, 550 U.S.  
26 544, 556 (2007). Ultimately, "[d]etermining whether a complaint states a plausible  
27 claim for relief will ... be a context-specific task that requires the reviewing court to  
28

1 draw on its judicial experience and common sense.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
2 679 (2009).

3 The SAC alleges that the City operates the San Clemente Maintenance  
4 Department. SAC ¶80. It further alleges that “[e]mployees of the City have engaged  
5 in unlawful activity, taking property without notice that they know or should know is  
6 the essential property of unsheltered homeless individuals in San Clemente, who have  
7 no [place] to leave their property during the day while they go to services, work and  
8 attend to other daily tasks.” SAC ¶80. The SAC details all municipal Defendants’  
9 efforts to criminalize and harass homeless individuals, by, among other things,  
10 seizing and destroying homeless people’s property. SAC ¶¶80, 99. Plaintiff James  
11 individually asserts a claim for one specific instance where his essential property and  
12 his most memorable belongings were seized by San Clemente employees. SAC ¶¶93-  
13 95, 98. He alleges that while living on the streets of San Clemente, he would keep  
14 his belongings in a storage facility until his government benefits were terminated and  
15 he could no longer afford to do so. SAC ¶74. As a result, Plaintiff would keep all his  
16 possessions with him at his regular location in the City and would neatly store them  
17 in public. SAC ¶74.

18 With this background, Plaintiff James further alleges in great detail that in  
19 early February 2019, his personal belongings, including his sleeping bag, blankets,  
20 birth certificate, personal papers, and sentimental items such as family pictures and  
21 cowboy boots from his childhood, were taken from the usual location where he stored  
22 his property. SAC ¶74. He approached an individual in that same area, whom he  
23 understood to be a City employee, and asked about his possessions. SAC ¶74. That  
24 individual represented to Plaintiff that the City did not “retain” his belongings. SAC  
25 ¶74. “When the entire factual context is considered, it is clear that [Plaintiff James]  
26 has ‘nudged [his] claim[]’ [that the City seized his property without due process]  
27 ‘across the line from conceivable to plausible.’ *Soo Park v. Thompson*, 851 F.3d  
28 910, 928 (9th Cir. 2017), *citing Iqbal*, 556 U.S. at 680.



1 Second, Mr. James has sufficiently alleged municipal liability under *Monell v.*  
2 *Dep't of Soc. Servs. Of City of New York*, 436 U.S. 658 (1978), based on the City's  
3 policy, practice, or custom of seizing and destroying the property of unhoused  
4 individuals, such as himself, without proper pre- and post- deprivation notice. SAC  
5 ¶¶ 74, 79-80, 93-95, 98-99. Municipal liability can be established where a City's  
6 policy, practice, or custom is shown to be a moving force behind a constitutional  
7 violation. *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011). "Actions  
8 taken pursuant to a municipal ordinance are made 'under color of state law' sufficient  
9 to trigger potential liability." *Coral Construction Co. v. King Cnty.*, 941 F.2d 910,  
10 926 (9th Cir. 1991), *citing Monell*, 436 U.S. at 690. *Monell* liability may be premised  
11 on the ordinance itself as a policy, or how it was implemented in practice or as a  
12 custom. *See Avalos v. Baca*, 596 F.3d 583, 587-88 (9th Cir. 2010).

13 Mr. James alleges, on information and belief, that the City of San Clemente  
14 has a custom, policy, and protocol of unlawfully seizing and destroying the property  
15 of unhoused individuals. SAC ¶¶ 99. The organizational Plaintiffs, HHROC and  
16 ESC are forced to expend their own funds in order to provide essential items such as  
17 clothing and bottled water to unhoused persons from the City of San Clemente.  
18 SAC ¶¶ 64-65. The entirety of the SAC indicates that the City has repeatedly engaged  
19 in the practice of seizing homeless individuals' property without due process.  
20 Plaintiff James's claim is merely one example of this policy, custom, and practice.  
21 SAC ¶ 74. He is entitled to relief from the City.

22 A policy "need only cause [the] constitutional violation; it need not be  
23 unconstitutional per se." *Jackson v. Gates*, 975 F.2d 648, 654 (9th Cir. 1992). It is  
24 enough that a "City policy 'causes' an injury where it is 'the moving force' behind  
25 the constitutional violation, or where 'the city itself is the wrongdoer.'" *Chew v.*  
26 *Gates*, 27 F.3d 1432, 1444 (9th Cir. 1994) (internal citations omitted). *See also*  
27 *Price v. Sery*, 513 F.3d 962, 972 (9th Cir. 2008) (holding that there was a dispute of  
28 fact as to whether the City's interpretation of its use of deadly force policy

1 constituted a longstanding custom or practice to support plaintiff's *Monell* claim,  
2 even if the formal written policy was facially constitutional); *see also Daskalea v.*  
3 *District of Columbia*, 227 F.3d 433, 442-43 (D.C. Cir. 2000) (finding that a  
4 municipality's sexual harassment policy could not insulate municipality from  
5 liability where, in practice, the guards' actions in the prison were quite different).

6 *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) does not require dismissal  
7 at this stage. In *Trevino*, the Ninth Circuit affirmed the lower court's grant of  
8 summary judgment in favor of the city where "the undisputed evidence fell short of  
9 establishing a 'persistent and widespread' practice such that it constitutes  
10 'permanent and well settled' city policy." *Id.* at 916. There, the Ninth Circuit relied  
11 on a fully developed record following two mistrials, a motion for summary  
12 judgment, and one related case involving substantially the same parties that went to  
13 trial on the same issues. *Id.* at 916. Only after the parties presented extensive  
14 evidence of the alleged "custom or policy" was the court able to properly make a  
15 finding with respect to *Monell* liability. *Id.* at 918-20.

16 Here, the parties are only at the pleading stage and as explained, enough facts  
17 have been alleged to plausibly suggest *Monell* liability against San Clemente.  
18 Whether the City was acting pursuant to this official policy, or whether the City has  
19 a widespread pattern and practice of immediately seizing and destroying the property  
20 of unhoused individuals, contrary to its written policy, are factual disputes that  
21 cannot be decided at this pleading stage. Accordingly, the allegations on the  
22 Complaint are sufficient "to give fair notice and to enable [the City] to defend itself  
23 effectively," as it has already begun to do. *Starr v. Baca*, 652 F.3d at 1216-17 (9th  
24 Cir. 2011). San Clemente's Motion to Dismiss Plaintiff James's due process claim  
25 for unlawful seizure of his property should be denied.<sup>1</sup>

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26  
27 <sup>1</sup> Plaintiffs also note that Mr. James has named a number of Does, so that even were  
28 the City of San Clemente to be dismissed, its employees should not be. The City  
does not contest the inclusion of Doe employees in its motion to dismiss.

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2 **V. THE FOURTH AMENDMENT CLAIM SHOULD BE ALLOWED TO**  
3 **PROCEED AS WELL**

4 As noted above under the due process claim, James alleged that the City's  
5 policies and protocols led to the seizure of his property by a City employee. The City  
6 relies on materials outside the complaint, and not currently before the court, to argue  
7 that they do not. This claim is not "unauthorized." The claim is alleged against the  
8 same defendant on the same facts as set out in the Second Amended Complaint. *See*  
9 *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 10 (2014).

10 **VI. PLAINTIFFS SHOULD BE GIVEN LEAVE TO AMEND TO ADD A**  
11 **FOURTEENTH AMENDMENT CLAIM**

12 Plaintiffs' First Amended Complaint contained a cause of action for a violation  
13 of their First Amendment rights based on the repeated orders to "move along." The  
14 Court determined that Plaintiffs' cited authority did not support a First Amendment  
15 Claim. The allegations do, however, assert a constitutional "right to loiter" as part of  
16 one's "liberty" protected by the Due Process Clause of the Fourteenth Amendment.  
17 Both Plaintiffs James and Nichols have been repeatedly awakened by law  
18 enforcement and threatened with arrest for sleeping in public. SAC ¶¶ 71, 75. They  
19 have been told to move along or leave the City. *Id.* This "freedom to loiter for  
20 innocent purposes" has been clearly established by the Supreme Court. *Papachristou*  
21 *v. City of Jacksonville*, 405 U.S. 156, 162, 165 (1972); *City of Chicago v. Morales*,  
22 527 U.S. 41, 53-55 (1999); *see also, Justin v. City of Los Angeles*, No. CV-00-  
23 12352-LGB-AIJx, 2000 WL 1808426, at \*11 (C.D. Cal. Dec. 5 2000)("Plaintiffs,  
24 however, risk a greater harm if the injunction is not granted: the violation of their  
25 First, Fourth, and Fourteenth Amendment rights."). Plaintiffs should be given leave  
26 to amend to include a Fourteenth Amendment claim. *See Johnson*, 574 U.S. at 10.  
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**VII. CONCLUSION**

For all of the foregoing reasons, Defendants’ motion to dismiss should be denied. Where necessary, Plaintiff should be granted leave to amend.

Dated: October 7, 2019

**ELDER LAW AND DISABILITY RIGHTS  
CENTER**

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**SCHONBRUN SEPLOW**

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