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August 4, 2021

Public Comment to Gainesville City Commission

Southern Legal Counsel (SLC), the National Homelessness Law Center (NHLC), and the American Civil Liberties Union Foundation of Florida (ACLU-FL) jointly submit this comment in support of the permanent repeal of the Open Container portion of the City Code of Ordinances. See Sec. 4-4 and Sec. 18-20(16). The Gainesville City Commission adopted Ordinance No. 200250 on September 10, 2020, which temporarily suspended the enforcement (as to personal possession and consumption) of Sec. 4-4 and Sec. 18-20(16) of the City Code of Ordinances. The City Commission, at its meeting of May 20, 2021, directed the drafting of Ordinance 210005, which would permit the allowances for possession and consumption granted by Ordinance No. 200250 to become permanent.

As the City considers this ordinance, SLC, NHLC, and ACLU-FL submit public comments supporting the recommendation of the City Commission to adopt Ordinance 210005, thereby permanently repealing the open container prohibitions contained in Sec. 4-4 and Section 18-20 of the City Code of Ordinances. See *Gainesville City Commission Meeting Agenda*, at 26-27 (July 19, 2021). We submit these comments based on our extensive history of working with members of the homeless community in Gainesville.

The City's decision to suspend enforcement of Sec. 4-4 and Sec. 18-20(16) during the COVID-19 pandemic further expanded the understanding of how unnecessary the open container ordinance was. Ordinances such as Sec. 4-4 and Sec. 18-20(16), which penalize the possession and consumption of alcoholic beverages outdoors on city-owned property and public rights-of-way, disproportionately impact individuals experiencing homelessness both through selective enforcement and absence of choice.

The disproportionate impact of open container ordinances on houseless individuals is attributable to their absence of choice. Barring homeless individuals from consuming alcohol in public acts as a blanket prohibition against an activity they are otherwise lawfully permitted to engage in, as they do not have access to private places where they can lawfully consume alcohol. This prohibition is particularly problematic for homeless individuals struggling with substance use disorders, as is the case for more than 11% of Florida's homeless population.¹ Homelessness is a systemic public health crisis and criminalization of this nature move to further exacerbate the problem, taking us further from the solution. There are myriad of actions

¹ Fla. Council on Homelessness, *2020 Annual Report*, at 50, available at <https://www.myflfamilies.com/service-programs/homelessness/docs/2020CouncilReport.pdf>

the City of Gainesville can take to address the devastating impacts a lack of housing has on persons experiencing homelessness in our community, and repealing the open container ordinance that disproportionately targets an already overly criminalized community is among them. Further, statistics demonstrate that black, indigenous, and other people of color (“BIPOC”) and LGBTQ+ individuals are over-represented among individuals experiencing homelessness in Florida. As such, laws that lend themselves to disparate enforcement, like open container ordinances, can contribute to the over-incarceration of already vulnerable and marginalized communities.

In *Powell v. Texas*, Justice White provided that if “a showing can be made...that avoiding public places when intoxicated is...impossible,” then laws penalizing drinking in public could violate the Eighth Amendment. This conclusion was based on Justice White’s understanding that a homeless person who suffers from alcoholism “must drink somewhere” and if they “have no place else to go...when they are drinking” then they must do so on the “public streets” which are their homes.² Therefore, the application of such statutes to houseless individuals suffering from alcoholism amounts to the criminalization of a harmless act they have no choice but to perform in public. By punishing individuals for their involuntary condition of being homeless, these open container ordinances may violate the Eighth Amendment’s prohibition against cruel or unusual punishment.³

The City Commission moved to suspend enforcement of the open container ordinance during the COVID-19 pandemic as a remedy for the obvious public health and safety concerns present. However, public health and safety concerns exist in non-pandemic times as well, especially for our most vulnerable and marginalized Gainesville residents.

As has been discussed, the City would still be free to utilize other tools, if necessary, such as continued enforcement of laws prohibiting disorderly intoxication or disorderly conduct if a person’s consumption of alcohol causes disturbances. These are more constructive, and will meet the City’s needs, better than reinstating the enforcement of open container laws.

Respectfully submitted,

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² *Powell v. Texas*, 392 U.S. 514, 551-3 (1968) (White, J., concurring); *see also Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 282 (4th Cir. 2019) (Virginia’s habitual drunkard statute criminalizes homeless plaintiffs for status by allowing prosecutions for involuntary manifestations of their illness).

³ *Powell* at 551, 553 (White, J., concurring); *see also Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992).

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