

October 11, 2023

Via email

Honorable Gerald Lebovits
New York State Supreme Court Justice
Supreme Court New York County
60 Centre Street
New York, New York 1007

Re: *Callahan v. Carey*, Index No. 42582/1979

Letter in opposition to the City Defendants' application for leave to seek
relief from, and modification of, provisions of the Final Judgment on Consent

Dear Justice Lebovits:

We write in response to the City Defendants' October 3, 2023 letter (the "October Letter") requesting permission to move for relief from, and modification of, the Final Judgment on Consent in *Callahan v. Carey* dated August 26, 1981 (the "Judgment" or "*Callahan*"). The Judgment has saved thousands of lives by protecting human beings from the elements. Just as New York City enters a period of freezing winter temperatures, the City Defendants seek leave to abandon the fundamental obligation to provide life-sustaining shelter. If they succeed, the most vulnerable New Yorkers will be left outside and in grave danger of bodily harm or death.

The October Letter represents the City Defendants' third iteration since May 2023 of a request to seek relief from and modify the Judgment, pursuant to ¶ 19.¹ The prior two requests have apparently been abandoned.

¹ The City Defendants' first letter, dated May 23, 2023, requested that their obligations to shelter every adult in need be stayed when the City's Department of Homeless Services ("City DHS") "lacks the resources and capacity to establish and maintain" sufficient shelters, but did not specify how City DHS would determine when it lacked the "resources and capacity" to shelter human beings from the elements. The City Defendants' second letter, dated July 17, 2023, proposed to create a Crisis Plan that would relieve them of certain obligations (such as bed spacing and staffing ratios) under the Judgment, while still protecting all single adults from the elements and meeting basic human needs. The parties met and collaborated productively on such a Crisis Plan prior to the July letter and continued to meet and confer up until the City Defendants sent the October Letter.

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In the October Letter, for the first time, the City Defendants seek to eliminate their obligations to shelter any New Yorker not covered by narrow State shelter regulations. The State regulations protect far fewer people than the Judgment. In practice, this proposed modification would immediately deny shelter to tens of thousands of people, including the vast majority of the new arrivals,² ***and also*** thousands of low-wage working New Yorkers, New Yorkers who receive federal disability payments, and long-time New Yorkers without immigration status.

Historically, Mayors and Governors have used emergency decrees to facilitate assistance to those facing harm from the emergency. In a perverse departure from that tradition, the City Defendants now seek to use an emergency decree to do just the opposite—to deny assistance to those in need. The City Defendants’ proposed modification would expose thousands of human beings to subzero temperatures, rain, snow, and other elements that will cause bodily harm, frostbite and even death. Record evidence in this litigation establishes the profound impact of frostbite on human beings, even when temperatures stay above freezing. See time study of auto-amputation of a 21-year-old man’s toes, caused by exposure, submitted to the Court as an exhibit to the Affidavit of Dr. James O’Connell, sworn to December 9, 1999, attached as Exhibit A.

Moreover, if the City Defendants prevail, New York City residents and the rest of the world will see mass homeless encampments that the New York State Legislature sought to prevent when it ratified Article XVII of the State Constitution.³ Massive encampments have become endemic in communities that do not have a right to shelter.⁴

Modification of *Callahan*, as proposed by the City Defendants, would set a dangerous precedent and call into question similar decrees that offer protection from the elements to especially vulnerable populations, such as families with minor children.⁵

As explained below, the City has many alternative options for handling the needs of new arrivals without invoking the drastic remedies they now seek. In response to any motion, Plaintiffs will show that the acts and omissions of the City and State Defendants have been a significant factor in the shelter capacity crisis the City Defendants now face. Rather than seeking permanent relief from their obligations under the Judgment to provide life-sustaining

² The City Defendants use various terms to refer to people who have recently entered the United States. In the October Letter, the City uses the terms “migrants” or “new arrivals.” In many of its public-facing documents the City uses the term “asylum seekers.” The City Defendants have informed Plaintiffs’ counsel that these terms refer to anyone who crossed the border on or after March 15, 2022 and has a fear of returning to their home country.

³ The historical record of the 1938 Constitutional Convention shows that the delegates sought to ensure support for the needy, “not only in periods of grave emergency, as at present, but even in times of normal unemployment,” 3 Revised Record of the Constitutional Convention of the State of New York (Albany, 1938) at 2126.

⁴ See attached photos from news reports of people sleeping outside, on airport floors, or in tents in Chicago, San Francisco, and Los Angeles, attached as Exhibit B.

⁵ See *Boston v. City of New York* (Index No. 402295/08), dated September 17, 2008 (establishing a right to shelter for families with children who have no other safe housing option).

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shelter to the most vulnerable New Yorkers, both levels of government should focus solely on taking the necessary steps to prevent people from being forced to sleep outside as winter approaches.

Accordingly, Plaintiffs oppose the City Defendants' request to make a motion to gut the constitutionally mandated right to shelter. Instead, Plaintiffs request that the City Defendants engage in Court-supervised mediation to explore practical alternatives that do not result in human beings turned away from shelter.

I. PLAINTIFFS' REQUESTS FOR RELIEF

Prior to the City Defendants' October Letter, the parties engaged in productive meetings to establish a "Crisis Plan," including the tools and resources the Defendants said they needed to ensure compliance with the most fundamental principle of the Judgment: protection of human beings from the elements. These discussions yielded concrete proposals that the Defendants have begun to implement, including deploying additional resources provided by the federal government following a joint application by the Defendants. To continue this progress, Plaintiffs request that this Court convene mediated settlement discussions (as contemplated during several past court conferences in Chambers with Justice Erika Edwards) prior to issuing a decision on the City Defendants' request to make their motion.

A mediation is necessary because both the City and State Defendants have failed to follow through on key elements of their crisis planning. Court-supervised mediated conferences would hold the parties accountable to their own stated objectives and serve to clarify the role of the State Defendants in order that the State might assist—rather than impede—the City Defendants in meeting the constitutional obligation borne by both levels of government to ensure the provision of life-sustaining shelter.

The October 15, 1984 Order in this matter set forth a procedure for seeking permission to pursue motion practice.⁶ It was intended to maximize efforts to resolve disputes, and, on many occasions, it has eliminated the need for litigation, even in urgent circumstances. Now, following the new assignment of this matter, the interests of all parties would be best served by a mediated dispute resolution process. Such a process could address the City Defendants' specific operational needs prior to expansive and protracted litigation over fundamental questions of law, while the needs of vulnerable human beings hang in the balance.

In the alternative, should this Court permit the City Defendants to file the new motion, given the radical change the City Defendants have proposed to a long-established fundamental

⁶ A copy of the October 15, 1984 Order is attached to the City Defendants' May 23, 2023 letter to the Court as part of the City's first request for permission to file a motion to modify the Judgment.

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right, Plaintiffs request that the Court set forth a submission schedule that would permit Plaintiffs to conduct adequate discovery, pursuant to ¶ 11 of the Judgment.⁷

Finally, Plaintiffs may, depending on the State Defendants' forthcoming position on the City's October Letter, request an opportunity to pursue relief against the State Defendants.

II. ARGUMENTS IN OPPOSITION TO CITY DEFENDANTS' REQUEST

1. The City's proposed modification to the Judgment obliterates the right to shelter, rather than proposing relief tailored to the current circumstances.

If the City Defendants proceed with the proposed modification request, Plaintiffs will fully brief their legal arguments as to why the City Defendants' proposal does not meet the legal standard for modifying the Judgment in this case. In this letter, Plaintiffs set forth some immediate concerns about what the City Defendants are asking this Court to permit. The relief the City Defendants propose in the October Letter would "relieve" the City Defendants "of any obligation to comply" ***with all 18 operative paragraphs of the Judgment.***

While the City Defendants claim that their proposed modification would be "temporary," the period of ***suspension could last indefinitely.*** As outlined in Section III of the City's October Letter, the City Defendants—and the City Defendants alone—would decide when to suspend the right to shelter. At any time in the future, whenever the Mayor or the Governor declares an emergency following a surge in the need for shelter, long-time New Yorkers and new arrivals alike could be denied shelter and relegated to the streets, parks, subways and other places that are unsafe for living. This overbroad proposal would apply to low-wage workers, people with disabilities, and long-term New Yorkers without a listed immigration status, as well as new arrivals.

2. The Judgment is not "Outmoded" or "Cumbersome."

The City Defendants mischaracterize the Judgment as an "outmoded and cumbersome framework." They ignore not only the collaborative efforts of the parties over the last year, but over 40 years of history. Their claim that they need greater "flexibility" is not only false but misleading.

The Judgment as it stands has survived for the last four decades because it provides sufficient flexibility to accommodate crises. In fact, historically, Plaintiffs' counsel has recognized good faith efforts at compliance and worked with the Defendants to achieve compliance in accordance with the engagement process set forth in the 1984 Order. During Superstorm Sandy, for example, when the City was confronted overnight with thousands of people unexpectedly in need of shelter from the storm, Plaintiffs and the City Defendants

⁷ Par. 11 requires disclosure of material "relevant" to enforcing and monitoring the City Defendants' commitments under the decree." *Callahan v. Carey*, 12 NY3d 498, 502 (2009).

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were not constrained by the Judgment in addressing the crisis. Even as the storm approached, the New York City Office of Emergency Management (“NYCEM”) set up shelters that did not comply with the Judgment but offered refuge for people suddenly without a safe place to sleep. During that period, the parties worked together, and the fundamental tenets of the right to shelter survived without intervention from the Court. The response to Superstorm Sandy demonstrates that the City has sufficient flexibility to address future extreme weather events that can be expected to occur with more frequency due to climate change.

Similarly, over the last year, as the City Defendants’ need for shelter sites grew acute, the City Defendants opened shelters at hundreds of new sites outside the Department of Homeless Services (“City DHS”) shelter system. In addition to City DHS, City agencies operating these sites include NYCEM, the Health + Hospitals Corporation, the Department of Housing Preservation and Development, and the Department of Youth and Community Development. Many of these sites deviate from the standards outlined in the Judgment. Given the circumstances, Plaintiffs worked collaboratively with the City Defendants to ensure that class members would be protected, rather than seeking judicial enforcement of the Judgment.⁸ Plaintiffs were only forced to ask this Court for relief in July 2023 when, in the scorching heat of summer, new arrivals seeking shelter were deprived of even the opportunity to request it, and instead had to sleep outside the City’s intake office for new arrivals at the Roosevelt Hotel in Midtown Manhattan.⁹

The logistical and financial strain recent arrivals have placed on the City Defendants is real, and accordingly, Plaintiffs ***have been, and will remain, flexible in collaborating with the City in developing a crisis plan, so long as it offers basic protection from the elements.*** The only remaining point for which City Defendants lack the “flexibility” they purport to seek is the right to a bed for each person each night—the right to shelter itself. The proposal outlined in the City Defendants’ October Letter would place thousands of people—new and native to New York alike—in peril as winter approaches. Plaintiffs unequivocally oppose the City Defendants’ request to move forward with their effort to achieve this radical result.

3. The City’s plan to conform New York City to the other 57 State Counties is inappropriate, misleading and would result in chaos.

The City Defendants make the disingenuous claim that their proposed modification would subject New York City residents to supposed uniform legal and regulatory standards employed by the State’s 57 other counties to screen applicants for shelter. The City

⁸ In discussions with the City Defendants about plans to shelter new arrivals, Plaintiffs identified two uncrossable lines: that families with children must not be placed in congregate settings, and that every person seeking shelter be provided with a bed. Every other requirement of the Judgment has been subject to negotiation on a site-by-site basis, subject to current conditions. The City Defendants have failed upon occasion to comply with even these fundamental requirements, but nonetheless no requests for judicial relief have been filed, other than leave to seek relief to address human beings sleeping on the streets in July.

⁹ See attached photos from news reports of new arrivals waiting in line and sleeping on the sidewalk outside the Roosevelt Hotel in July 2023, attached as Exhibit C.

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Defendants fail to accurately depict the realities of their proposed modification and the chaos that would ensue.

The State statutory and regulatory scheme outlined by the City Defendants in the October Letter is confusing and contradictory, as there is no uniform State standard: different counties have different rules. Even the most inclusive reading would exclude from shelter New Yorkers with low-wage work income or federal disability benefits, and all but a few specified immigration statuses.

In practice, New York's counties diverge widely in how they screen applicants for shelter. Many counties simply deny people shelter when they run out of room without applying any criteria whatsoever. Upstate counties commonly turn single adults away from shelter because they have employment income or disability income, or due to their immigration status. As a result, they rely on sleeping in cars, in public places or return to other dangerous places.¹⁰

Even if the other 57 State counties did conduct shelter screening uniformly, New York City's diverse demographics, high population, acute affordability crisis, dense geographic landscape, historic cultural significance to immigrants, and attraction as an international tourist destination differentiate its needs from other New York counties.

New York City's densely populated areas and well-connected transit network make homelessness visible in and around schools, daycare sites, parks, bus stops, subways, and restaurants and other businesses. Because parking proves scarce and expensive, unhoused people rarely sleep in their cars as they do in more rural areas and sprawling cities. Simply put, turning away individuals who seek shelter would look very different on the streets and subways of New York City than it does in other parts of New York State. Aside from the irreparable harm to individuals, without a right to shelter, New York City will become a national and international spectacle.

In public statements, the City Defendants have implied that ending the right to shelter will somehow deter people from coming to New York City, but offer no evidence to support this false claim.¹¹ Immigration is nothing new to New York City; an average of over 78,300

¹⁰ See, e.g., New York State Office of Temporary and Disability Assistance ("OTDA") Fair Hearing Decision No. 8607216J (available at https://otda.ny.gov/fair%20hearing%20images/2023-6/Redacted_8607216J.pdf) (reversing denial of shelter for unemployed woman about to start new job on the basis that she failed to spend \$170 in savings, after she slept on a park bench) (Niagara Co.); OTDA Fair Hearing Decision No. 8579959K (available at https://otda.ny.gov/fair%20hearing%20images/2023-4/Redacted_8579959K.pdf) (upholding denial of shelter to domestic violence survivor on the basis of receipt of a lump sum of unemployment insurance benefits three years earlier) (Monroe Co.); OTDA Fair Hearing No. 8496439N (available at https://otda.ny.gov/fair%20hearing%20images/2022-9/Redacted_8496439N.pdf) (reversing denial of shelter to man with open wound who slept in his car) (Suffolk Co.).

¹¹ See Bernadette Hogan and Nolan Hicks, "Eric Adams Seeks Court Approval to Suspend NYC's 'Right to Shelter' Rule in Wake of Migrant Crisis," New York Post. May 23, 2023 (available at <https://nypost.com/2023/05/23/nyc->

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new immigrants arrived annually during 1970-1979 (before there was a right to shelter); an average of over 85,600 annually during 1982-1989; and an average of nearly 112,600 annually during 1990-1994.¹² The Statute of Liberty has, for centuries, attracted persecuted people from around the world to New York City, where the population speaks nearly every language in the world and immigrants have historically received a warm welcome.¹³ Many of the new arrivals, for example, are LGBTQIA+ and were forced to flee their home countries, where they could not be who they who are.¹⁴

There is no evidence that the City Defendants' messages regarding the right to shelter dissuade new arrivals from coming to New York City.¹⁵ To the extent some border states send buses to New York for political purposes, the reversal of New York City's fundamental protections and the attendant images of suffering would allow those politicians to declare victory in the national and international media and embolden them to accelerate these efforts to further exploit the situation.

4. The State and City Defendants have Failed to Follow Through on Prior Crisis Planning

For the last 18 months, Plaintiffs have remained consistent and clear. ***Short of failing to shelter people from the elements and provide for their most basic needs, Plaintiffs remain ready and willing to negotiate a crisis plan.*** Following advocacy by the Governor, supported by the Plaintiffs and the City Defendants, many of the resources identified by the City and State Defendants as necessary to address the City's needs have now been put into place and are beginning to take effect. These resources include expedited processing of work authorization documents and Temporary Protected Status for Venezuelans. Yet, despite these productive efforts, the City and State Defendants have not followed through on the additional steps necessary to carry out their detailed plans to meet this moment.

[mayor-eric-adams-seeks-to-suspend-right-to-shelter/](#)). *See also Mayor Adam's press statements on his trips to South America, "We are out of room in New York City"* (October 10, 2023 at 11:30am).

¹² *The Newest New Yorkers 1990-1994, An Analysis of Immigration to NYC in the Early 1990s* at 2, NEW YORK CITY DEPARTMENT OF PLANNING (Jan. 1997).

¹³ Over 3,000 people a day arrived in New York City on average in 1907 (See U.S. Department of Commerce and Labor, Annual Report of the Commissioner-General of Immigration (1907) at 81, https://eosfcweb01.eosfc-intl.net/CP4810_U95007_Documents/AnnualReports_INS/AnnRepIN%201907.pdf).

¹⁴ Daniel Parra, "For LGBTQIA+ Asylum Seekers, Life in NYC Brings New Freedom, and Challenges," City Limits, July 10, 2023 (available at <https://citylimits.org/2023/07/10/for-lgbtqia-asylum-seekers-life-in-nyc-brings-new-freedom-and-challenges/>).

¹⁵ See Andy Newman, Julie Turkewitz and Juan Arredondo, "Adams Went South to Deter Migrants. Many Say They'll Come Anyway," New York Times, October 7, 2023 (available at <https://www.nytimes.com/2023/10/07/nyregion/latin-america-eric-adams-migrants.html>); Jason Beeferman, "The only option!: Migrants say NYC remains best choice amid Adams' discouragement," Politico, October 7, 2023 (available at <https://www.politico.com/news/2023/10/07/nyc-migrants-latin-america-adams-00120490>); Craig McCarthy and Emily Crane, "Mayor Adams visits migrants in Ecuador, fails to tell them not to come to NYC," N.Y. Post, October 6, 2023 (available at <https://nypost.com/2023/10/06/mayor-adams-visits-migrants-in-ecuador-fails-to-tell-them-not-to-come-to-nyc/>).

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For months, for example, the State Defendants promised to help resettle families outside of New York City through their Migrant Resettlement Assistance Program (“MRAP”), the current version of the historic State role of resettling refugees to upstate communities in need of new residents to promote economic development and employment. However, to date, according to the City’s October Letter, only five (5) families have been relocated from New York City shelters through this State program.

Overall, the most glaring acts and omissions by both the State and City Defendants include:

- Failure over the past year and a half to timely connect new arrivals to available immigration relief that would have put them on a pathway to employment much sooner (enabling them to move out of shelter much earlier and reducing the need for shelter capacity).
- Failure over the past year and a half to assist new arrivals in obtaining work permits and jobs that would allow them to exit shelter.
- Failure to rapidly implement effective case management services at all new arrival shelter sites that could have enabled people to move out of shelter earlier and reduced the need for shelter capacity. For example, many new arrivals simply need reticketing to other jurisdictions.
- Failure to make use of federal properties outside of New York City that the federal government has offered for shelter capacity.
- Failure to make use of State properties outside of New York City that could be used for shelter capacity.
- Failure to make use of all available properties in New York City that could be used for shelter capacity.
- Failure to address the need for additional rental assistance and homeless prevention efforts to avert and abbreviate shelter stays for New Yorkers, which would reduce the need for shelter for New Yorkers and free up existing shelter capacity to address the immediate humanitarian crisis.
- Failure to provide adequate staffing in City offices and programs that new arrivals and longer-term New Yorkers alike rely on to avoid and exit shelter.

On this record of acts and omissions, the City's request to eviscerate the Judgment cannot proceed. Moreover, if the City Defendants are permitted to proceed, through discovery requests pursuant to ¶ 11 of the Judgment, Plaintiffs may uncover additional acts and omissions that, if addressed, could obviate the need to gut the right to shelter and put human beings in danger.

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III. CONCLUSION

In light of the foregoing, Plaintiffs respectfully ask this Court to schedule a Chambers conference after the exchange of letters is completed on October 18, 2023. Plaintiffs request that the Court engage the parties in a mediation effort to avert unnecessary protracted litigation before permitting the motion practice requested by the City Defendants. Such a mediation effort may obviate the need for the drastic actions that the City contemplates, and it could ensure the safety of many thousands of New Yorkers who need shelter from the elements as temperatures plummet this winter.

Should the Court grant the City Defendants leave to make a motion following the conference, Plaintiffs respectfully request a submission schedule that permits Plaintiffs to conduct discovery pursuant to ¶ 11 of the Judgment. This discovery will be necessary to respond to the City Defendants' radical and extraordinary claims, as well as to potentially seek relief against the State Defendants, if necessary, to address their acts and omissions.

Respectfully submitted,

/s/ Joshua Goldfein
Joshua Goldfein
The Legal Aid Society

/s/ Steven Banks
Steven Banks
Michele Hirshman
Paul, Weiss, Rifkind, Wharton & Garrison LLP

Attorneys for the Plaintiffs

Cc: Counsel of Record

Exhibit A

EXHIBIT C-1:

Deep frostbite of all toes. Young man who feel asleep near the Charles River on a night when the ambient temperature was 20-25 degrees and the day temperature had been in the mid-30s. This picture was taken at McInnis House one month later. He suffers from schizophrenia as well as poly-substance use (alcohol and heroin). He initially used drugs because they silenced his auditory hallucinations that began at age 17.



EXHIBIT C-2:

Same patient at McInnis House. Picture taken two months after initial frostbite injury. The boundaries between the necrotic (black) areas and the viable (reddish) tissue are beginning to become demarcated.



EXHIBIT C-3:

Same patient at McInnis House. Four months after initial frostbite injury. The right great toe is in the process of auto-amputation. Not surprisingly, this prolonged process was quite horrifying for the patient as well as our staff at McInnis House.





EXHIBIT C-4:

Quality is poor, but this is one week after the previous pictures. The great toe had fallen off during the night while the patient was sleeping. The exposed bone in the toe necessitated grafting surgery at Massachusetts General Hospital.

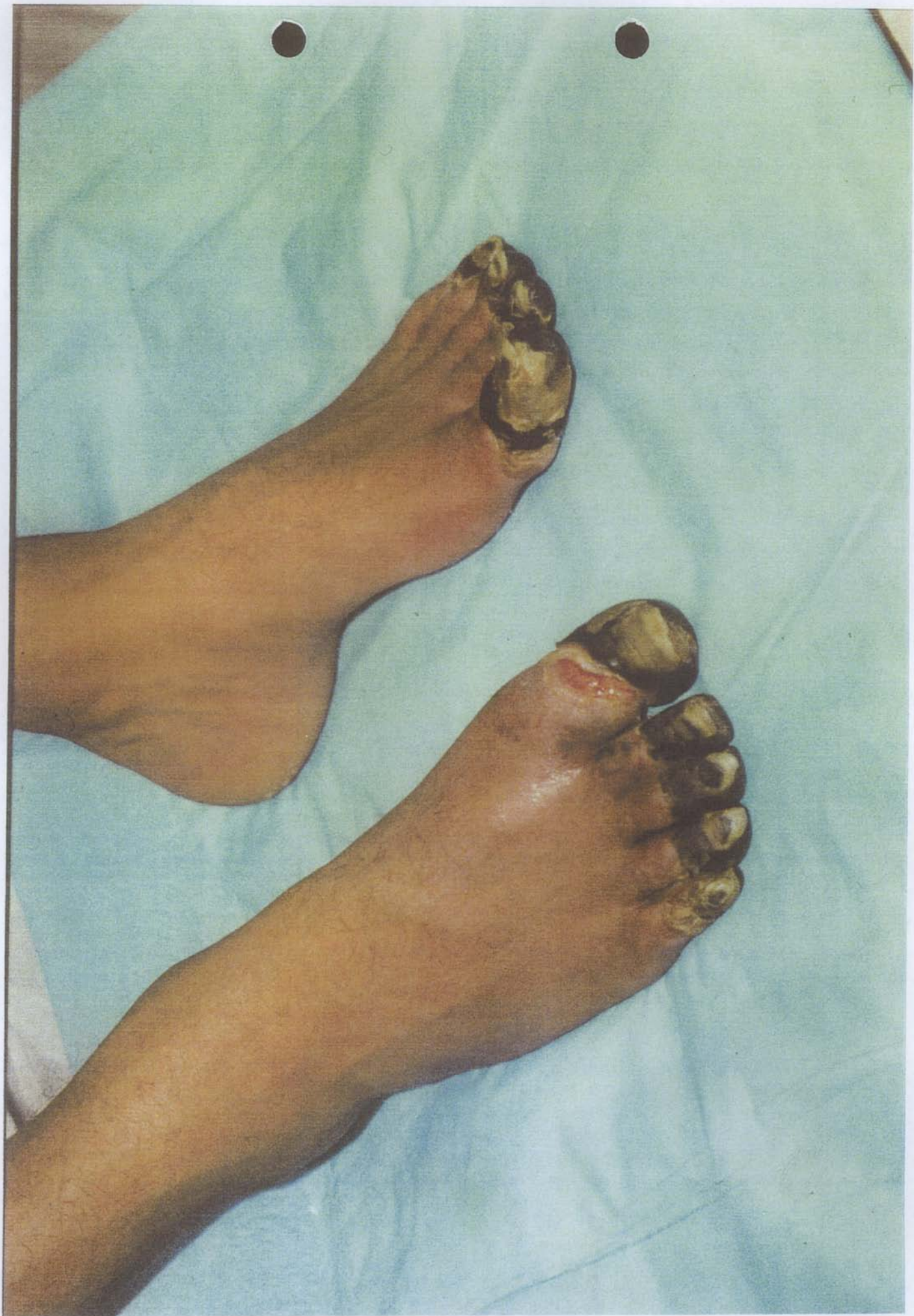


EXHIBIT C-5:

Same patient. This picture, taken two years later during a subsequent admission to McInnis House, demonstrates the final results of his frostbite.



EXHIBIT D:

50 year-old man with deep frostbite of all toes. Sustained after passing out on concrete on a cold and snowy January night when the temperature was 25-30 degrees. Picture taken three months after the cold-related injury.

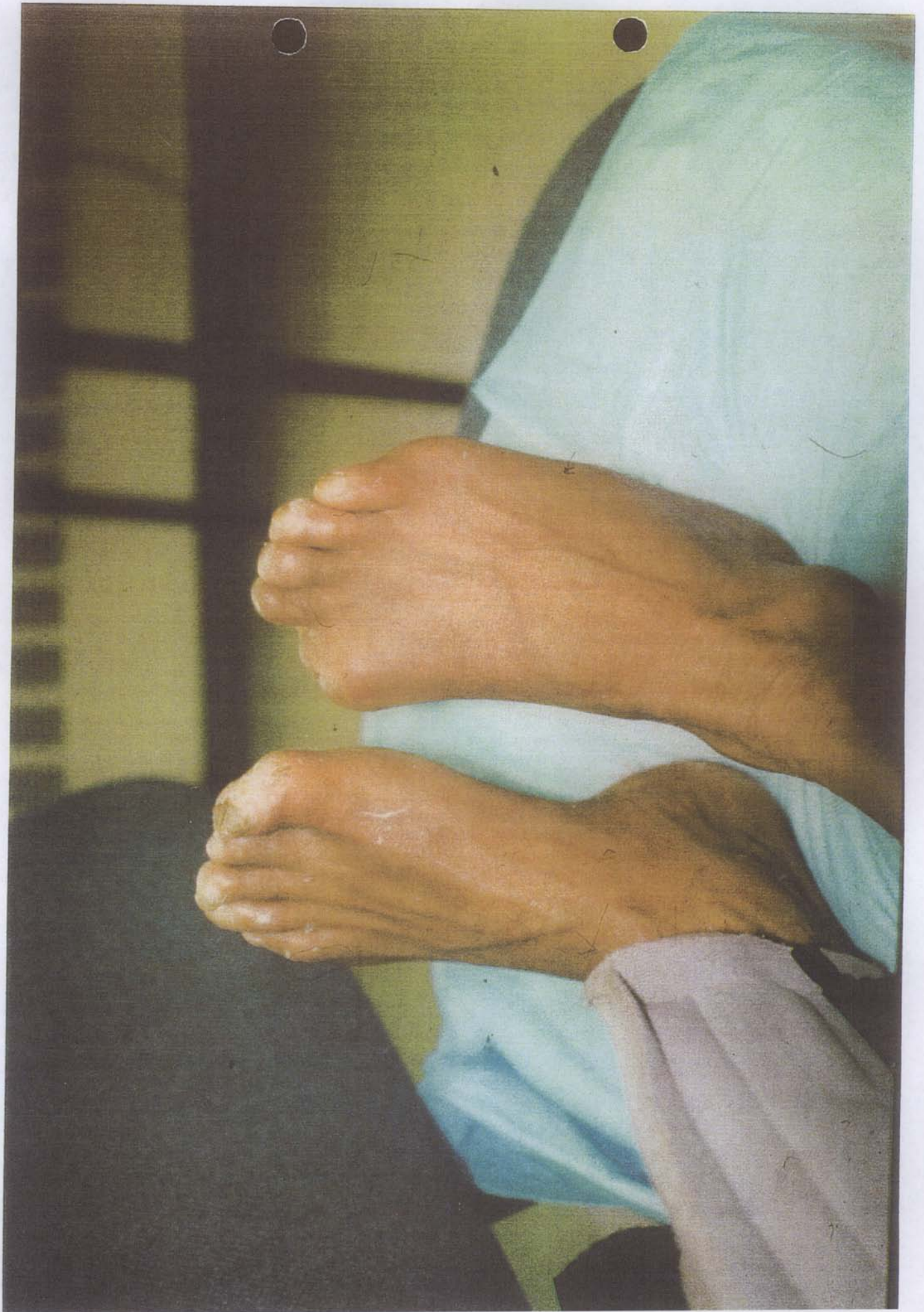


Exhibit B



Source: <https://www.nytimes.com/2023/10/06/us/chicago-migrants.html>

Chicago O'Hare International Airport, October 2023.



Source: <https://www.nytimes.com/2023/10/06/us/chicago-migrants.html>

A Chicago police station, October 2023.



Source: <https://www.theguardian.com/us-news/2022/dec/22/us-homeless-shelters-help-winter-weather>

Adjacent to a Chicago expressway, Winter 2019.



Source: <https://www.sfchronicle.com/politics/article/Advocates-say-San-Francisco-is-still-sweeping-17706130.php>

Leavenworth Street in San Francisco, January 2023.



Source: <https://calmatters.org/housing/homelessness/2023/07/los-angeles-homeless-encampments/>

Hollywood, Los Angeles, June 2023.



Source: <https://ktla.com/news/local-news/los-angeles-homeless-count-results-to-be-released-thursday/>

Skid Row in Los Angeles, February 2023.

Exhibit C



Source: <https://nypost.com/2023/07/31/migrants-sleep-outside-nycs-roosevelt-hotel-as-shelter-hits-capacity/>

45th Street and Vanderbilt Avenue near the Roosevelt Hotel in Manhattan, Summer 2023.



Source: <https://nypost.com/2023/07/31/migrants-sleep-outside-nycs-roosevelt-hotel-as-shelter-hits-capacity/>

45th Street and Vanderbilt Avenue near the Roosevelt Hotel in Manhattan, Summer 2023.



Source: <https://nypost.com/2023/07/31/migrants-sleep-outside-nycs-roosevelt-hotel-as-shelter-hits-capacity/>

45th Street and Vanderbilt Avenue near the Roosevelt Hotel in Manhattan, Summer 2023.



Source: <https://www.thenation.com/article/society/migrants-roosevelt-hotel-nyc/>

45th Street and Vanderbilt Avenue near the Roosevelt Hotel in Manhattan, Summer 2023.