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October 21, 2020

Norman Yee, President
San Francisco Board of Supervisors
City Hall
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Sent via email to board.of.supervisors@sfgov.org

Re: File No. 200951

Honorable Supervisor Yee:

A surreal scene occurred at the Rules Committee meeting from which this legislation originated. I had just reminded the committee-members of the necessity of San Francisco Mental Health Education Funds, Inc. ("SFMHEF") in exposing the involuntary mental health gulag that San Francisco has become. This resulted in palpable smugness as they unanimously gaveled it through.

It is not every day that one finds politicians so eager and willing to wear their contempt for the Constitution and for their oaths of office as badges of honor.

The logic is simple: The federal Constitution—to say nothing of the state—forbids involuntary mental health treatment through detention or administration of antipsychotic medication unless the patient is dangerous to self or others due to mental illness. This is the standard developed by the U.S. Supreme Court (though pioneered by California's Lanterman-Petris-Short Act), which is the institution responsible for interpreting the Constitution.[1] This is still good law and its reasoning is still sound: psychiatric diagnoses are too unreliable a basis upon which to work such drastic losses of liberty unless the safety of the public is at issue.[2] Most people thought to

[1] *Cooper v. Aaron*, 358 U.S. 1, *18-19, 78 S. Ct. 1401 *1409-10, 3 L. Ed. 2d 5 *16-17 (1958).

[2] *O'Connor v. Donaldson*, 422 U.S. 563, *575 (Justice Stewart) (unanimous) (1975) (involuntary detention); *Washington v. Harper*, 494 U.S. 210, *221-22 (Justice Kennedy), *237-38 (Justice Stevens, *diss.*) (unanimous on this point) (1990) (involuntary administration of antipsychotic medication). *See*, *also*, Kenneth Mark Colby and

have mental illness (even among mental health professionals, whether a given patient has it will depend upon whom you ask) are not dangerous due to mental illness. Therefore, they cannot be involuntarily treated, no matter how much distress they may cause "well-meaning" and "compassionate" people who cannot bear the sight of human suffering (and no matter how "sure" a psychiatrist feels that they are sick). Furthermore, even if it were the case that a litmus test existed for mental illness, treatments are not very effective in curing it.[3] Treatment being ineffective would not be a problem if it were not also the case that it is onerous.[4] People have a right to be free of it.

The Lanterman-Petris-Short Act, backed by interpretations of both federal and state Constitutions, would thus keep the public from making stupid and tragic mistakes . . . if it were but followed. Prior to 2001, involuntary treatment was up against these Constitutional constraints.[5] There was also a popular movement against them. Nearly two dozen mental health bills were introduced in the legislature at the beginning of the year 2000.[6] A.B. 1800 among them sought to lower the standard for involuntary mental health treatment. A committee of ten state legislators toured the state, holding public hearings on the issue.[7] Unfortunately, San Francisco caved to political pressure against the unpopular ones, contemporaneous with some building failures on the opposite coast and a declaration of war.

James E. Spar, *The Fundamental Crisis in Psychiatry: Unreliability of Diagnosis* (1983); H.L.M. Hart, *Law, Liberty, and Morality* (1963) (government should be concerned with public safety and has neither right nor duty to regulate morals).

[3] Robyn M. Dawes, *House of Cards: Psychology and Psychiatry Built on Myth* (1994) (examining Glass-Segal meta-study on effectiveness of therapy). *See*, *also*, *O'Connor v. Donaldson*, *supra*, 422 U.S. at *584 (Chief Justice Berger, *concur.*).

[4] Involuntary administration of antipsychotic medication, "one of the earmarks of the gulag." *Keyhea v. Rushen*, 223 Cal.Rptr. 746, 178 Cal.App.3d 526 (1986) (Associate Justice King). Psychosurgery "more harmful than the disease." *Aden v. Younger*, 57 Cal. App. 3d 662, 678, 129 Cal. Rptr. 535 (1976) (Justice Brown).

[5] Bruce J. Winick, *The Right to Refuse Mental Health Treatment* (1996).

[6] "Hearing Spotlights Plight of Neglected Mentally-Ill," *Sacramento Bee*, March 3, 2000, A-3.

[7] Senate Concurrent Resolution 59 (1999-2000 session), creating the Joint Committee on Mental Health Reform.

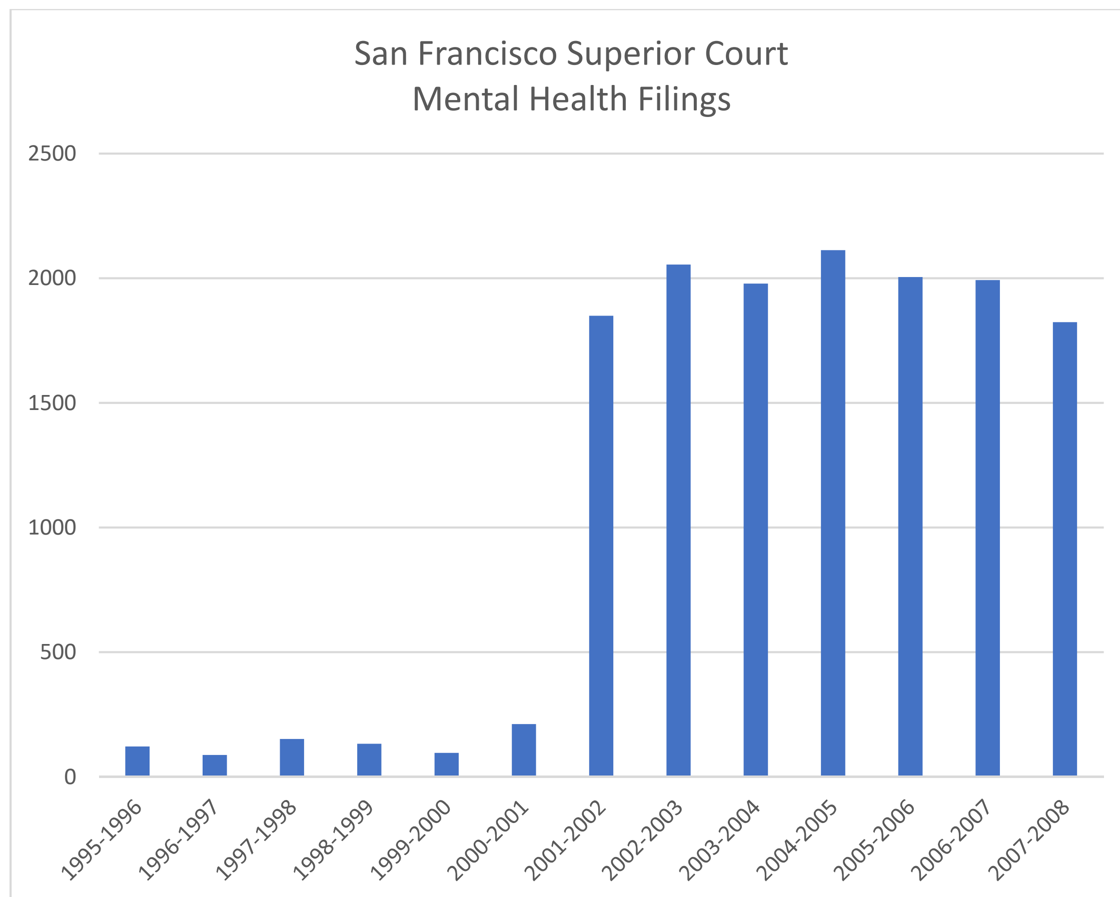

Fig. 1 – Meteoric rise in petitions for long-term involuntary mental health treatment before San Francisco Superior Court

Make no mistake. Such a rise in petitions could only occur with a comparable rise in orders granting them. Such a rise in orders could only have occurred through a drastic abrogation of the aforementioned standards. Such a drastic abrogation of standards could only stand by immunizing the cases from challenge. Such immunization may only occur one way: *ex parte* petitions in totally-sealed cases. This is violative of the federal Constitution on its face, as well as providing cover for other Constitutional violations to continue with impunity.

As suggested, this had some vague connection to the War on Terror. The War on Terror was declared against "international terrorists," and no specific country.[8] "International terrorists" may include U.S. persons inside the U.S.[9] War includes the use of high-technology clandestine

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[8] Authorization for the Use of Military Force of Sept. 18, 2001, Pub. L. 107-40, § 2(a) (115 Stat. 224).

[9] 50 U.S.C. § 1801(b)(2)(C) (defining "agent of a foreign power" to include U.S. persons who "knowingly engage[] in . . . international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power . . .") and (a)(4) (defining "foreign power" to include "a group engaged in international terrorism or activities in preparation therefor . . .").

methods. UCSF underwent an huge expansion contemporaneous with the War on Terror, vaulting to the largest employer in the City and County and building its Mission Bay campus, distinctive for its buildings closed to the public, a first for this school devoted entirely to the medical sciences. These buildings are secure due to classified research carried on therein. To be eligible for classification, the information to be protected must be "expected to cause identifiable or describable damage to the national security," and pertain to, relevantly, "military plans, weapons systems, or operations," "intelligence activities (including covert action), intelligence sources or methods, or cryptology," or "scientific, technical, or economic matters relating to the national security . . ."[10]

A survey of the literature on mental illness and terrorism concluded that there was no reliable distinction between the two, and the International Committee of the Red Cross had vigorously argued leading up to 9-11 that terrorists should be treated as enemies, rather than as criminals.[11] The intelligence community is further required by law to cooperate with local authorities, including mental health authorities.[12] Added to this, some vacated decisions by the 9th Circuit had established immunity from prosecution for federal law enforcement officers who violate state law in the course of their duties (such as California's Lanterman-Petris-Short Act, which put tight limits on involuntary mental health treatment).[13] Presumably, this would extend to military activity. Deprecated U.S. Supreme Court precedent supports violation of Constitutional rights at a time of war.[14] A dissenting opinion had warned against conversion of "the Constitutional Bill of Rights into a suicide pact."[15] Altogether, this adds up to at least a strong likelihood of a domestic policy of involuntary mental health treatment using clandestine weaponry on very questionable authority, but which cannot be challenged anyway, all under auspices of the War on Terror. But there is more.

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[10] Sec. 1.4(a), (c), and (e) of Exec. Order No. 13,526 (Dec. 29, 2009), 3 C.F.R. §§ 298, 300 (2009 Compilation) (2010), *reprinted in 50 U.S.C. § 3161 note*.

[11] Nicholas N. Kittrie, *The War Against Authority: From the Crisis of Legitimacy to a New Social Contract* (1998) 31-56 (literature survey), and 221 (International Committee of the Red Cross).

[12] Sec. 1.4(g) of Exec. Order No. 12,333 (Dec. 4, 1981), 3 C.F.R. §§ 200, 202 (1981 Compilation) (1982), *reprinted as amended in 50 U.S.C. § 3001 note.* Section added by E.O. 13,470 (July 30, 2008).

[13] *Harris v. Roderick*, 126 F.3d 1189, *1199 n. 12 (9th Cir. 1997) (Circuit Judge Reinhardt) (immunity not decided), *Idaho v. Horiuchi*, 1998 U.S. Dist. LEXIS 7667, *31 (D. Id.) (District Judge Lodge) (immunity granted), *aff'd* 215 F. 3d 986, 997 (9th Cir. 2000) (District Judge Shubb), *reh'g granted* 228 F.3d 1069 (9th Cir. 2001), *vacated* 226 F.3d 979 (9th Cir. 2001).

[14] *Toyosaburo Korematsu v. United States*, 323 U.S. 214, *217-18 (1944) (Justice Black), *reh'g denied*, *overruled Trump v. Hawaii*, 138 S. Ct. 2392, *2423, 201 L.Ed.2d 775 (2018); *see*, *also*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, *45 (2010) (Chief Justice Roberts) (state of war does not negate Constitutional protections).

[15] *Terminiello v. Chicago*, 337 U.S. 1, *37 (1949) (Justice Jackson, *diss.*).

San Francisco has since become the leading county in the state for violating the rights of patients.

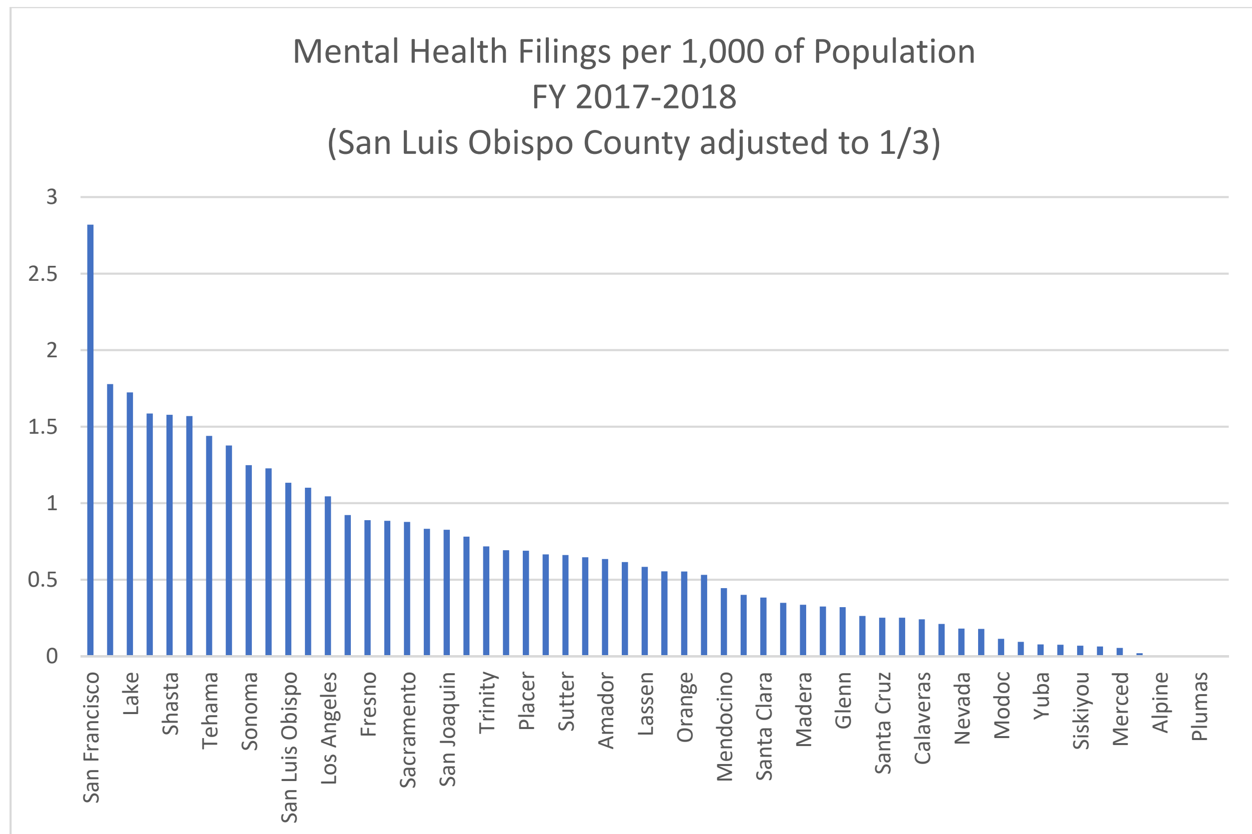

Fig. 2 – Ranking of California counties by number of petitions for long-term involuntary mental health treatment filed, per 1,000 of population, in FY 2018-2019. San Luis Obispo County's figure has been reduced to compensate for the presence of the Atascadero Special Facility ("ASF"), which generates all or nearly all of California's *Penal Code* § 2966 petitions, included in this statistic because prisoners are committed to long-term involuntary mental health treatment at the ASF without judicial process in California, and so would otherwise not contribute to this statistic at all.

San Francisco's involuntary mental health gulag has even overtaken its criminal justice system in terms of the number of lives directly affected.

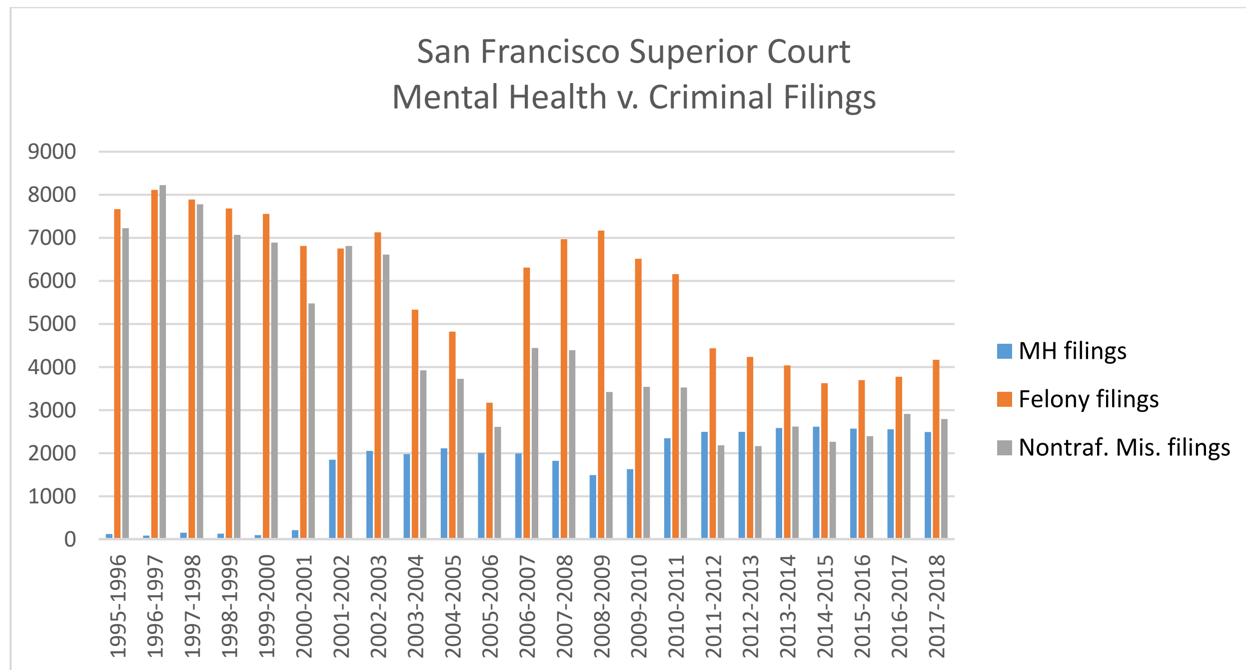

Fig. 3 – Petitions for long-term involuntary mental health treatment filed, as compared to misdemeanor and felony complaints

These numbers come from the Judicial Council of California and the U.S. Census. They may be checked against reports available on their websites. Precise references available upon request.

As you might suspect, the number of patients subject to long-term involuntary mental health treatment (whose treatment is not so much long-term as permanent, or, rather, terminal) has grown rather large in recent years. Behavioral Health Services recently reported some 30,000 active patients.[16] This is over three percent of the City and County's population.

The ostensible reasons for replacing SFMHEF with DPH sound hollow and are ever-changing. One ought to consider why now would be an opportune time to sever a 47-year-old relationship. My Sunshine Ordinance/PRA requests to examine the archives of the Behavioral Health Commission ("BHC") have gone unanswered after the statutory time limit had expired. In more conventional times, they might have shown why SFMHEF was made the fiscal intermediary of

[16] Mental Health Board of San Francisco, *Fiscal Year 2018-2019 Annual Report* 33, available at https://www.sfdph.org/dph/files/commTaskForcesDocs/mentalHlthBdDocs/newMntlHlth/uploadedfiles/Annual%20Report%202019%20-%20final%2006-30-2019.pdf shows 27,980 total mental health + substance abuse patients. Deborah Sherwood of BHS claimed 30,000 active patients at a BHC committee meeting last year.

BHC in 1973. The only likely answer is to give BHC independence from DPH. The above information shows why this independence is now more important than ever.

Therefore, beware. File no. 200951 has nothing to do with lack of transparency, a Paycheck Protection Loan, nor financial irregularities (DPH's investigation is still ongoing), nor the workload of Commissioners serving on both boards (to cite Supervisor Stefani's latest and new rationalization). File no. 200951 is coming up now because last November BHC passed a resolution recommending the approval of a proposed ordinance that would begin to daylight San Francisco's involuntary mental health treatment gulag, onerously for DPH, a copy of which I am appending to this letter. As it was, the resolution and proposed ordinance never made it to the Health Commission, nor to you. How much worse might it have fared (and better for DPH) if BHC had been staffed by DPH at that time?

Reject File no. 200951, or condemn San Francisco's mental health gulag to even deeper darkness. If you pass it, not only might you violate your Oath of Office, you might even have become the very enemy against whom you swore to defend the Constitution.

Very truly yours,

Wynship Hillier

Enclosure
cc/encl.: Marylyn Tesconi, Chair, San Francisco Behavioral Health Commission
Harriette Stallworth Stevens, Chair, San Francisco Mental Health Education Funds, Inc.

ATTACHMENT A: DRAFT LANGUAGE OF PROPOSED ORDINANCE

Be it ordained by the People of the City and County of San Francisco:

Section 1. Article 41 of the Health Code is hereby amended by adding Division IV to read as follows:

DIVISION IV: LONG-TERM INVOLUNTARY TREATMENT

SEC. 4131. REPORTS.

The Department of Public Health shall provide an annual report to the Board of Supervisors showing the following numbers for each fiscal year:

(a) Regarding misdemeanor defendants who have been determined to be incompetent to stand trial due to mental disorder alone, whom the court has either found not to be appropriate candidates for diversion pursuant to California Penal Code § 1001.35, or who are not eligible for diversion pursuant to California Penal Code § 1001.36,

(1) The number of such individuals whom the local behavioral health director was ordered to evaluate pursuant to California Penal Code § 1370.01(a)(3)(A) during the fiscal year;

(2) The number of initial determinations regarding the suitability of outpatient treatment the local behavioral health director or designee made pursuant to California Penal Code § 1370.01(a)(3)(A) for such defendants during the fiscal year;

(3) The number of such defendants whom the local behavioral health director or designee recommended that they be required to undergo outpatient treatment, rather than committed to a treatment facility during the fiscal year;

(4) The number of such defendants who were transferred from outpatient to inpatient status pursuant to California Penal Code §§ 1608 or 1609 during the fiscal year;

(5) The number of such defendants who were transferred from inpatient to outpatient status pursuant to Title 15 of Part 2 of the California Penal Code during the fiscal year;

(6) The number of such defendants who departed from the City and County while on outpatient status, including, but not limited to, departures from the state pursuant to California Penal Code § 1611, during the fiscal year;

(7) The number of such defendants who entered the City and County while on outpatient status during the fiscal year;

(8) The number of such defendants who recovered competency while on outpatient status pursuant to California Penal Code § 1607 during the fiscal year;

(9) The number of such defendants who recovered competency while inpatients;

(10) The number of such defendants whose involuntary treatment terminated without recovery of competence due to the conclusion of the period of commitment, while inpatients, during the fiscal year;

(11) The number of such defendants whose involuntary treatment terminated without recovery of competence due to the conclusion of the period of commitment, while on outpatient status, during the fiscal year;

(12) The number of such defendants who died while inpatients during the fiscal year;

(13) The number of such defendants who died while on outpatient status during the fiscal year;

(14) The number of such defendants who were inpatients at the end of the fiscal year;

(15) The number of such defendants who were on outpatient status at the end of the fiscal year; and

(16) Other matters the Department deems relevant.

(b) Regarding individuals subject to postcertification treatment pursuant to Article 6 of Chapter 2 of Part 1 of Division 5 of the California Welfare & Institutions Code,

(1) The number of such individuals whom the local behavioral director or designee assumed supervision as outpatients pursuant to California Welfare & Institutions Code §5305(c) during the fiscal year;

(2) The number of such individuals who were transferred from outpatient to inpatient status pursuant to California Welfare & Institutions Code §§ 5306.5(b) or 5307 during the fiscal year;

(3) The number of such individuals who were unconditionally released from inpatient status pursuant to California Welfare & Institutions Code § 5309(b) during the fiscal year;

(4) The number of such individuals subject to supervision as outpatients pursuant to California Welfare & Institutions Code § 5305(c) who departed from the City and County during the fiscal year;

(5) The number of such individuals who died while inpatients during the fiscal year;

(6) The number of such individuals who died while subject to supervision as outpatients pursuant to California Welfare & Institutions Code § 5305(c) during the fiscal year;

(7) The number of such individuals who were inpatients at the end of the fiscal year;

(8) The number of such individuals who were subject to supervision as outpatients pursuant to California Welfare & Institutions Code § 5305(c) at the end of the fiscal year; and

(9) Other matters the Department deems relevant.

Section 2. Effective Date. This ordinance shall become effective 30 days after enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the Mayor's veto of the ordinance.

Secton 3. Scope of the Ordinance. In enacting this ordinance, the Board of Supervisors intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Health Code that are explicitly shown in this ordinance as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the "Note" that appears under the official title of the ordinance.

Section 4. Undertaking for the General Welfare. In enacting and implementing this ordinance, the City is assuming and undertaking only to promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an obligation for break of which it is liable in money damages to any person who claims that such breach proximately caused injury.