

# Anti-homeless laws may violate California's equal protection doctrine

## Overview

Under California's equal protection doctrine, Los Angeles Municipal Code 56.11 and similar laws that are designed to harass the homeless may be unconstitutional. In 2016, the Los Angeles City Council adopted LAMC 56.11 to address the city's homeless encampments.<sup>[1]</sup> The law's purpose is to "balance the needs" of residents to access "clean and sanitary" public areas with the "homeless population['s]" property interests, and it prohibits storing "any tangible property" in public areas.<sup>[2]</sup> The ordinance permits the city to confiscate and destroy such property if it violates the law's size, placement, or personal attendance requirements after written notice.<sup>[3]</sup> The ordinance was recently enjoined by a federal court, yet the injunction's narrow terms invite LA to reenact a similar law.<sup>[4]</sup> If that happens, LAMC 56.11 and similar laws can be invalidated for violating California's equal protection doctrine.

## Analysis

Federal law is not the ideal vehicle to challenge anti-homeless laws, and LAMC 56.11 illustrates why. The ordinance is currently inoperative, having been enjoined by the Ninth Circuit on narrow grounds.<sup>[5]</sup> The court ruled that the ordinance's seizure-and-destruction provisions violated the Fourth Amendment as a warrantless seizure of property.<sup>[6]</sup> The remainder of the ordinance was enjoined as inseverable.<sup>[7]</sup> The court avoided discussing the ordinance's broader provisions, its effects on the fundamental rights of the poor, and the city's statements regarding LAMC 56.11. The message this sends to Los Angeles and other cities is that such ordinances are permitted with only minor changes.<sup>[8]</sup> This is because federal equal protection jurisprudence does not reach anti-homeless laws, forcing federal courts engage in

piece-by-piece analysis under other doctrines. Thus, federal courts cannot provide a lasting answer to local anti-homeless laws.

Meanwhile, LAMC 56.11 could have been wholly invalidated under California's constitution on alternate grounds. Such an ordinance can be subject to strict scrutiny either because it involves a suspect class (the homeless) or impairs a fundamental interest (to maintain essential property), and in general any anti-homeless law is potentially subject to strict scrutiny because it targets a suspect class. LAMC 56.11 would fail strict scrutiny. And because LAMC 56.11 was enacted with a discriminatory purpose against the homeless, it cannot survive California's animus-based rational review. Thus, California's equal protection jurisprudence permits a more comprehensive analysis of anti-homeless laws than federal law.

### **LAMC 56.11 and beyond: homelessness as a suspect class**

The homeless satisfy California's criteria for determining a suspect class. The primary factors in determining a suspect class are whether the class of persons who exhibit the characteristic have "historically [] been subjected to invidious and prejudicial treatment" and whether the character in question "bears no relationship to the individual's ability to perform or contribute to society."<sup>[9]</sup> Immutability and political powerlessness weigh in favor of designating a suspect class, but are not prerequisites.<sup>[10]</sup> Homelessness passes this test because the homeless have been subject to prejudicial treatment; the status of lacking a home is irrelevant to one's ability to contribute to society; and barriers exist that impair the ability of the homeless to engage in politics.

The homeless have endured a history of prejudicial treatment, confronting laws that criminalized, displaced, and banished the homeless.<sup>[11]</sup> Just as racial minorities and women saw their voting rights denied for invidious reasons,<sup>[12]</sup> the homeless were unable to register to vote in California until 1976 due to requirements to list a permanent address.<sup>[13]</sup> Today, people reliant on homeless shelters continue to face discrimination in employment due to requirements to report their housing history.<sup>[14]</sup> The homeless have faced, and continue to face, invidious discrimination.

Lacking a residential address bears no relation to one's ability to contribute to society. Homelessness is the condition of lacking a residential address. A residence "is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose."<sup>[15]</sup> This is distinct from permissible classifications based on intelligence, physical disability,<sup>[16]</sup> and mental disability — which all relate to "real and undeniable"<sup>[17]</sup> differences in ability to perform. By contrast, lacking a regular address better resembles the impermissible classifications based on race and gender that are based on "outdated social stereotypes."<sup>[18]</sup> The vast majority of homeless are neither physically disabled nor suffer serious mental illness.<sup>[19]</sup> The lack of a residential address does not dictate one's ability to contribute to society.

Although political powerlessness is not a prerequisite to suspect classification, this factor weighs in favor of recognizing the homeless as a suspect class.<sup>[20]</sup> The homeless were largely excluded from political involvement until the 1970s due to durational residency requirements to vote and hold public office.<sup>[21]</sup> Many homeless do not vote because parties ignore them, or they fear being harassed at voting booths, and they are reluctant to leave belongings behind to travel to voting centers.<sup>[22]</sup> And the homeless are politically powerless "inasmuch as they lack the financial resources necessary to obtain access to many of the most effective means of persuasion." These practical considerations conspire to keep the homeless politically powerless despite the changes in election law.

The homeless meet every California factor for determining a suspect class: they have historically been subjected to invidious and prejudicial treatment, their characteristic bears no relationship to the ability to perform or contribute to society, and they are politically powerless. With this threshold consideration met, a court can apply strict scrutiny.

### **Wealth-based laws that affect a fundamental interest trigger strict scrutiny**

Both California and federal courts reserve strict scrutiny for legislation based on "suspect classifications" or affecting "fundamental" rights.<sup>[23]</sup> Not every law that

impacts a fundamental right will be subject to strict scrutiny; only laws that cause a “real and appreciable” harm to a fundamental interest are subject to the heightened standard.<sup>[24]</sup> Federal courts have not recognized wealth as a suspect classification.<sup>[25]</sup> But the California Supreme Court has: in *Serrano II*, it applied strict scrutiny under the state constitution to legislation based on wealth classifications that affect a fundamental interest.<sup>[26]</sup>

The *Serrano* series of cases dealt with a school district funding scheme in which local wealth primarily determined how much funding the state provided.<sup>[27]</sup> This meant that poorer districts could not match the funding levels of wealthier districts because the poorer districts could not levy local taxes to compensate for the funding gap.<sup>[28]</sup> Thus, the law disadvantaged the education rights of students in poorer districts relative to wealthier districts.<sup>[29]</sup> The court held that strict scrutiny applied to the funding scheme because the law employed wealth classifications and impaired the fundamental right of education.<sup>[30]</sup> Thus, wealth alone is not a suspect class: wealth-based classifications must overlap with a fundamental right to merit strict scrutiny.<sup>[31]</sup>

### **LAMC 56.11 implicates the fundamental interest in maintaining essential property**

LAMC 56.11 merits strict scrutiny because it is a wealth-based law that has a real and appreciable effect on a homeless person’s fundamental right to maintain essential property.<sup>[32]</sup> It relies on a fiction that to avoid having property confiscated or destroyed one need only privately store those belongings. That is a false choice for the homeless, just as raising local taxes in *Serrano I* to backfill low school funding was a false choice.<sup>[33]</sup> LAMC 56.11 is punishment for being poor — it establishes a classification based on wealth.<sup>[34]</sup>

LAMC 56.11 also affects the fundamental right to maintain essential property: it defines personal property as “any tangible property” including “tents,” “sleeping bags,” “merchandise,” “clothing,” “documents,” and “medication.”<sup>[35]</sup> Those items

are all necessary to daily life. The California constitution establishes the right to property as a fundamental interest, and several sections of article I describe property's significance.<sup>[36]</sup> Article I, section 1 recognizes a general right to maintain property, listing among the inalienable rights "acquiring, possessing, and protecting property."<sup>[37]</sup> If that right is to mean anything, it must include the right to possess property that is necessary for daily life.

The right to property is fundamental because of its importance to being a "full member of society."<sup>[38]</sup> *Serrano I* relied on the link between education and social mobility to determine that it is a fundamental interest.<sup>[39]</sup> Similarly, government restrictions on essential property rights would force the homeless to chase their most basic needs at the expense of the opportunity to invest in greater ambitions. This would trap the homeless in their condition, removing their ability "to participate in the social, cultural, and political activity of our society."<sup>[40]</sup>

Maintaining property is also fundamental because of its direct connection to individual health. The right to abortion partly depends on a woman's "fundamental interest in the preservation of her personal health."<sup>[41]</sup> Here, depriving individuals of essential shelter and clothing will expose them to the elements and associated exposure injuries.<sup>[42]</sup> And confiscating medication will exacerbate existing maladies. Just as the state cannot force a woman into a situation detrimental to her well-being, the state cannot confiscate property that is essential to life.

Local laws like LAMC 56.11 penalize the homeless for having little property, and the penalty is to confiscate what little they own. Owning essential property is a fundamental right under the California constitution, it is necessary to being a "full member" of society, and it is required to maintain individual health. LAMC 56.11's effect on the fundamental right to maintain essential property is "real and appreciable" because it harms a homeless person's ability based on their poverty.<sup>[43]</sup> Thus, LAMC 56.11 would be subject to strict scrutiny in California courts because it classifies based on wealth and affects the fundamental interest of maintaining essential property.

## **LAMC 56.11 fails strict scrutiny**

LAMC 56.11 cannot survive strict scrutiny. To survive strict scrutiny, a law must be “precisely tailored to serve a compelling governmental interest.”<sup>[44]</sup> LAMC 56.11 fails this test because it is not narrowly tailored and the city itself has acknowledged several less-restrictive alternatives.

The ordinance’s stated purpose is overinclusive: it aims to maintain “clean and sanitary” public areas and promote “public health.”<sup>[45]</sup> Yet LAMC 56.11 permits the city to confiscate “any” unattended or bulky property stored in public areas.<sup>[46]</sup> This omits considerations of cleanliness, whether the right of way is impeded or not, dangerousness, or public benefit. For example, that wide net would capture a bouquet of flowers placed atop a city trash bin. The ordinance also includes an arbitrary limit that allows the city to discriminate based on the time of day.<sup>[47]</sup> A narrower version of LAMC 56.11 (including only provisions on ADA accessibility, public hazards, and contraband) would be sufficient to accomplish the law’s stated purpose.<sup>[48]</sup>

And there are less-restrictive alternatives: the city’s own controller found several that would reduce public storage of personal property without requiring confiscation or destruction.<sup>[49]</sup> These alternatives include increasing the storage capacity of the city’s existing voluntary storage facility, repurposing 9,000 underutilized city-owned properties as new voluntary storage areas, and providing the homeless with storage lockers.<sup>[50]</sup> The existence of alternative ways for the city to promote public safety without impinging on individuals’ fundamental right to maintain essential property is fatal to ordinances like this.

## **Animus-based rational review may also be fatal to LAMC 56.11**

LAMC 56.11 would likely fail rational basis review in California. Ordinarily rational basis is highly deferential to the legislation being reviewed.<sup>[51]</sup> Yet courts at times apply a less deferential variation called animus-based rational review. Rather than asking if legislation is rationally related to the statutory classification, this analysis

asks whether the classification's purpose is lawful.<sup>[52]</sup> Animus-based rational review has been invoked to strike down legislation with a discriminatory purpose because animus toward a politically unpopular group is not a legitimate governmental interest.<sup>[53]</sup> That analysis applies to LAMC 56.11.

California animus-based rational review inquiry is stricter than its federal counterpart. The U.S. Supreme Court has limited the scope of federal animus-based rational review to legislative history and text.<sup>[54]</sup> California's high court has gone farther, and considered "events which led up to and accompanied" the passage of a law, public statements made by legislators, introductory language, and the law's "probable impact."<sup>[55]</sup> LAMC 56.11 would not survive California's animus-based rational review because its broader context demonstrates a discriminatory purpose.

The official pronouncements by Los Angeles regarding LAMC 56.11 show its impermissible purpose. The "Declaration of Legislative Intent" names the "homeless population" as the only group whose property rights need to be balanced against public needs.<sup>[56]</sup> And every city council member who spoke preceding the vote noted the law's impact on the homeless.<sup>[57]</sup> The introductory text and the council's comments show that LAMC 56.11 was intended to apply primarily, if not solely, to the homeless.

The city's LAMC 56.11 protocol and controller's report illustrate the law's "probable impact" on the homeless.<sup>[58]</sup> The protocol describes a procedure for initiating and deploying a homeless encampment sweep.<sup>[59]</sup> The controller's report states that LAMC 56.11 is "the current framework for how the City deals with homeless encampments."<sup>[60]</sup> While state courts sometimes engage in speculation to determine an ordinance's probable discriminatory enforcement,<sup>[61]</sup> LA's pronouncements explicitly acknowledge a discriminatory enforcement plan that parallels the council's views of the law.

Los Angeles is well aware that its stance on the homeless is constitutionally suspect. The controller's report notes that the city was sued five times over the last 20 years

for its anti-homeless policies and that the litigation “shaped” LAMC 56.11.<sup>[62]</sup> The city’s repeated attempts to make unconstitutional anti-homeless ordinances pass muster are “events which led up to” the passage of LAMC 56.11.<sup>[63]</sup> The city’s past litigation weighs against LAMC 56.11 having a benign purpose.

The upshot is that LAMC 56.11 was enacted by a city that harbored an invidious purpose, that intended discriminatory enforcement, all in a pattern of violating the homeless population’s rights. Animus-based rational review would invalidate LAMC 56.11 as a whole.

## Conclusion

Justice Mosk warned that when courts uphold anti-homelessness laws, they encourage a “competition among cities to impose comparable restrictions in order to avoid becoming a refuge for homeless persons driven out by other cities.”<sup>[64]</sup> He was right: this trend shows “no signs of slowing down,”<sup>[65]</sup> and California cities are expected to enact 11 new anti-homelessness laws per year.<sup>[66]</sup>

California’s equal protection jurisprudence is a more potent tool to dismantle anti-homelessness laws than its federal counterpart and can effectively review legislation that discriminates against the homeless. Of course, litigation will not solve homelessness; California needs policy solutions to provide education, jobs, and treatment to enable people to achieve stability, and programs to catch them if they fall. While we await those policy solutions, California’s equal protection doctrines can stop cities from harassing the homeless and require cities to respect the dignity of their most vulnerable citizens. That is at least a step in the right direction.

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1. Holland, *L.A. Limits Property of Homeless to What Can Fit in Trash Bin*, The Seattle Times (March 30, 2016). ↑
2. L.A. Mun. Code §§ 56.11.1, 56.11.2(j). ↑



3. *Id.* § 56.11.3(a)-(f). ↑
4. *Garcia v. City of Los Angeles* (2021) at 1124. ↑
5. *See generally id.* ↑
6. *Id.* at 1118-19. ↑
7. *Id.* at 1122. ↑
8. *Id.* at 1124 (concluding that “the City is free to draft a lawful version of the Bulky Items Provision”). ↑
9. *In re Marriage Cases* (2008) at 753. ↑
10. *Id.* at 752. ↑
11. *See generally* American Civil Liberties Union, *Outside the Law: The Legal War Against Unhoused People* (2021). ↑
12. *See Sail’er Inn, Inc. v. Kirby* (1971) at 19. ↑
13. *See* Former Elec. Code § 207, added by Stats. 1976, ch. 1172, § 4, repealed by Stats. 1994, ch. 920, § 1, and reenacted without substantive change as Elec. Code § 2027 by Stats. 1994, ch. 920, § 2 (stating that temporary locations such as a trailer, vehicle, or public camp can be used as a place of domicile for voter registry purposes). *See also Collier v. Menzel* (1985) at 31 (noting that Election Code § 207 signifies that the legislature has not “adopted the traditional notion that a dwelling or habitation for voter registration signifies four walls”). ↑
14. *See generally* Golabek-Goldman, *Ban the Address: Combating Employment Discrimination Against the Homeless* (2017) 126 Yale L. J. 1788 (reviewing how employers reject prospective employees based on their history of living in homeless shelters). ↑
15. Gov. Code § 244. ↑

16. *Sail'er Inn, Inc.* at 18. ↑
17. *See People v Barrett* (2012) at 1135 (conc. & dis. opn. of Liu, J.). ↑
18. *Sail'er Inn, Inc.* at 18. ↑
19. Los Angeles Almanac, Homelessness in Los Angeles County (2020) (stating that 17% of L.A.'s homeless population is physically disabled and 22% suffer from a serious mental illness). ↑
20. *In re Marriage Cases* at 753. ↑
21. *Young v. Gness* (1972) at 27-28 (finding that any durational residency requirement for voter registration in excess of 30 days violated equal protection); *Thompson v. Mellon* (1973) at 106 (holding that any durational residency requirement for public office candidate registry in excess of 30 days violated equal protection). ↑
22. Ockerman, *California Should Have a Significant Homeless Vote. Here's Why That Might Not Happen.*, VICE (March 3, 2020). ↑
23. *Darces v. Woods* (1984) at 888. ↑
24. *Bd. of Supervisors of Sac. County v. Local Agency Formation Com. of Sac.* (1992) at 914. ↑
25. *San Antonio Independent School Dist. v. Rodriguez* (1973). ↑
26. *Serrano v. Priest* (1976) at 768 (*Serrano II*). ↑
27. *Id.* at 744-45. ↑
28. *Serrano v. Priest* (1971) at 598 (*Serrano I*). ↑
29. *Serrano II* at 747. ↑
30. *Id.* at 766 n.45. ↑
31. *Ibid.* ↑

32. *See ibid.* ↑
33. *See Serrano I* at 598. ↑
34. *See In re Antazo* (1970) at 108. *In Re Antazo* was the first case in which the California Supreme Court recognized wealth as a suspect class. ↑
35. L.A. Mun. Code § 56.11.2(j). ↑
36. *See* Cal. Const., art. I, §§ 1 (inalienable rights), 7 (due process and equal protection clause), 19 (eminent domain), 20 (equal property rights guaranteed to noncitizens), 21 (property rights in marriage), and 22 (prohibition on conditioning vote on property qualifications). ↑
37. Cal. Const., art. I, § 1. ↑
38. *In re Marriage Cases* at 734. ↑
39. *Serrano I* at 607. ↑
40. *Id.* at 606. ↑
41. *Com. to Defend Reproductive Rights v. Myers* (1981) at 274. ↑
42. Committee on Health Care for Homeless People, Homelessness, Health, and Human Needs (1988) at 45-47. ↑
43. *Bd. of Supervisors of Sac. County* at 914. ↑
44. *Darces* at 888. ↑
45. L.A. Mun. Code § 56.11.1. ↑
46. *Id.* § 56.11.3(a), (i). ↑
47. *Id.* § 56.11.3(f). ↑
48. *Id.* § 56.11.3(d), (g), (h). ↑
49. L.A. City Controller, Report on Homeless Encampments (2017) at 19-23. ↑

50. *Ibid.* ↑
51. *People v. Chapman* (2018) at 288-89 (noting that rational basis review presumes the validity of the challenged statute). ↑
52. *See Parr v. Municipal Court* (1971) at 864. ↑
53. *See id.* at 868; *Romer v. Evans* (1996) at 634. ↑
54. *See Pollvogt, Unconstitutional Animus* (2012) 81 Fordham L.Rev. 887, 926. ↑
55. *See Parr* at 865-68. ↑
56. L.A. Mun. Code § 56.11.1. ↑
57. Los Angeles City Clerk, *City Council Meeting – Wednesday* (March 30, 2016) Timestamp: 1:18-1:19 (Councilmember Buscaino stating LAMC 56.11 would “end enabling” of encampments); 1:54-1:58 (Councilmember Gilbert Cedillo voicing concerns that LAMC 56.11 is moving the city in direction of criminalizing homelessness); 1:58-2:00 (Councilmember Mike Bonin agreeing that providing more storage is a better solution than criminalization); 2:00-2:03 (Councilmember Curren Price reiterating Councilmember Bonin’s points). ↑
58. *See Parr* at 868. ↑
59. Los Angeles Sanitation, *Los Angeles Municipal Code 56.11 Standard Operating Protocols* (2016) at 4-5. ↑
60. L.A. City Controller, *Report on Homeless Encampments* (2017) at 2. ↑
61. *See, e.g., Parr* at 868-69. ↑
62. L.A. City Controller, *Report on Homeless Encampments* (2017) at 2-5. ↑
63. *Parr* at 867. ↑
64. *Tobe v. City of Santa Ana* (1995) at 1128 (dis. opn. of Mosk, J.). ↑

65. *See* Policy Advocacy Clinic, Berkeley Law, California's New Vagrancy Laws: The Growing Enactment and Enforcement of Anti-Homeless Laws in the Golden State (2015) at 10. ↑

66. *Ibid.* ↑