

No. 24-1003

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Alfredo Beltran, Daniel Wanner, and Better Days Ahead Outreach Inc.,
Plaintiffs-Appellees,

v.

Borough of Pottstown,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:23-CV-04234 (Perez, J.)

**BRIEF OF REGIONAL HOUSING LEGAL SERVICES AS AMICUS
CURIAE SUPPORTING APPELLEES AND AFFIRMANCE**

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May 22, 2024

CORPORATE DISCLOSURE STATEMENT

Amicus is a nonprofit organization. It has no parent corporation, and no publicly held corporation owns any portion of it.

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INTEREST OF AMICUS CURIAE¹

Regional Housing Legal Services (“RHLS”) is a statewide legal services/nonprofit law firm that focuses on the development, preservation and advocacy for affordable housing and equitable community development. RHLS’s strategy is to provide boutique-level legal services and policy/legislative insight to organizations that have been excluded from power in the housing system, to engage in advocacy to make the housing system more racially equitable and to reduce homelessness for all communities. RHLS’s interest in this case is to ensure its clients’ clients are not criminally penalized for lacking shelter.

SUMMARY OF ARGUMENT

The Court should affirm the District Court’s decision because Defendant-Appellant’s argument hinges on a false premise – that criminalization is a necessary tool for local municipalities to address homelessness. Instead, the experiences of developers and owners of affordable housing and shelters throughout Pennsylvania demonstrate that without appropriate constitutional parameters, municipalities and their leaders can leverage law enforcement and administrative and zoning restrictions to force unhoused people out of their communities. Local jurisdictions have immense power to shape their communities. Homelessness is a policy choice. By effectively prohibiting shelters throughout the Borough of Pottstown and imposing punitive measures against their unhoused residents when there is consequently no available shelter, Appellant is making a policy choice that undermines its argument

¹ No party’s counsel authored this brief in whole or in part. No party nor any party’s counsel contributed money that was intended to fund preparing or submitting the brief. No person other than amici contributed money related to the preparation or submission of this brief.

that it intends in any meaningful way to address the “health, welfare, and safety concerns” of their unhoused residents. *See* Appellant’s Br. at 3. Instead, their approach fails to provide solutions while simultaneously exacerbating the challenges of homelessness.

ARGUMENT

I. Insufficient Shelter Capacity and Restrictive Residential Zoning Ordinances Exacerbate Homelessness in Pottstown

As Appellees explain, and the District Court observed, the Borough of Pottstown, and Montgomery County more broadly, do not have enough shelter beds to house the number of Pottstown’s unhoused residents. *See* Appellee’s Br. at 3. The destruction caused by Hurricane Ida in 2021, compounded by soaring inflation due to the COVID-19 pandemic, ignited a severe affordable housing crisis across the County. *Id.* As a result, the number of unhoused people more than doubled in Montgomery County between 2021 and 2022. *See* MONTGOMERY COUNTY HOMELESS TASKFORCE, April 24, 2023, PowerPoint Slides at 6-7.² Today, that number remains higher than at any point since 2017. *Id.* Adding further strain, the only year-round shelter option in Montgomery County for residents closed in 2022. *See* Appellee’s Br. at 3. And Montgomery County’s capacity for emergency hotel room stays is insufficient to meet the need, with a waitlist of up to six months. *See* Appellee’s Br. at 3-4.

² Available at: https://www.montgomerycountypa.gov/DocumentCenter/View/39191/Homelessness-Taskforce-Mtg_4-24-23_Final (*see also* Justine McDaniel, “I Can’t Get Out”: These Families Lost their Homes in Hurricane Ida. They’re Stuck in Hotels Six Months Later, PHILA. INQUIRER (Feb. 24, 2022), available at <https://www.inquirer.com/news/pennsylvania/hurricane-idarecovery-homeless-families-montco-chesco-20220224.html> (“Of the 302 households put up in hotels by Montgomery and Chester Counties, 182 have found housing or returned to their repaired homes. The remaining 120 have no inhabitable home to return to. And that number doesn’t include displaced families who aren’t staying in the county-funded hotels.”).

Despite the significant increase in homelessness and severely insufficient shelter capacity in the area, Pottstown maintains a zoning ordinance³, as the District Court noted, “which effectively prevents the presence of homeless shelters within the Borough.” *Better Days Ahead Outreach Inc.*, 2023 WL 8237255, at *3. The term most closely related to a shelter for the unhoused within the zoning code’s dwelling type definitions is “rooming house”, defined as “[a] building or structure or any part thereof where rooms or sleeping accommodations are rented to individuals to be used principally as a place of rest and sleep and for toilet and dressing, and does not provide cooking facilities or allow or provide for the preparation or provision of meals.” *See* Pottstown Municipal Code; Ch. 27, Part 14.⁴ To operate a rooming house, the developer must request a Special Exception from the Borough, a discretionary administrative process. *See* Pottstown Municipal Code; Ch. 27, Part 14, Sect. 334.6; 336.6; 337.6.⁵ Further, because a rooming house requires the collection of rent and does not allow the provision of meals, a shelter provider must seek another exception from the city for such services. Consequently, any shelter provider seeking to develop a homeless shelter within Pottstown, such as Beacon of Hope as Plaintiffs-Appellees explain, must request layers of special exceptions from the Borough, which causes delays, increased costs, and imposes a significant barrier to entry for providing

³ *See also*, JA.II. 0275, “[O]ur Zoning ordinance does not permit homeless shelters to operate within the Borough” *See also*, Pottstown Municipal Code; Chapter 27; 334.6; 336.6; 337.6 (requiring hearing to operate rooming house in subject zoning district).

⁴ *Available at*:

<https://ecode360.com/30828753?highlight=rooming%20house.rooms&searchId=25211033766581725#14225905> (Definition of rooming house).

⁵ Requiring hearing to operate rooming house in subject zoning district.

shelter.⁶

Taken together, the extreme zoning restrictions imposed by the Borough barring shelters, coupled with a lack of affordable housing options, forces most unhoused people in Montgomery County with no choice but to sleep outside.

II. Homelessness is Caused by a Lack of Affordable Housing

A. Evidence Shows a Strong Correlation between Housing Affordability and Homelessness Rates

Defendant-Appellant's argument that criminal sanctions are necessary to address the homelessness crisis overlooks the fundamental drivers of this complex issue. It is important that the Court understand the scope and causes of the problem. Analysis of data across different U.S. cities reveals a strong correlation between housing affordability and homelessness rates. Places with high housing costs relative to local incomes experience higher rates of homelessness. As the U.S. Interagency Council on Homelessness (USICH) explains: "The areas with the most unsheltered homeless . . . are also the most expensive housing markets." *See* USICH, ALL IN: THE FEDERAL STRATEGIC PLAN TO PREVENT AND END HOMELESSNESS (Dec. 2022) at 54 (last accessed May 19, 2024).⁷ A leading study on causes of the rates of homelessness, conducted across thirty U.S. cities and counties with the highest rates of homelessness, concluded that "housing costs explain far more of the difference in rates of homelessness than variables such as substance use disorder, mental health, weather, the strength of the social safety net, poverty, or economic conditions", countering long-held common misconceptions. *See* PEW CHARITABLE TRUSTS, *How*

⁶ *See example*, Beacon of Hope's application for zoning variance. *Available at*: <https://www.pottstown.org/AgendaCenter/ViewFile/Item/13107?fileID=5964>.

⁷ *Available at*: https://www.usich.gov/sites/default/files/document/All_In.pdf.

Housing Costs Drive Levels of Homelessness (last accessed May 19, 2024).⁸ Strikingly, according to a U.S. Governmental Accountability Office (GAO) statistical analysis, it was found that median rent increases of just \$100 a month were associated with a 9% increase in homelessness. See U.S. GOVERNMENTAL ACCOUNTABILITY OFFICE (GAO), *Better HUD Oversight of Data Collection Could Improve Estimates of Homeless Population*, at 30 (2020)(last accessed May 19, 2024).⁹

While Montgomery County may have more unsubsidized affordable housing stock relative to other high-cost metropolitan areas across the country, much of the housing remains out of reach for its residents. The current housing situation in Montgomery County, PA presents several challenges for residents, especially those earning lower incomes. The Fair Market Rent (FMR) for a two-bedroom apartment in Montgomery County is set at \$1,470.¹⁰ See NATIONAL LOW INCOME HOUSING COALITION, *Out of Reach: Pennsylvania*, at 5 (2023)(last accessed May 19, 2024). To afford this without spending more than 30% of income on housing, a household needs to earn \$58,800 annually.¹¹ This translates to an hourly wage of \$28.27, which is significantly higher than the county's estimated mean renter wage of \$26.34.¹² Consequently, for a resident of Montgomery County making minimum wage, it would require about 3.9 full-time jobs to comfortably afford a two-bedroom rental in Montgomery County.

⁸ Available at: <https://www.pewtrusts.org/en/research-and-analysis/articles/2023/08/22/how-housing-costs-drive-levels-of-homelessness>. See also, Local Progress Impact Lab et. al., Amici Curiae Brief in Support of Respondents, *Grants Pass, v. Johnson*, Supreme Court Dkt. 23-175, at 3 – 8.

⁹ Available at: <https://www.gao.gov/assets/d20433.pdf>.

¹⁰ Available at: https://nlihc.org/sites/default/files/oor/Pennsylvania_2023_OOR.pdf (affordability is determined by 30% of household income going toward overall housing costs).

¹¹ *Id.*

¹² *Id.*

This data points to a notable gap between the cost of living and the wages many residents earn, emphasizing the economic pressures faced by renters in the area. The housing wage, which is the hourly rate a full-time worker must earn to afford a modest apartment while spending only 30% of their income on housing costs, is one of the highest in Pennsylvania, underscoring the high cost of housing in Montgomery County. Despite the existence of housing assistance programs, such as Section 8 Housing Choice Vouchers, only one in four families eligible for assistance actually receive it due to insufficient funding. *See* CENTER ON BUDGET AND POLICY PRIORITIES, *Project-Based Vouchers*, at 2 (July 11, 2023)(last accessed May 19, 2024).¹³

Another recent study found that cities with inelastic housing markets tend to have higher rates of homelessness. *See* G. COLBURN & C.P. ALDERN, *Homelessness Is a Housing Problem: How Structural Factors Explain U.S. Patterns*, at 138 (U. Cal. Press Paperback ed. 2022). According to the authors, an inelastic housing market is characterized by a limited supply of available housing relative to demand, often resulting in high prices and rents that bar entry for many residents. *Id.* Local land use and zoning policies are critical tools in shaping these characteristics. *Id.* at 156. Zoning ordinances prohibiting homeless shelters, such as is the case here, further limit the availability of temporary housing solutions, particularly in pressurized housing markets where affordable units are already scarce. Individuals already struggling with high housing costs are unable to find any form of stable shelter. And without shelters to absorb some of the demand, the competition for scarce affordable housing further increases.

¹³ *Available at:* <https://www.cbpp.org/research/housing/policy-basics-project-based-vouchers>.

Moreover, local land use regulations and zoning rules are major drivers of the supply crisis by artificially limiting construction and increasing costs. See U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH, POLICY & PRACTICE: *Innovative Solutions to Help Local Policymakers and Practitioners Address Today's Housing and Community Development Challenges*, at 1 (2023)(last accessed May 19, 2024).¹⁴ As stated above, among RHLS's clients are mission-driven developers with expertise in developing shelters and affordable housing across Pennsylvania. It is their common experience that when local jurisdictions impose administrative barriers and zoning restrictions, it increases the risk and costs of development, often making many projects economically unfeasible. As a result, developers are often compelled to redirect a project to more accommodating markets or abandon it all together, thereby depriving the community of potential housing solutions. This imbalance results in increased housing prices for consumers, particularly for lower-income renters, which can thereby lead to homelessness. In fact, restrictive zoning has become so significant that it has captured the attention of Congress, leading to the inclusion of \$85 million in U.S. Department of Housing and Urban Development (HUD) grants in the 2023 omnibus to support localities identify and implement zoning reforms that will increase density, reduce minimum lot sizes, and streamline permitting processes.¹⁵ See JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, *The State of the*

¹⁴ Available at: <https://www.huduser.gov/portal/sites/default/files/pdf/policy-and-practice-publication-2023-april.pdf>.

¹⁵ Available at: https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2023.pdf

Nation's Housing, at 40 (2023)(last accessed May 19, 2024). Accordingly, zoning ordinances that prohibit shelters only serve to perpetuate an inelastic housing market and reinforce the structural barriers that lead to high rates of homelessness.

B. Jurisdictions With Proactive Housing Policies Have More Effectively Managed or Reduced Homelessness Rates

In jurisdictions with declining homelessness rates, the decrease has been attributed to creating policies that address the root cause of homelessness. Among these jurisdictions, strategic policies include prioritizing investments in affordable housing and shelter and removing zoning barriers to affordable housing and shelter construction. See H. Love and T. HADDEN LOH, Brookings Institution, *Homelessness in U.S. Cities and Downtowns* (Dec. 7, 2023)(last accessed May 19, 2024).¹⁶ An illustrative example is the comparison between Houston and Dallas over the past decade. Houston has effectively used zoning reform to decrease homelessness by reducing minimum lot sizes citywide from 5,000 square feet to 1,400 square feet. See A. HOROWITZ & L. MARSHALL, Pew Charitable Trusts, *Zoning Reform Can Reduce Homelessness* (February 19, 2023)(last accessed May 19, 2024).¹⁷ Contrastingly, Dallas' minimum lot size remains 7,500 square feet. *Id.* Houston's reform allowed for the construction over 800,000 homes with prices largely within range for middle-income households. *Id.* During this period, Houston's average monthly rent rose by only \$382, compared to a \$643 increase in Dallas, and homelessness in Houston dropped by 29%, whereas it rose by 35% in Dallas. *Id.*

¹⁶ Available at: <https://www.brookings.edu/articles/homelessness-in-us-cities-and-downtowns/>.

¹⁷ Available at: <https://www.pewtrusts.org/en/about/news-room/opinion/2024/02/19/zoning-reform-can-reduce-homelessness>.

In Pennsylvania, the City and County of Erie joined with community leaders to launch Housing First Erie, a public-private partnership dedicated to addressing chronic homelessness in the region. CITY OF ERIE, *Public-Private Partnership Launches Housing First Erie to Address Chronic Homelessness* (Apr. 18, 2024)(last accessed May 20, 2024).¹⁸ The initiative includes a comprehensive plan to develop housing for 150 people experiencing chronic homelessness in Erie County, which will include new construction of a 50 unit building and the acquisition and rehabilitation of 100 scattered-site units across the county. *Id.* And in 2022, the City of Lancaster, PA allocated \$7.4 million to develop 85 new affordable housing units and preserve 443 affordable housing units through renovation. CITY OF LANCASTER, *City of Lancaster Awards \$7.4 Million in American Rescue Plan Funds to Create & Preserve Affordable Housing* (Nov. 22, 2022).¹⁹ Further, Lancaster allocated funds to construct a new low-barrier shelter for the purpose of expanding the city’s emergency shelter capacity. CITY OF LANCASTER, PA., RES. NO. 26 – 2024 (March 12, 2024).²⁰ Approaches like these are solutions oriented to meet the needs of instability and unhoused residents.

Understanding the root causes of homelessness makes the solution clear: adopting policies that increase shelter and affordable housing options. Cities that have taken this approach instead of relying on punitive measures against the unhoused have achieved meaningful success in reducing homelessness.

¹⁸ Available at: <https://cityof.erie.pa.us/2024/04/18/public-private-partnership-launches-housing-first-erie-to-address-chronic-homelessness/>.

¹⁹ Available at: <https://www.cityoflanasterpa.gov/blog/7-4-million-in-american-rescue-plan-funds-to-affordable-housing/>.

²⁰ Available at: <https://ecode360.com/documents/LA1674/public/753026710.pdf>.

III. Appellant Has Significant Authority to Control Access to Affordable Housing and Shelter in Its Jurisdiction.

A. Appellant's Contention That the Threat of Criminal Punishment Is a Necessary Tool to Protect the Safety of Its Unhoused Residents Is Unconvincing.

Local jurisdictions are empowered through their zoning and local land use authority to make choices about their community's built environment. *See* Pa. Mun. Planning Code, Art. VI. "Zoning". Local jurisdictions have broad discretion and difficult choices when balancing "general welfare by guiding and protecting amenity, convenience, future governmental, economic, practical, and social and cultural facilities, development and growth, as well as the improvement of governmental processes and functions[.]" Pa. Mun. Planning Code Sec. 105 "Purpose of Act". This delegation of police power is an important tool for communities to protect the health and safety of their residents. *See* PA. GOV. CTR. FOR LOCAL GOV'T SERV, *Local Land Use Controls in Pennsylvania*, at 2 (October 2020)(last accessed May 21, 2024).²¹ In the context of protecting the health and safety needs of residents suffering unsheltered homelessness the provision of shelter is among the most effective interventions.²² The imposition of fines, sanctions, or other penalties does little or nothing to protect the health and safety of those punished, and little to protect the health and safety of the surrounding community. *See* Laure Haber, *Criminalization*

²¹ Available at: <https://dced.pa.gov/download/planning-series-01-local-land-use-controls-in-pennsylvania/?wpdmdl=56207&refresh=66435412afec51715688466>. ("In Pennsylvania, the power and responsibility to plan for land use and its regulation lies substantially with local government, including counties, given that the General Assembly delegated to local governments a portion of the 'police power' with respect to planning and land use controls to protect public health, safety, and general welfare.").

²² For example, "[i]n Massachusetts, the people who lived mostly in shelters suffered a death rate about four times higher than that of the state's general adult population. But the people who stayed outside year-round [...] died at about ten times the normal rate." (*See* T. KIDDER, *Rough Sleepers*, 56 (Random House Trade Paperback ed. 2024)).

of the Unhoused: A Case Study of Alternatives to a Punitive System, 31, *Geo. J. on Poverty L. & Pol’y* 199, 202 (Winter, 2024).²³

Appellant’s zoning code entirely prohibits shelters from operating within its jurisdiction. *See* JA.II. 0275.²⁴ As discussed *supra*, shelter is a more direct, efficient, humane, and effective solution to an individual’s unsheltered status than sanctions. Appellant’s prohibition of shelter in its jurisdiction evidences a knowing policy focused on revitalization at the expense of unsheltered resident’s health and safety needs. It is undisputed in this case that Appellant has the authority to permit shelter operations within its jurisdiction. Appellant’s own zoning code allows for petition for special exception to such operations. However, the admitted and adamant facial exclusion of all shelter operations combined with the administrative burdens of special exception works to frustrate efforts to provide safe shelter for the encampment residents specifically and all individuals suffering homelessness in Pottstown generally. A brief analysis of how these local barriers can prevent the development and provision of affordable housing and shelter options will be illustrative.

Beyond shelter options, the availability of permanent affordable housing opportunities is also largely controlled by local jurisdictions. For example, the Internal Revenue Code Section 42 governs the allocation of the Low-Income Housing Tax Credit (“LIHTC”). IRC Section 42 requires notification of local jurisdictions’ executive when an application for a low-income housing development utilizing LIHTC

²³ (“Even without legal penalties, disbanding encampments and constantly forcing people to move to new locations poses a significant health and safety *risk*.” (emphasis added)).

²⁴ (Public Statement from the Borough of Pottstown Council, “[O]ur Zoning ordinance does not permit homeless shelters to operate within the Borough”); *See also*, Pottstown Mun. Code; Chapter 27; 334.6; 336.6; 337.6 (requiring hearing to operate rooming house in subject zoning district).

is submitted. *See* 26 U.S.C. § 42(m)(1)(A)(ii). This provision may be intended to allow local jurisdictions adequate time and insight to prepare and plan for proposed development. However, it can also sound the starting gun for exclusionary efforts. LIHTC reforms are focused on removing administrative barriers presented by local approvals and streamline the development process. *See generally*, [Affordable Housing Credit Improvement Act of 2023](#), S. 1557 118 Cong., Sec. 306 (2023). In addition to the executive notification requirement, many allocating agencies score developments favorably based on various aspects of a development’s readiness to proceed. In Pennsylvania, up to 10 points may be awarded for developments which demonstrate all zoning approvals, and 5 points may be awarded for developments which do not possess full approval but “provide a letter from a qualified attorney or local zoning official which articulates and identifies a realistic and timely path forward to secure final zoning approval.” PENNSYLVANIA HOUSING FINANCE AGENCY, [Qualified Allocation Plan at Page 46, Sec. D.3. \(March 10, 2022\)](#)(last accessed May 21, 2024).²⁵ Zoning and readiness criteria are a sensible and effective means for allocating agencies to make determinations on which proposals may be able to quickly and efficiently utilize limited resources. However, these criteria have the additional impact of placing significant power in the hands of local zoning officials. Applications for LIHTC are highly competitive, and 5 points can ‘make or break’ an application. Local officials are thus provided significant leverage to shape applications or create barriers to securing these critical points. By withholding support, requiring hearings,

²⁵ Available at https://www.phfa.org/forms/multifamily_program_notices/qap/2022/2022-lihtc-allocation-plan.pdf

or otherwise imposing administrative process, local jurisdictions can significantly delay development processes. These delays can prove fatal to the development.

A case from the City of Black Jack Missouri which pre-dates the LIHTC program illustrates this point. *See Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033 (8th Cir. 1979).²⁶ In *Black Jack* after learning of a proposal to build affordable housing assisted by HUD, the community organized itself to incorporate into a local jurisdiction empowered to enact zoning ordinances and enacted “Zoning Ordinance No. 12” which, among other things, prohibited all new multi-family dwellings in the newly established jurisdiction. *See United States v. City of Black Jack, Missouri*, 372 F. Supp. 319, 322-325 (Dist. Court, ED Missouri 1974). In *Black Jack* local efforts to incorporate for the purposes of enacting this exclusionary zoning ordinance were initiated by the proposed developers filing an application for financing and a feasibility letter required to secure such, which letter was publicly available. *Id.* at 324. Ultimately Zoning Ordinance No. 12 was declared unlawful and void. *See Park View Heights Corp. v. City of Black Jack*, 454 F. Supp. 1223 at 1225 (E.D. Missouri 1978). The case was originally initiated in 1971 relating to funds first received from HUD in 1970. The legal victory striking down the restrictive zoning was won in 1974, after the original financing had expired. Subsequent litigation related to remedies concluded with the 8th Circuit remanding the District Court’s denial of injunctive relief and noting “We are hopeful that, upon remand of this case, the parties will finally reach a meeting of the minds and put an end to this long and

²⁶ The case has a complicated procedural history involving a class action, federal intervention and multiple 8th Circ. opinions culminating. The Fair Housing Act principals in *Black Jack* are less relevant here than the impact of the timing and delays caused by the subject zoning restriction.

bitterly fought conflict. As costs of construction continue to spiral upward, it becomes more and more difficult to remedy the wrong done to the plaintiff class.” *Id.* at 1041. With no further court history, Richard Rothstein’s analysis in his book *The Color of Law*, provides context as to the fate of the planned housing: “the lawyers for the church group said that, despite the court ruling, ‘no developer in his or her right mind’ would proceed with the project in the face of such hostility. It was never built.” *See* R. ROTHSTEIN, *The Color of Law*, 126 (Liveright Paperback ed. 2018) (2017). This example is illustrative because it demonstrates the nexus between public notification of development efforts and the leveraging of jurisdictional police power over zoning and local land use to delay or prohibit development. Although the ordinance in *Black Jack* was struck down on fair housing grounds, the delays caused were successful in preventing the development at issue. Given the risk that delays can cause in the development process, even temporary or minor administrative burdens imposed by regulating jurisdictions can, even if inadvertently, prevent housing and shelter options from existing. Here, Appellant’s zoning-based prohibition on shelter in its jurisdiction, even if possible to access through a special exception process, prevents unhoused residents from seeking the shelter that Appellant seeks to punish them for lacking.

When communities leverage the grant of police power authority in matters of local land use and zoning to erect barriers to sustainable and effective development-based interventions and simultaneously enact policies to punish particular residents in their communities through fines, citations, and the threat of imprisonment a clear picture of exclusion develops. It is untenable for a jurisdiction to claim the threat of

criminal sanctions is necessary to protect the health and safety of unsheltered residents while simultaneously preventing the development of shelter opportunities for these very individuals.

B. Appellant Not Only Impermissibly Punishes Individuals' Status, But Its Own Policies Contribute to the Status They Seek to Punish.

In the instant case, a ready, willing, and able service provider desired to create and operate expanded shelter opportunities in Pottstown. *See* Appellee's Br. at 15. Taking Appellant's notice at its face value, that the desire to remove individuals from the encampment is "For your personal safety," it is hard to understand how this goal is best achieved through the threat of sanction rather than permitting shelter operations. While Appellant insists its sanction threats are coupled with service offers, the record demonstrates that there are no available services behind these offers. *See* Appellee's Br. at 11-12 (fn2).²⁷

Combining zoning and local land use with police power to achieve exclusionary ends is not new to the American landscape. Jim Crow vagrancy laws, federally sponsored locally implemented racial redlining, racially restrictive covenants, and exclusionary zoning codes, paint a dark picture of our country's history utilizing land use, financing, and development processes to achieve exclusionary goals. While the instant case loses much of the race-based exclusion of this history, the unique context of homelessness presents a nuance. While local jurisdictions have little control over

²⁷ *See also, Better Days Ahead Outreach Inc.*, 2023 WL 8237255 ("Borough Manager Keller testified that it has and will continue to work with Beacon of Hope on the variance. While the press release and Keller's testimony tender that the Borough has made efforts to work collaboratively with Beacon of Hope and the other service providers, this Court finds quite the opposite. After engaging with Access Services and Beacon of Hope about its plan to close the College Drive Encampment, there can be no doubt that the Borough was aware of the lack of shelter space available.").

whether an individual constituent is black, brown, foreign, or female, they have significant control over whether they have or lack access to shelter. This nexus, between a jurisdiction's ability to control access to shelter and its approach to constituents who lack shelter is fundamental to the analysis of *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) relied on by the court below that prohibits "bans on sleeping in public when there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters." *Better Days Ahead Outreach Inc.*, 2023 WL 8237255, at *3 (internal citations omitted). In the instant case, the lack of available shelter is not in dispute.²⁸ The cause of lack of shelter in Pottstown is also no mystery. Its own ordinances do not permit permanent shelters.

Pottstown does have a special exemption process to permit shelter and did reach a temporary 'move every 30 days' resolution over the coldest months of the year to permit limited access to life saving warm space. Appellee's Br. at 7. However, the default prohibition on shelter development combined with the sanction-based approaches to unsheltered residents sends a clear message that Pottstown does not welcome services or its unsheltered residents. These approaches degrade the ability of organizations like RHLS' non-profit client base to implement successful homelessness interventions, such as the development of shelter and affordable housing opportunities. They in turn degrade the ability of individuals suffering homelessness to secure successful housing stability.

²⁸ *Id.* ("it is uncontroverted that the Borough of Pottstown has (1) categorically barred the existence of homeless shelters through its zoning code; and (2) plans to enforce the closure of the College Drive Encampment under the threat of criminal sanctions.").

IV. Punishing Homelessness is Counterproductive and Misconstrues the Issue that Housing and Shelter are the Solutions to Homelessness.

Appellant characterizes forced displacement of its unsheltered residents under threat of criminal sanctions as a necessary measure to protect their health and safety. This mantle of paternalism is a thin veneer. Appellant simultaneously admits it actively prohibits the very shelter necessary to provide safe respite for these residents. “No permanent shelters are located in Pottstown, *and Pottstown’s Ordinances do not permit permanent shelters.*” Def.’s Br. at 5. The authority of Appellant to prevent shelter in its jurisdiction is not in question in this instance. However, preventing access to shelter and then seeking to punish residents for lack of shelter that is subsequently not available is impermissible and ineffective.

This cycle reinforces barriers to exiting homelessness. Even minor citations and fines can cause insurmountable barriers to individuals seeking housing. Tenant selection plans often or always require criminal and credit checks. *See* U.S. DEPT OF HOUS. AND URBAN DEV., Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing, (April 29, 2024), Section II. A. page 2 (last accessed May 21, 2024).²⁹ HUD advises that criminal and credit checks can lead to disparate denial rates among protected classes and advises housing providers to practice caution when implementing screening criteria. HUD is undergoing intensive regulatory efforts to reduce the barriers of certain credit and criminal record screening practices. *See* Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg.

²⁹ Available at:

https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Guidance_on_Screening_of_Applicants_for_Rental_Housing.pdf.

25332 (April 10, 2024). However, even policies rigorously compliant with HUD guidance may exclude potential residents based on unpaid balances owed to jurisdictions from fines, or history from the criminal sanctions Appellant seeks to impose. Housing providers who may otherwise be motivated to provide housing opportunities to individuals can become constrained by their own tenant selection plans which often require intensive administrative processes to amend. If Appellant were allowed to impose these penalties, it could frustrate the ability of RHLS's clients to offer housing and shelter solutions to the clients they intend to serve. Sanctioning unhoused residents can have the collateral consequence of seriously impairing their access to the needed solution: shelter and housing.

Appellant admits in the instant case that its punitive approach was driven in part by constituent demand. *See* Def.'s Br. at 4. The record demonstrates that Appellant's prohibition on shelter is also driven by a desire to exclude. *See* JAIL 0275. The blending of prohibitive local land use policies which do not permit any permanent shelter operations with individualized punishment of unsheltered residents lays bare the intended exclusionary outcome. "We are already seeing an influx of homeless individuals from outside the region who by their own admission, come here because this is where the services are located. [...] We are sympathetic to the needs of each and every one of our residents." *See* Def.'s Br. at 3 (emphasis original). Jurisdictions are not permitted to control *who* lives within their boundaries. *See generally, Saenz v. Roe*, 526 U.S. 489, 511 (1999). Appellant's actions taken together lay bare the issue Appellant's policies address is not solving the crisis of homelessness facing its

community, but impermissibly punishing its unhoused residents to drive them out of their community.

The citations, sanctions, and other punitive approaches, rightly prohibited by the preliminary injunction, are not well tailored to solving the problem of homelessness. Even minor fines can significantly contribute to a cycle of homelessness and poverty. *See* 31 Geo. J. on Poverty L. & Pol’y, at 220. These tactics may achieve a goal of moving unhoused residents along but will not, cannot, achieve the goal of addressing the problem of homelessness.

CONCLUSION

Regional Housing Legal Services respectfully urges the Court to consider these arguments and evidence presented in support of the Appellees’ position against Pottstown’s punitive measures on its unhoused residents.

Local jurisdictions like Pottstown face a choice, they can invest resources in housing solutions or punitive based practices; create a zoning and local land use milieu to encourage equitable development of services and affordable housing opportunities or empower exclusionary practices. Effective and sustainable interventions to solve homelessness exist. The homelessness crisis which kills our neighbors can be solved. It cannot be solved with sanctions, fines, or handcuffs. It can be solved with housing and shelter.

For these reasons, along with the reasons in Appellees’ brief, *Amicus* asks the Court to affirm the District Court.

Respectfully Submitted,

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May 22, 2024

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 5,224 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Word for Microsoft 365 MSO (Version 2404 Build 16.0.17531.20152) 64-bit, set in Century Schoolbook 12-point type; and

(iii) was scanned for viruses prior to submission.

I further certify that I am a member in good standing of the bar of the Third Circuit.

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CERTIFICATE OF SERVICE

I certify that on May 22, 2024, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

I further certify that within the required time, I will serve 7 paper copies of this brief upon the Clerk of Court.

I further certify that those paper copies will be identical to the electronically-filed version of the brief.

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