WOODBURN
OREGON
Incorporated 1889

Agenda Item

August 9, 2023

TO: City Council

FROM: Frank Lonergan, Mayor

SUBJECT: **Committee Appointment**

The following appointment is made, subject to the approval of the Council. Please forward any adverse comments to me prior to the Council meeting on Monday, August 14, 2023. No reply is required if you approve of my decision.

Woodburn Recreation and Parks Board

- Justin May

pfm asset management

CITY OF WOODBURN

Investment Performance Review
For the Quarter Ended June 30, 2023

Client Management Team

Lauren Brant, Managing Director
Giancarlo Morales-Belletti, Portfolio Manager
Jeremy King, Key Account Manager

PFM Asset Management LLC

13010 SW 68th Pkwy
Tigard, OR 97223
503-837-8445

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Harrisburg, PA 17101-2141
717-232-2723

Market Update

Summary

► In Q2, U.S. economic conditions were characterized by a myriad of financial headlines: (1) investors contended with ongoing recession risks; (2) regional bank concerns; (3) the Federal Reserve's (Fed) historic pace of interest rate hikes; (4) stubbornly high inflation; and (5) a debt ceiling impasse in Washington.

► President Biden signed the bi-partisan debt ceiling bill, avoiding a much-publicized potential default and allowing the U.S. Treasury to fund its obligations. The bill suspends the debt ceiling until January 1, 2025 and included some spending cuts.

► U.S. inflation, as measured by the consumer price index (CPI), has fallen from 6.5% year-over-year (YoY) at the beginning of the year to just 3.0% as of June as monthly gains have moderated. Prices for energy, used cars and airlines fares have shown sharp declines over the past year. But, Core CPI, excluding food and energy prices, remained elevated at 4.8% YoY due to elevated prices for shelter, food, and medical services.

► The Fed followed up the two 25 basis point (bps) hikes in Q1 with one more 25 bp hike at the May meeting, bringing the overnight rate to a target range of 5% to 5.25%. At the June FOMC meeting, the Fed paused hiking, breaking the string of consecutive meetings with an increase at 10. The "hawkish pause" was accompanied by new Fed projections (the so called "dot plot") which indicated the expectation for two more 25 bp rate hikes in the remaining part of calendar year 2023, underscoring the Fed's vigilance in fighting inflationary pressures.

Economic Snapshot

► Real gross domestic product (GDP) increased at an annual rate of 2.0% in the first quarter of 2023. The growth rate reflected increases in consumer spending, exports, government spending, and business fixed investment that were partly offset by decreases in private inventories and residential housing. Future growth expectations have been continually increased, with the median forecast reported by a Bloomberg survey of economists standing at 2.0% for Q2 as well.

► The U.S. labor market remained strong and tight in Q2. Over the second quarter, the U.S. economy added 732,000 new jobs. Although the pace of job gains has trended lower over the past two years, job creation remains elevated compared to pre-pandemic levels. The unemployment rate closed the quarter at 3.6%, very near its 50-year low of 3.4% reached in April. But, the strength of the labor market has moderated slightly, as weekly unemployment claims have risen, the number of job openings has fallen from record highs, and the labor force participation rate reached a post-pandemic high of 62.6%. Wage growth, measured by average hourly earnings, remains elevated at 4.4% YoY.

► On the consumer front, personal consumption continued to grow, durable goods were strong, consumer credit reached record levels and consumer confidence hit an 18-month high. Spending on merchandise dropped while outlays for services increased, underscoring the importance that the services sector has carried for economic growth over the past several quarters.

► In the housing sector, mortgage rates have been above 6% for the entire year, maintaining pressure on homebuyers. Homeowners appear reluctant to give up below-market mortgage rates, resulting in low sales inventory. As a result, existing home sales remain historically low, while new home sales to their highest level in more than a year.

Interest Rates

► U.S. Treasury yields jumped across the yield curve in the second quarter, as economic data came in stronger than expected, and markets capitulated to the Fed's "higher-for-longer" trajectory for short term rates. Increases in the yield curve were led by the 2-year U.S. Treasury note, which finished the quarter at 4.90%, up 87 bps from 4.03% on March 31.

► While yields of all tenors increased, the U.S. Treasury yield curve remains steeply inverted. The difference between the yield on the U.S. Treasury 2-year (4.90%) and 10-year note (3.84%) ended the quarter at over 100 bps (1.00%), marking one of the deepest levels of curve inversion in over 40 years.

► As a result of higher yields across the board, fixed income indices posted negative total returns in Q2. The ICE BofA 2-, 5-, and 10-year U.S. Treasury indices returned -0.92%, -1.68%, and -1.93%, respectively.

Sector Performance

► Diversification away from U.S. Treasury securities was strongly additive to fixed-income performance during the second quarter as yield spreads across most sectors tightened. Although investors began the quarter with heightened concern about market volatility, recent bank failures, credit conditions and the looming debt ceiling impasse, sentiment eased during the quarter. That move to a more "risk on" mentality resulted in strong relative performance from spread sectors, like corporate, asset-backed and mortgage-backed securities.

► Federal agency spreads tightened as net issuance slowed. Agency discount notes found increased utility during Q2 as a replacement for U.S. Treasury bills during the height of the debt ceiling uncertainty. In longer maturities, both callable and non-callable agencies generated similar positive excess returns.

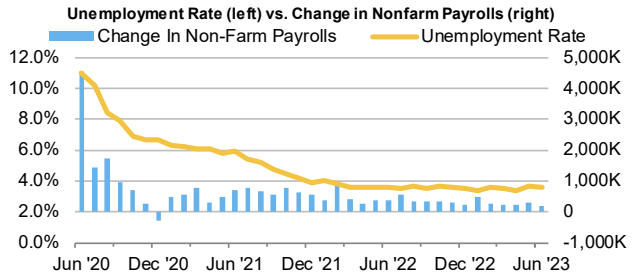
► Investment-grade (IG) corporate spreads continued to retrace from their banking crisis wides but remain above longer-term averages. As spreads narrowed, the IG curve flattened resulting in longer durations performing better on a relative basis, as did lower quality issues. Although the spread between financials and industrials remains well above longer-term averages, financials outperformed in Q2 as their retracement from banking crisis wides was more significant.

► Asset-backed security (ABS) yield spreads also continued to retrace from mid-March wides, but not to the extent in corporates. Like IG credit, ABS was a positive contributor to performance during the quarter and excess returns were similar across both auto and credit card collateral.

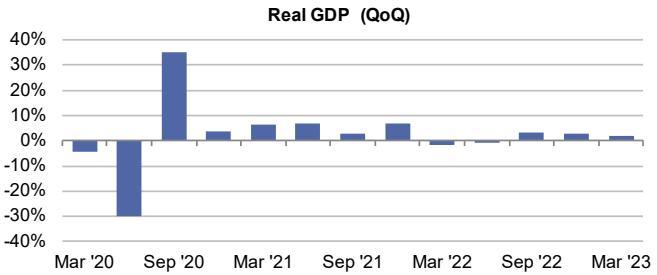
► Mortgage-back security (MBS) whipsawed in Q2 as a steep tightening of spreads through the second half of the quarter more than offset the widening through April. As a result, the sector broadly generated quite attractive excess returns for the quarter, with 30-year collateral outperforming 15-year terms. Strong returns were driven in part by lighter supply due to a decline in existing home sales and refinancings.

Economic Snapshot

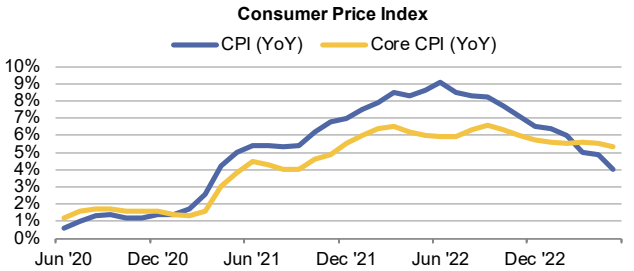
Labor Market		Latest	Mar '23	Jun '22
Unemployment Rate	Jun '23	3.6%	3.5%	3.6%
Change In Non-Farm Payrolls	Jun '23	209,000	217,000	370,000
Average Hourly Earnings (YoY)	Jun '23	4.4%	4.3%	5.4%
Personal Income (YoY)	May '23	5.5%	5.5%	4.3%
Initial Jobless Claims (week)	7/1/23	248,000	228,000	213,000



Growth				
Real GDP (QoQ SAAR)	2023Q1	2.0%	2.6%[1]	-1.6%[2]
GDP Personal Consumption (QoQ SAAR)	2023Q1	4.2%	1.0%[1]	1.3%[2]
Retail Sales (YoY)	May '23	1.6%	2.2%	9.3%
ISM Manufacturing Survey (month)	Jun '23	46.0	46.3	53.1
Existing Home Sales SAAR (month)	May '23	4.30 mil.	4.43 mil.	5.13 mil.



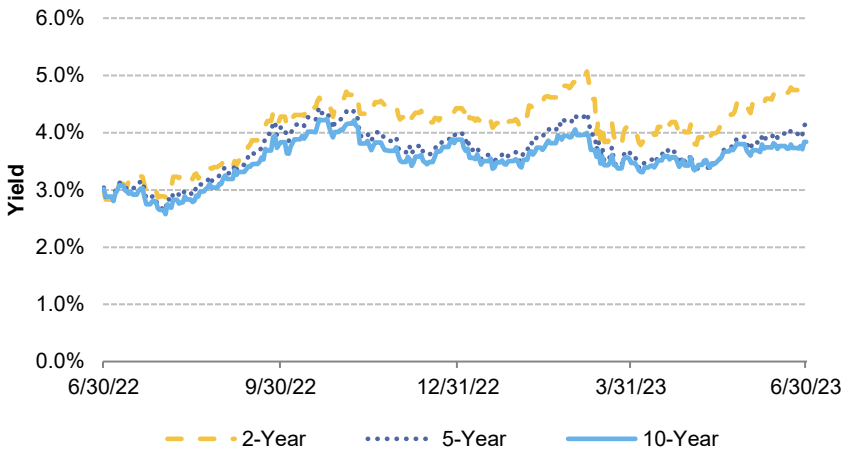
Inflation / Prices				
Personal Consumption Expenditures (YoY)	May '23	3.8%	4.2%	7.0%
Consumer Price Index (YoY)	May '23	4.0%	5.0%	9.1%
Consumer Price Index Core (YoY)	May '23	5.3%	5.6%	5.9%
Crude Oil Futures (WTI, per barrel)	Jun 30	$70.64	$75.67	$105.76
Gold Futures (oz.)	Jun 30	$1,929	$1,969	$1,807



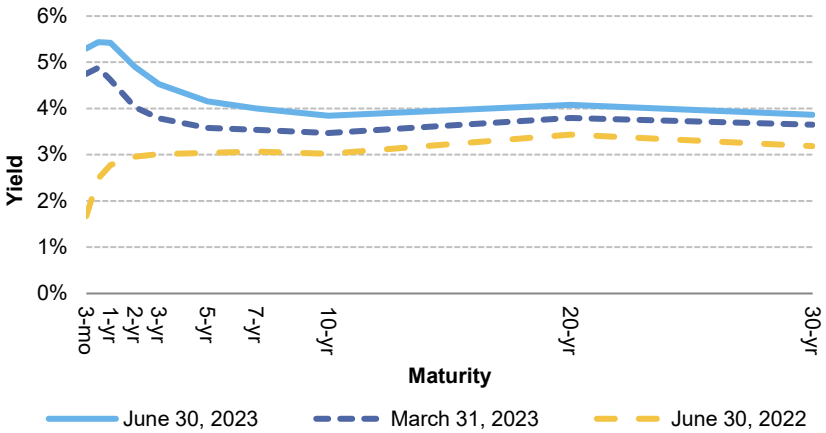
1. Data as of Fourth Quarter 2022.
2. Data as of First Quarter 2022.
Note: YoY = year-over-year, QoQ = quarter-over-quarter, SAAR = seasonally adjusted annual rate, WTI = West Texas Intermediate crude oil.
Source: Bloomberg.

Interest Rate Overview

U.S. Treasury Note Yields



U.S. Treasury Yield Curve

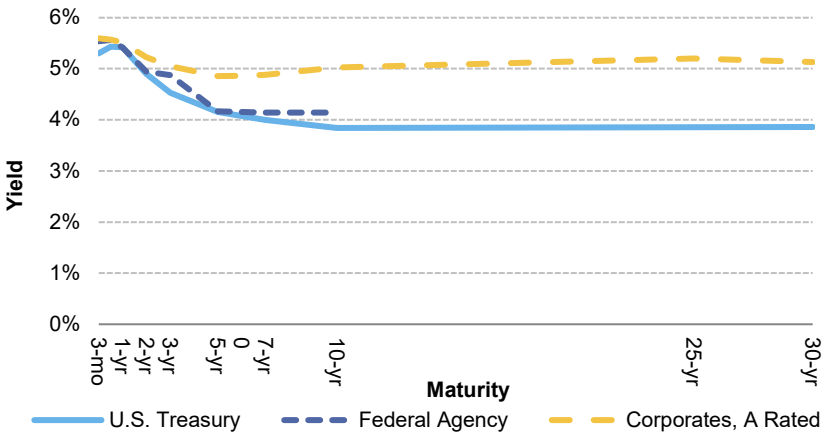


U.S. Treasury Yields

Maturity	Jun '23	Mar '23	Change over Quarter	Jun '22	Change over Year
3-Month	5.30%	4.75%	0.55%	1.67%	3.63%
1-Year	5.42%	4.62%	0.80%	2.78%	2.64%
2-Year	4.90%	4.03%	0.87%	2.96%	1.94%
5-Year	4.16%	3.58%	0.58%	3.04%	1.12%
10-Year	3.84%	3.47%	0.37%	3.02%	0.82%
30-Year	3.86%	3.65%	0.21%	3.19%	0.67%

Source: Bloomberg.

Yield Curves as of 06/30/2023



ICE BofAML Index Returns

	As of 06/30/2023		Returns for Periods ended 06/30/2023		
June 30, 2023	**Duration**	**Yield**	**3 Month**	**1 Year**	**3 Years**
1-3 Year Indices					
U.S. Treasury	1.82	4.98%	(0.57%)	0.13%	(1.05%)
Federal Agency	1.70	5.11%	(0.28%)	0.35%	(0.87%)
U.S. Corporates, A-AAA rated	1.87	5.62%	0.12%	1.27%	(0.48%)
Agency MBS (0 to 3 years)	1.99	5.32%	(0.18%)	(0.07%)	(1.95%)
Taxable Municipals	1.77	5.30%	(0.39%)	0.11%	0.53%
1-5 Year Indices					
U.S. Treasury	2.57	4.71%	(0.86%)	(0.43%)	(1.79%)
Federal Agency	2.04	4.99%	(0.39%)	(0.05%)	(1.49%)
U.S. Corporates, A-AAA rated	2.62	5.47%	(0.05%)	1.20%	(1.14%)
Agency MBS (0 to 5 years)	3.10	5.09%	(0.44%)	(0.62%)	(2.39%)
Taxable Municipals	2.60	5.12%	(0.54%)	0.08%	(0.45%)
Master Indices (Maturities 1 Year or Greater)					
U.S. Treasury	6.46	4.36%	(1.41%)	(2.47%)	(4.97%)
Federal Agency	3.36	4.81%	(0.43%)	(0.61%)	(2.53%)
U.S. Corporates, A-AAA rated	7.02	5.30%	(0.42%)	0.44%	(3.89%)
Agency MBS (0 to 30 years)	5.62	4.78%	(0.53%)	(1.56%)	(3.77%)
Taxable Municipals	9.28	5.02%	(0.40%)	(0.61%)	(4.24%)

Returns for periods greater than one year are annualized.

Source: ICE BofAML Indices.

Disclosures

PFM Asset Management LLC ("PFMAM") is an investment adviser registered with the U.S. Securities and Exchange Commission and a subsidiary of U.S. Bancorp Asset Management, Inc. ("USBAM"). USBAM is a subsidiary of U.S. Bank National Association ("U.S. Bank"). U.S. Bank is a separate entity and subsidiary of U.S. Bancorp. U.S. Bank is not responsible for and does not guarantee the products, services or performance of PFMAM.

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Portfolio Review:
CITY OF WOODBURN

Certificate of Compliance

During the reporting period for the quarter ended June 30, 2023, the account(s) managed by PFM Asset Management ("PFMAM") were in compliance with the applicable investment policy and guidelines as furnished to PFMAM.

Acknowledged : *PFM Asset Management LLC*

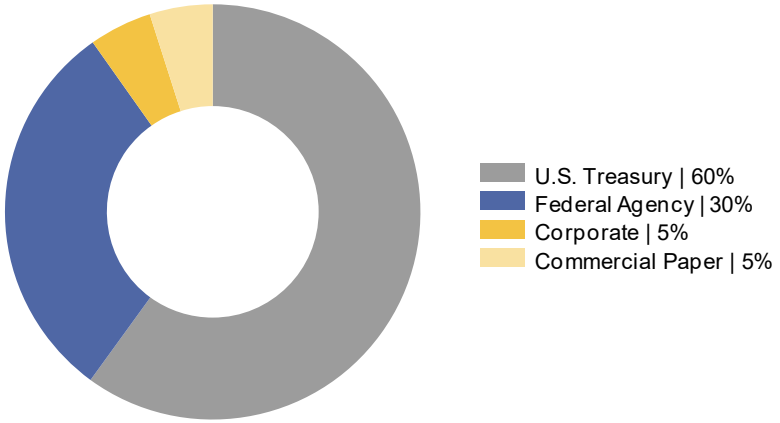
Note: Pre- and post-trade compliance for the account(s) managed by PFM Asset Management is provided via Bloomberg Asset and Investment Management ("AIM").

Portfolio Snapshot[1]

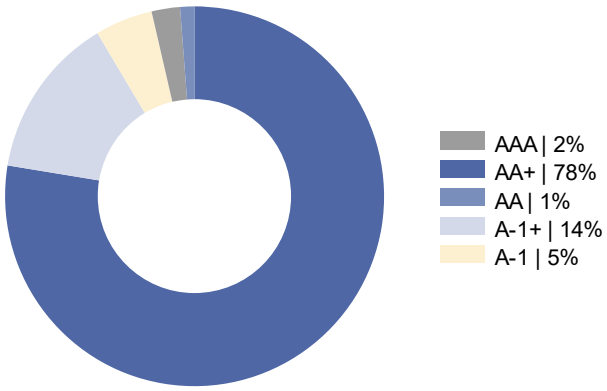
Portfolio Statistics

Total Market Value	$39,689,779.75
Securities Sub-Total	*$39,362,088.75*
Accrued Interest	*$327,691.00*
Cash	*$0.00*
Portfolio Effective Duration	1.32 years
Benchmark Effective Duration	1.28 years
Yield At Cost	4.91%
Yield At Market	5.07%
Portfolio Credit Quality	AA

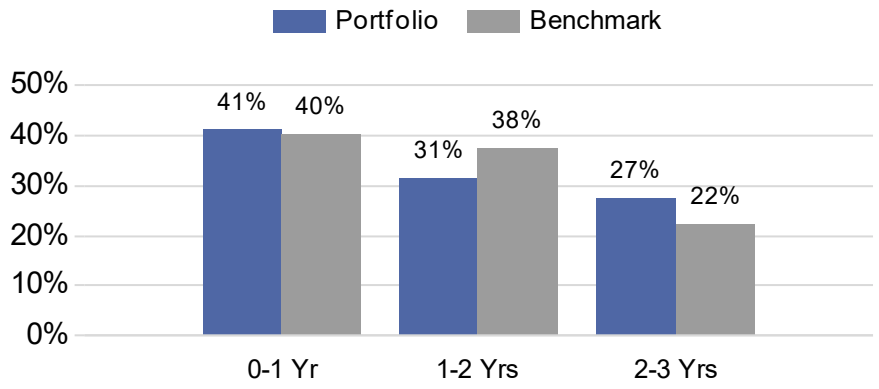
Sector Allocation



Credit Quality - S&P



Duration Distribution



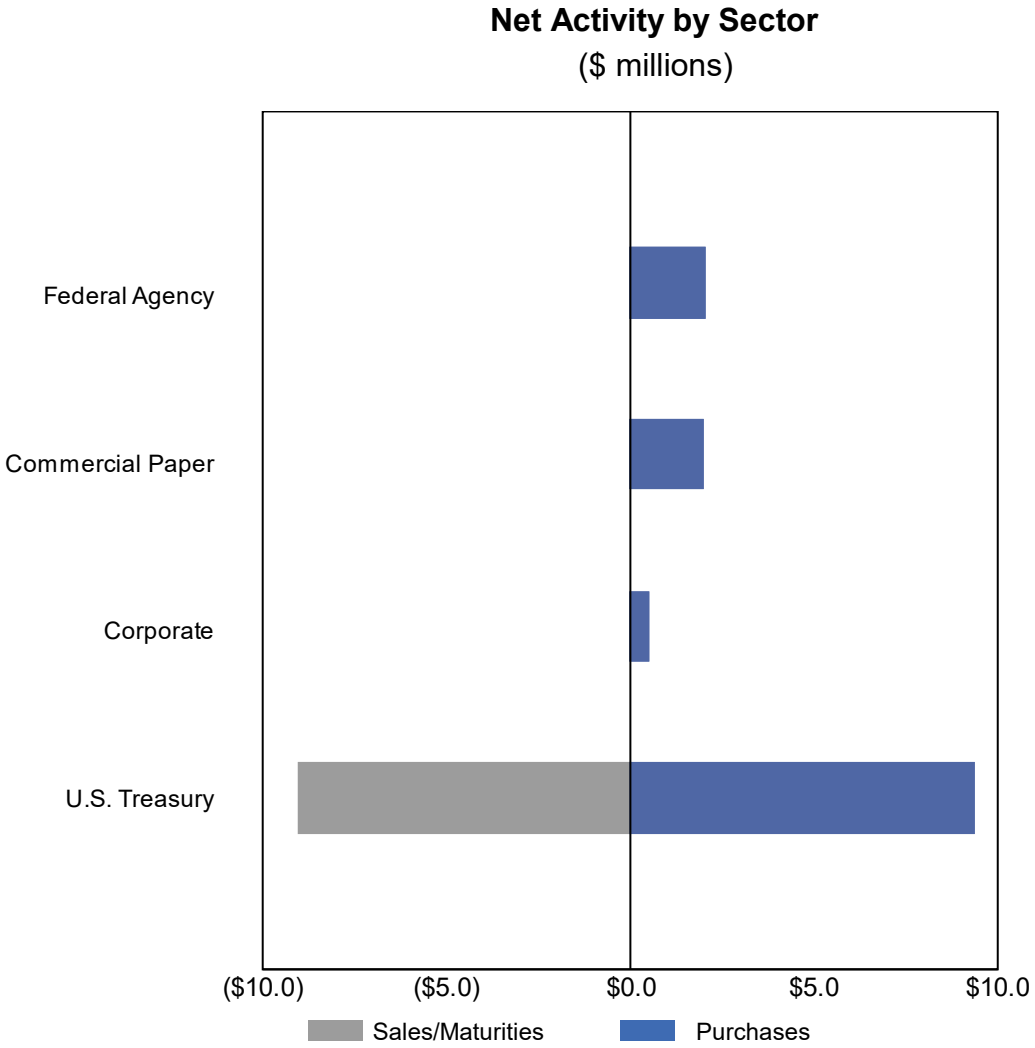
1. *Yield and duration calculations exclude cash and cash equivalents. Sector allocation includes market values and accrued interest.*
   The portfolio's benchmark is the ICE BofA 0-3 Year U.S. Treasury Index. Source: Bloomberg.
   An average of each security's credit rating was assigned a numeric value and adjusted for its relative weighting in the portfolio.

Issuer Diversification

Security Type / Issuer	Market Value (%)	S&P / Moody's / Fitch
U.S. Treasury	**59.9%**	
UNITED STATES TREASURY	59.9%	AA / Aaa / AAA
Federal Agency	**30.3%**	
FANNIE MAE	5.0%	AA / Aaa / AAA
FEDERAL HOME LOAN BANKS	25.3%	AA / Aaa / NR
Commercial Paper	**4.9%**	
MITSUBISHI UFJ FINANCIAL GROUP INC	2.4%	A / Aa / A
NATIXIS NY BRANCH	2.4%	A / Aa / AA
Corporate	**4.9%**	
APPLE INC	1.2%	AA / Aaa / NR
JOHNSON & JOHNSON	1.2%	AAA / Aaa / NR
MICROSOFT CORP	1.2%	AAA / Aaa / NR
WAL-MART STORES INC	1.2%	AA / Aa / AA
Total	**100.0%**	

Ratings shown are calculated by assigning a numeral value to each security rating, then calculating a weighted average rating for each security type / issuer category using all available security ratings, excluding Not-Rated (NR) ratings. For security type / issuer categories where a rating from the applicable NRSRO is not available, a rating of NR is assigned. Includes accrued interest and excludes balances invested in overnight funds.

Portfolio Activity

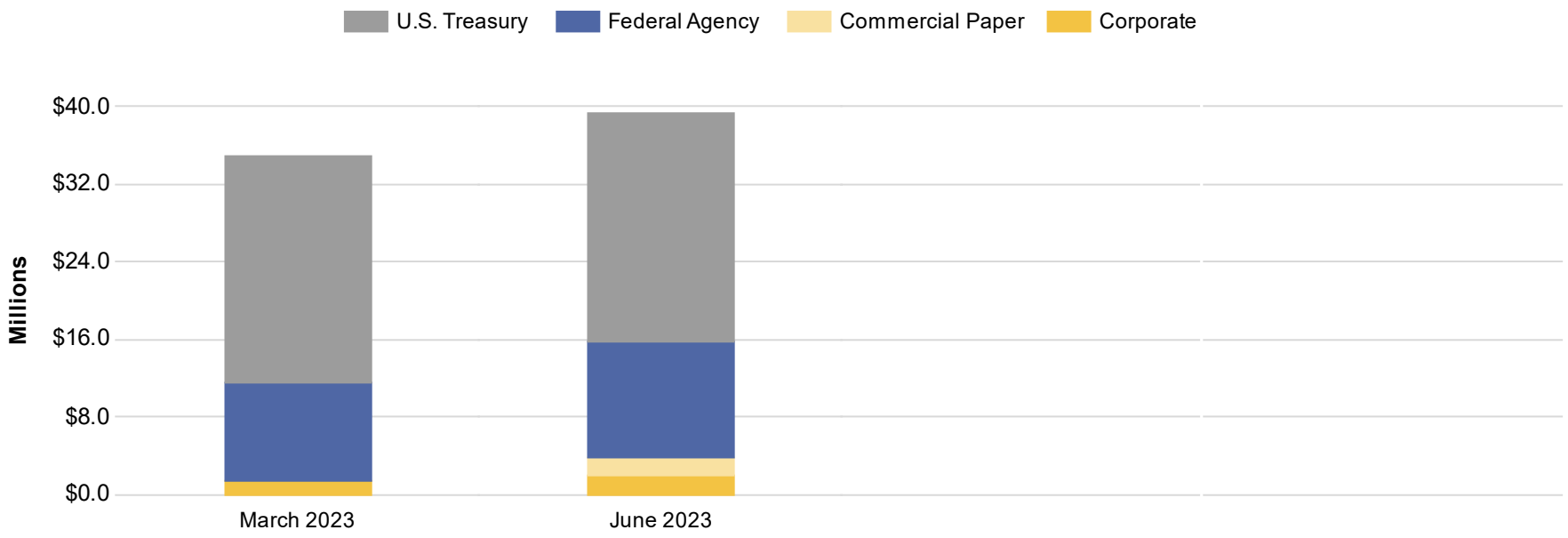


Sector	Net Activity
Federal Agency	$2,036,640
Commercial Paper	$1,935,944
Corporate	$480,914
U.S. Treasury	$323,573
Total Net Activity	**$4,777,071**

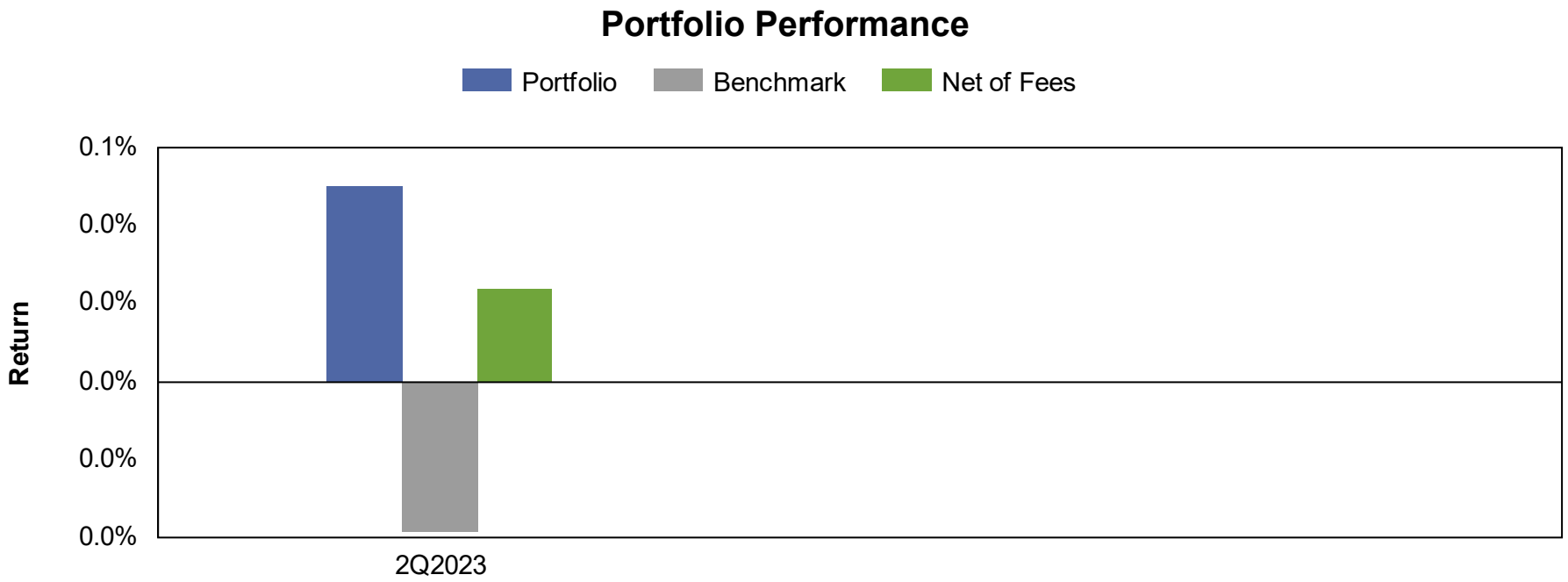
Based on total proceeds (principal and accrued interest) of buys, sells, maturities, and principal paydowns. Detail may not add to total due to rounding.

Sector Allocation Review

Security Type	Mar-23	% of Total	Jun-23	% of Total		
U.S. Treasury	$23.4	67.1%	$23.6	60.0%		
Federal Agency	$10.0	28.7%	$11.9	30.2%		
Commercial Paper	$0.0	0.0%	$1.9	4.9%		
Corporate	$1.5	4.2%	$1.9	4.9%		
Total	**$34.9**	**100.0%**	**$39.4**	**100.0%**		



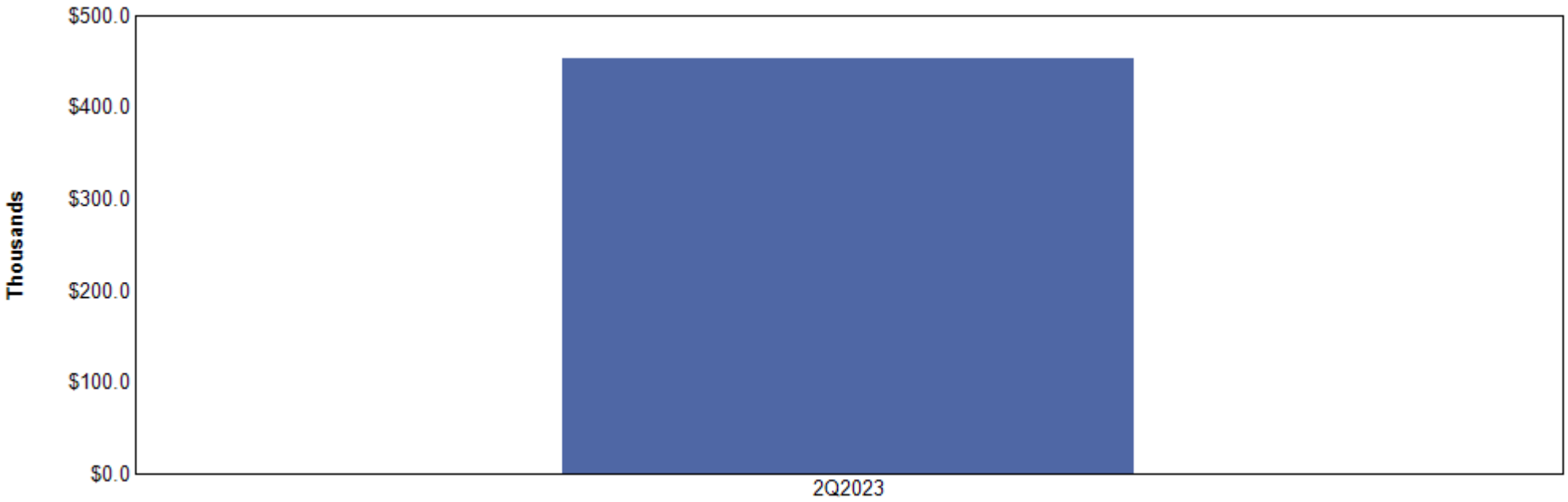
Market values, excluding accrued interest. Only includes fixed-income securities held within the separately managed account(s) and LGIPs managed by PFMAM. Detail may not add to total due to rounding.



Market Value Basis Earnings	2Q2023
Interest Earned[1]	$270,908
Change in Market Value	($265,342)
Total Dollar Return	**$5,566**
Total Return[2]	
Portfolio	0.05%
Benchmark[3]	-0.04%
Basis Point Fee	0.03%
Net of Fee Return	0.02%

1. Interest earned calculated as the ending accrued interest less beginning accrued interest, plus net interest activity.
2. Returns are presented on a periodic basis.
3. The portfolio's benchmark is the ICE BofA 0-3 Year U.S. Treasury Index. Source: Bloomberg.

Accrual Basis Earnings



Accrual Basis Earnings	2Q2023
Interest Earned[1]	$270,908
Realized Gains / (Losses)[2]	-
Change in Amortized Cost	$182,273
Total Earnings	**$453,181**

1. Interest earned calculated as the ending accrued interest less beginning accrued interest, plus net interest activity.
2. Realized gains / (losses) are shown on an amortized cost basis.

Portfolio Holdings and Transactions

Managed Account Detail of Securities Held

Security Type/Description Dated Date/Coupon/Maturity	CUSIP	Par	S&P Rating	Moody's Rating	Trade Date	Settle Date	Original Cost	YTM at Cost	Accrued Interest	Amortized Cost	Market Value
U.S. Treasury											
US TREASURY BILL DTD 07/14/2022 0.000% 07/13/2023	912796XQ7	3,000,000.00	A-1+	P-1	1/12/2023	1/13/2023	2,929,447.71	4.79	0.00	2,995,322.50	2,995,787.40
US TREASURY BILL DTD 05/25/2023 0.000% 11/24/2023	912797FL6	2,500,000.00	A-1+	P-1	6/1/2023	6/2/2023	2,437,030.38	5.32	0.00	2,447,465.35	2,448,100.00
US TREASURY N/B NOTES DTD 03/31/2022 2.250% 03/31/2024	91282CEG2	2,500,000.00	AA+	Aaa	5/10/2023	5/12/2023	2,445,312.50	4.80	14,139.34	2,453,751.93	2,441,015.50
US TREASURY NOTES DTD 04/30/2019 2.250% 04/30/2024	9128286R6	2,500,000.00	AA+	Aaa	5/10/2023	5/12/2023	2,441,601.56	4.75	9,476.90	2,449,849.93	2,435,547.00
US TREASURY N/B NOTES DTD 07/31/2022 3.000% 07/31/2024	91282CFA4	2,000,000.00	AA+	Aaa	3/6/2023	3/7/2023	1,942,109.38	5.16	25,027.62	1,955,225.22	1,949,375.00
US TREASURY N/B NOTES DTD 01/31/2023 4.125% 01/31/2025	91282CGG0	2,500,000.00	AA+	Aaa	3/6/2023	3/7/2023	2,464,062.50	4.92	43,016.23	2,470,052.08	2,460,937.50
US TREASURY N/B NOTES DTD 10/15/2022 4.250% 10/15/2025	91282CFP1	2,000,000.00	AA+	Aaa	3/6/2023	3/7/2023	1,977,890.63	4.70	17,882.51	1,980,581.80	1,977,500.00
US TREASURY N/B NOTES DTD 11/15/2022 4.500% 11/15/2025	91282CFW6	2,000,000.00	AA+	Aaa	3/6/2023	3/7/2023	1,991,015.63	4.68	11,494.57	1,992,074.76	1,989,687.60
US TREASURY N/B NOTES DTD 01/15/2023 3.875% 01/15/2026	91282CGE5	1,500,000.00	AA+	Aaa	3/6/2023	3/7/2023	1,470,234.38	4.62	26,814.57	1,473,538.51	1,472,109.30
US TREASURY N/B NOTES DTD 02/15/2023 4.000% 02/15/2026	91282CGL9	1,500,000.00	AA+	Aaa	3/6/2023	3/7/2023	1,475,039.06	4.61	22,541.44	1,477,730.02	1,477,031.25
US TREASURY N/B NOTES DTD 04/15/2023 3.750% 04/15/2026	91282CGV7	1,000,000.00	AA+	Aaa	5/10/2023	5/12/2023	1,003,437.50	3.62	7,889.34	1,003,276.72	978,906.20
US TREASURY N/B NOTES DTD 05/15/2023 3.625% 05/15/2026	91282CHB0	1,000,000.00	AA+	Aaa	6/26/2023	6/29/2023	980,703.13	4.34	4,629.76	980,739.85	975,625.00
Security Type Sub-Total		**24,000,000.00**					**23,557,884.36**	**4.78**	**182,912.28**	**23,679,608.67**	**23,601,621.75**
Federal Agency											
FANNIE MAE NOTES DTD 02/08/2019 2.500% 02/05/2024	3135G0V34	2,000,000.00	AA+	Aaa	3/6/2023	3/7/2023	1,951,200.00	5.28	20,277.78	1,968,097.91	1,965,844.00

Security Type/Description Dated Date/Coupon/Maturity	CUSIP	Par	S&P Rating	Moody's Rating	Trade Date	Settle Date	Original Cost	YTM at Cost	Accrued Interest	Amortized Cost	Market Value
Federal Agency											
FEDERAL HOME LOAN BANK NOTES DTD 11/07/2022 4.875% 06/14/2024	3130ATVC8	2,000,000.00	AA+	Aaa	3/6/2023	3/7/2023	1,988,240.00	5.35	4,604.17	1,991,173.68	1,989,166.00
FEDERAL HOME LOAN BANK NOTES DTD 11/07/2022 4.875% 09/13/2024	3130ATVD6	2,000,000.00	AA+	Aaa	3/6/2023	3/7/2023	1,987,780.00	5.30	29,250.00	1,990,329.50	1,987,486.00
FEDERAL HOME LOAN BANK NOTES DTD 11/04/2022 4.625% 12/13/2024	3130ATUR6	2,000,000.00	AA+	Aaa	3/6/2023	3/7/2023	1,981,600.00	5.17	4,625.00	1,984,898.92	1,980,416.00
FEDERAL HOME LOAN BANKS NOTES DTD 03/03/2023 5.000% 02/28/2025	3130AV7L0	2,000,000.00	AA+	Aaa	3/6/2023	3/7/2023	1,998,920.00	5.03	33,146.07	1,999,093.04	1,994,048.00
FEDERAL HOME LOAN BANK NOTES DTD 02/17/2023 4.625% 03/14/2025	3130AUZC1	2,000,000.00	AA+	Aaa	5/10/2023	5/12/2023	2,014,800.00	4.20	34,430.56	2,013,698.81	1,983,694.00
Security Type Sub-Total		**12,000,000.00**					**11,922,540.00**	**5.05**	**126,333.58**	**11,947,291.86**	**11,900,654.00**
Corporate											
WALMART INC CORPORATE NOTES DTD 09/09/2022 3.900% 09/09/2025	931142EW9	500,000.00	AA	Aa2	3/6/2023	3/8/2023	489,185.00	4.83	6,066.67	490,542.78	489,215.00
MICROSOFT CORP NOTES (CALLABLE) DTD 11/03/2015 3.125% 11/03/2025	594918BJ2	500,000.00	AAA	Aaa	3/6/2023	3/8/2023	478,705.00	4.85	2,517.36	481,227.06	480,651.00
APPLE INC (CALLABLE) BONDS DTD 02/23/2016 3.250% 02/23/2026	037833BY5	500,000.00	AA+	Aaa	3/6/2023	3/8/2023	478,135.00	4.85	5,777.78	480,456.77	481,616.50
JOHNSON & JOHNSON (CALLABLE) NOTES DTD 03/01/2016 2.450% 03/01/2026	478160BY9	500,000.00	AAA	Aaa	6/1/2023	6/5/2023	477,715.00	4.19	4,083.33	478,294.41	471,695.50
Security Type Sub-Total		**2,000,000.00**					**1,923,740.00**	**4.68**	**18,445.14**	**1,930,521.02**	**1,923,178.00**
Commercial Paper											
MUFG BANK LTD/NY COMM PAPER DTD 04/12/2023 0.000% 01/05/2024	62479LA54	1,000,000.00	A-1	P-1	6/27/2023	6/29/2023	970,444.44	5.77	0.00	970,755.55	970,786.00

Security Type/Description Dated Date/Coupon/Maturity	CUSIP	Par	S&P Rating	Moody's Rating	Trade Date	Settle Date	Original Cost	YTM at Cost	Accrued Interest	Amortized Cost	Market Value
Commercial Paper											
NATIXIS NY BRANCH COMM PAPER DTD 05/12/2023 0.000% 02/05/2024	63873JB58	1,000,000.00	A-1	P-1	6/28/2023	6/29/2023	965,499.44	5.82	0.00	965,811.66	965,849.00
Security Type Sub-Total		**2,000,000.00**					**1,935,943.88**	**5.80**	**0.00**	**1,936,567.21**	**1,936,635.00**
Managed Account Sub Total		**40,000,000.00**					**39,340,108.24**	**4.91**	**327,691.00**	**39,493,988.76**	**39,362,088.75**
Securities Sub Total		**$40,000,000.00**					**$39,340,108.24**	**4.91%**	**$327,691.00**	**$39,493,988.76**	**$39,362,088.75**
Accrued Interest											**$327,691.00**
Total Investments											**$39,689,779.75**

Quarterly Portfolio Transactions

Trade Date	Settle Date	Par ($)	CUSIP	Security Description	Coupon	Maturity Date	Transact Amount ($)	Yield at Market	Realized G/L (BV)
BUY									
5/10/2023	5/12/2023	1,000,000.00	91282CGV7	US TREASURY N/B NOTES	3.75%	4/15/2026	1,006,203.89	3.62%	
5/10/2023	5/12/2023	2,500,000.00	9128286R6	US TREASURY NOTES	2.25%	4/30/2024	2,443,435.80	4.75%	
5/10/2023	5/12/2023	2,000,000.00	3130AUZC1	FEDERAL HOME LOAN BANK NOTES	4.62%	3/14/2025	2,036,640.28	4.20%	
5/10/2023	5/12/2023	2,500,000.00	91282CEG2	US TREASURY N/B NOTES	2.25%	3/31/2024	2,451,767.42	4.80%	
6/1/2023	6/2/2023	2,500,000.00	912797FL6	US TREASURY BILL	0.00%	11/24/2023	2,437,030.38	5.32%	
6/1/2023	6/5/2023	500,000.00	478160BY9	JOHNSON & JOHNSON (CALLABLE) NOTES	2.45%	3/1/2026	480,913.61	4.19%	
6/26/2023	6/29/2023	1,000,000.00	91282CHB0	US TREASURY N/B NOTES	3.62%	5/15/2026	985,135.87	4.34%	
6/27/2023	6/29/2023	1,000,000.00	62479LA54	MUFG BANK LTD/NY COMM PAPER	0.00%	1/5/2024	970,444.44	5.77%	
6/28/2023	6/29/2023	1,000,000.00	63873JB58	NATIXIS NY BRANCH COMM PAPER	0.00%	2/5/2024	965,499.44	5.82%	
Total BUY		**14,000,000.00**					**13,777,071.13**		**0.00**
INTEREST									
4/17/2023	4/17/2023		91282CFP1	US TREASURY N/B NOTES	4.25%	10/15/2025	42,500.00		
5/3/2023	5/3/2023	500,000.00	594918BJ2	MICROSOFT CORP NOTES (CALLABLE)	3.12%	11/3/2025	7,812.50		
5/15/2023	5/15/2023	2,000,000.00	91282CFW6	US TREASURY N/B NOTES	4.50%	11/15/2025	45,000.00		
6/13/2023	6/13/2023	2,000,000.00	3130ATUR6	FEDERAL HOME LOAN BANK NOTES	4.62%	12/13/2024	56,270.83		
6/14/2023	6/14/2023	2,000,000.00	3130ATVC8	FEDERAL HOME LOAN BANK NOTES	4.87%	6/14/2024	58,770.83		
Total INTEREST		**6,500,000.00**					**210,354.16**		**0.00**

Quarterly Portfolio Transactions

Trade Date	Settle Date	Par ($)	CUSIP	Security Description	Coupon	Maturity Date	Transact Amount ($)	Yield at Market	Realized G/L (BV)
MATURITY									
5/9/2023	5/9/2023	3,000,000.00	912797FD4	US TREASURY BILL	0.00%	5/9/2023	3,000,000.00		
6/1/2023	6/1/2023	3,000,000.00	912796ZG7	US TREASURY BILL	0.00%	6/1/2023	3,000,000.00		
6/29/2023	6/29/2023	3,000,000.00	912796ZR3	US TREASURY BILL	0.00%	6/29/2023	3,000,000.00		
Total MATURITY		**9,000,000.00**					**9,000,000.00**		**0.00**

Important Disclosures

This material is for general information purposes only and is not intended to provide specific advice or a specific recommendation, as it was prepared without regard to any specific objectives or financial circumstances.

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It is not possible to invest directly in an index. The index returns shown throughout this material do not represent the results of actual trading of investor assets. Third-party providers maintain the indices shown and calculate the index levels and performance shown or discussed. Index returns do not reflect payment of any sales charges or fees an investor would pay to purchase the securities they represent. The imposition of these fees and charges would cause investment performance to be lower than the performance shown.

The views expressed within this material constitute the perspective and judgment of PFMAM at the time of distribution and are subject to change. Any forecast, projection, or prediction of the market, the economy, economic trends, and equity or fixed-income markets are based upon certain assumptions and current opinion as of the date of issue and are also subject to change. Some, but not all assumptions are noted in the report. Assumptions may or may not be proven correct as actual events occur, and results may depend on events outside of your or our control. Changes in assumptions may have a material effect on results. Opinions and data presented are not necessarily indicative of future events or expected performance.

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Important Disclosures

- Market values that include accrued interest are derived from closing bid prices as of the last business day of the month as supplied by Refinitiv, Bloomberg, or Telerate. Where prices are not available from generally recognized sources, the securities are priced using a yield-based matrix system to arrive at an estimated market value.
- In accordance with generally accepted accounting principles, information is presented on a trade date basis; forward settling purchases are included in the monthly balances, and forward settling sales are excluded.
- Performance is presented in accordance with the CFA Institute's Global Investment Performance Standards (GIPS). Unless otherwise noted, performance is shown gross of fees. Quarterly returns are presented on an unannualized basis. Returns for periods greater than one year are presented on an annualized basis. Past performance is not indicative of future returns.
- Bank of America/Merrill Lynch Indices provided by Bloomberg Financial Markets.
- Money market fund/cash balances are included in performance and duration computations.
- Standard & Poor's is the source of the credit ratings. Distribution of credit rating is exclusive of money market fund/LGIP holdings.
- Callable securities in the portfolio are included in the maturity distribution analysis to their stated maturity date, although, they may be called prior to maturity.
- MBS maturities are represented by expected average life.

Glossary

- Accrued Interest: Interest that is due on a bond or other fixed income security since the last interest payment was made.
- Agencies: Federal agency securities and/or Government-sponsored enterprises.
- Amortized Cost: The original cost of the principal of the security is adjusted for the amount of the periodic reduction of any discount or premium from the purchase date until the date of the report. Discount or premium with respect to short-term securities (those with less than one year to maturity at time of issuance) is amortized on a straight line basis. Such discount or premium with respect to longer-term securities is amortized using the constant yield basis.
- Asset-Backed Security: A financial instrument collateralized by an underlying pool of assets – usually ones that generate a cash flow from debt, such as loans, leases, credit card balances, and receivables.
- Bankers' Acceptance: A draft or bill or exchange accepted by a bank or trust company. The accepting institution guarantees payment of the bill as well as the insurer.
- Commercial Paper: An unsecured obligation issued by a corporation or bank to finance its short-term credit needs, such as accounts receivable and inventory.
- Contribution to Total Return: The weight of each individual security multiplied by its return, then summed for each sector to determine how much each sector added or subtracted from the overall portfolio performance.
- Effective Duration: A measure of the sensitivity of a security's price to a change in interest rates, stated in years.
- Effective Yield: The total yield an investor receives in relation to the nominal yield or coupon of a bond. Effective yield takes into account the power of compounding on investment returns, while nominal yield does not.
- FDIC: Federal Deposit Insurance Corporation. A federal agency that insures bank deposits to a specified amount.
- Interest Rate: Interest per year divided by principal amount and expressed as a percentage.
- Market Value: The value that would be received or paid for an investment in an orderly transaction between market participants at the measurement date.
- Maturity: The date upon which the principal or stated value of an investment becomes due and payable.
- Negotiable Certificates of Deposit: A CD with a very large denomination, usually $1 million or more, that can be traded in secondary markets.
- Par Value: The nominal dollar face amount of a security.
- Pass-through Security: A security representing pooled debt obligations that passes income from debtors to its shareholders. The most common type is the mortgage-backed security.

Glossary

- Repurchase Agreements: A holder of securities sells these securities to an investor with an agreement to repurchase them at a fixed price on a fixed date.
- Settle Date: The date on which the transaction is settled and monies/securities are exchanged. If the settle date of the transaction (i.e., coupon payments and maturity proceeds) occurs on a non-business day, the funds are exchanged on the next business day.
- Supranational: A multinational union or association in which member countries cede authority and sovereignty on at least some internal matters to the group, whose decisions are binding on its members.
- Trade Date: The date on which the transaction occurred; however, the final consummation of the security transaction and payment has not yet taken place.
- Unsettled Trade: A trade which has been executed; however, the final consummation of the security transaction and payment has not yet taken place.
- U.S. Treasury: The department of the U.S. government that issues Treasury securities.
- Yield: The rate of return based on the current market value, the annual interest receipts, maturity value, and the time period remaining until maturity, stated as a percentage on an annualized basis.
- YTM at Cost: The yield to maturity at cost is the expected rate of return based on the original cost, the annual interest receipts, maturity value, and the time period from purchase date to maturity, stated as a percentage on an annualized basis.
- YTM at Market: The yield to maturity at market is the rate of return based on the current market value, the annual interest receipts, maturity value, and the time period remaining until maturity, stated as a percentage on an annualized basis.

COUNCIL MEETING MINUTES
JULY 24, 2023

DATE COUNCIL CHAMBERS, CITY HALL, CITY OF WOODBURN, COUNTY OF MARION, STATE OF OREGON, JULY 24, 2023

CONVENED The meeting convened at 7:00 p.m. with Mayor Lonergan presiding.

ROLL CALL

Mayor Lonergan	Present
Councilor Carney	Present
Councilor Cornwell	Present
Councilor Schaub	Present
Councilor Morris	Present
Councilor Cabrales	Present – via video conferencing
Councilor Wilk	Present

Staff Present: City Administrator Derickson, City Attorney Shields, Assistant City Administrator Row, Assistant City Attorney Granum, Police Chief Pilcher, Special Projects Director Wakeley, Community Services Director Cuomo, Economic Development Director Johnk, Community Development Director Kerr, Finance Director Turley, Public Works Director Stultz, Public Affairs and Communications Coordinator Moore, City Recorder Pierson

PROCLAMATIONS

National Night Out - Mayor Lonergan proclaimed Tuesday, August 1st, 2023, as National Night Out in the city of Woodburn.

CONSENT AGENDA

A. Woodburn City Council minutes of July 11, 2023,
B. Acceptance of The Right-of-Way Dedication Legion Park, Park Ave. (Tax Lots 4700 & 5200),
C. Acceptance of a Public Waterline Easement at 2400 N. Pacific Highway, Woodburn, OR 97071 (Tax Lot 051W08A005000),
D. Intergovernmental Agreement (#HE-5484-23) Marion County and City of Woodburn,
E. Monthly Financial Report,
F. Redflex Report for April – June 2023.

Carney/Cornwell… approve the consent agenda. The motion passed unanimously.

COUNCIL BILL NO. 3224 - A RESOLUTION APPOINTING MCKENZIE GRANUM AS CITY ATTORNEY PURSUANT TO THE WOODBURN CITY CHARTER AND AUTHORIZING THE MAYOR TO EXECUTE THE ATTACHED EMPLOYMENT AGREEMENT

Carney introduced Council Bill No. 3224. City Recorder Pierson read the bill by title only since there were no objections from Council. On roll call vote for final passage, the bill passed unanimously. Mayor Lonergan declared Council Bill No. 3224 duly passed.

COUNCIL BILL NO. 3225 - A RESOLUTION ADOPTING THE CITY OF WOODBURN ADDENDUM TO THE MARION COUNTY MULTI-JURISDICTIONAL HAZARD MITIGATION PLAN

Carney introduced Council Bill No. 3225. City Recorder Pierson read the bill by title only since there were no objections from Council. Police Chief Pilcher provided a staff report. On roll call

vote for final passage, the bill passed unanimously. Mayor Lonergan declared Council Bill No. 3225 duly passed.

AWARD A CONTRACT FOR A TRANSPORTATION SYSTEM PLAN (TSP) SUBAREA PLAN/UPDATE RELATED TO THE SOUTHWEST AREA OF THE CITY, INCLUDING INDUSTRIALLY ZONED LAND AND AUTHORIZE THE CITY ADMINISTRATOR TO EXECUTE THE CONTRACT FUNDED IN PART BY A GRANT AWARD FROM BUSINESS OREGON

Community Development Director Kerr provided a staff report. **Carney/Schaub** … award a consultant contract for a TSP subarea plan related to the southwest area, and including Urban reserve Area (URA) lands, to Kittleson & Associates, Inc. in the amount of $168,017 and authorize the City Administrator to execute the agreement with Kittleson & Associates and authorize the City Administrator to sign the grant agreement with Business Oregon. The motion passed unanimously.

CITY ADMINISTRATOR'S REPORT

The City Administrator reported the following:

The City was awarded a $1.7 million grant from the Oregon Communities Pathways Program to construct five trail segments.

After the fourth of July there were a lot of questions and concerns about fireworks that he heard from people. He added that he will wait for feedback from City Council on whether they are interested in having a discussion on fireworks in Woodburn.

The police department has been very busy this summer especially during the weekends with a lot of calls for service. Our public works department has also been very busy and recently received recognition from the Oregon Health Authority for the City's assistance during the pandemic. He thanked both departments for all the work they do for Woodburn.

Attended the Oregon City Manager's conference in Pendleton along with Maricela, Jesse, and Beny.

MAYOR AND COUNCIL REPORTS

Councilor Cabrales stated that she is going on vacation and won't be at the next meeting.

Councilor Morris thanked the Chief and team for the traffic tip line.

Councilor Schaub stated that she did a walkthrough of the Aware Food Bank, and it is going to be a wonderful asset to Woodburn.

Councilor Wilk noted that the food bank may be having their grand opening in October. He added his concern for the fourth of July fires in the city and that the Council may want to spend time on what can be done.

Councilor Cornwell stated that she would like to discuss the firework issue as well.

Mayor Lonergan thanked those who attended the meeting in Library Park two weeks ago that gave

us a chance to recognize our volunteers. He thanked staff for their dedication to the City.

A week ago he hosted a meeting at the Bungalow Theater and Museum for Mayors through Mid-Willamette Valley Council of Governments, which represents Marion, Polk, and Yamhill Counties, all the Mayors in those counties were invited to attend.

ADJOURNMENT

Cornwell/Schaub… move to adjourn. The motion passed unanimously. Mayor Lonergan adjourned the meeting at 7:34 p.m.

APPROVED_____
FRANK LONERGAN, MAYOR

ATTEST _____
Heather Pierson, City Recorder
City of Woodburn, Oregon

CITY OF WOODBURN

Community Development Department

MEMORANDUM

270 Montgomery Street Woodburn, Oregon 97071 (503) 982-5246

Date: August 1, 2023

To: Chris Kerr, Community Development Director

From: Melissa Gitt, Building Official

Subject: **Building Activity for July 2023**

	2021		2022		2023	
	No.	**Dollar Amount**	**No.**	**Dollar Amount**	**No.**	**Dollar Amount**
Single-Family Residential	29	$9,592,407	0	$0	7	$2,184,484
Multi-Family Residential	1	$2,841,215	0	$0	7	$10,683,135
Assisted Living Facilities	0	$0	0	$0	0	$0
Residential Adds & Alts	7	$51,850	22	$790,746	12	$138,418
Industrial	0	$0	0	$0	0	$0
Commercial	3	$1,535,449	6	$544,600	11	$4,246,759
Signs and Fences	0	$0	0	$0	0	$0
Manufactured Homes	0	$0	0	$0	0	$0
TOTALS	40	$14,020,921	28	$1,335,346	37	$17,252,796
Fiscal Year to Date (July 1 – June 30)		**$14,020,921**		**$1,335,346**		**$17,252,796**

WOODBURN
OREGON
Incorporated 1889

Agenda Item

August 14, 2023

TO: Honorable Mayor and City Council through City Administrator

FROM: Curtis Stultz, Public Works Director

SUBJECT: **Acceptance of Right-of-Way and Easements at 1775 Hardcastle Avenue**

RECOMMENDATION:

Authorize the acceptance of three easements and one right-of-way dedication granted by Friedman Properties LLC, for real property at 1775 Hardcastle Avenue; Tax Lot 051W08DC00900.

BACKGROUND:

As a condition of the Final Decision for the Hardcastle Apartments Project, dated March 9, 2023, the developer was required to provide three easements and dedicate right-of-way to the City of Woodburn.

DISCUSSION:

The easements under consideration each have a unique use, size, and location. A description of each follows:

- A 1.5' wide public access easement along the north side of Hardcastle Avenue, totaling approximately 176 square feet;
- A 22' wide public access easement over and across Tax Lot 051W08DC00900, totaling approximately 2,673 square feet; and
- A 5' wide Public Utility Easement along the north side of Hardcastle Avenue, totaling approximately 595 square feet.

The right-of-way dedication under consideration is the width that results in the north half-street right-of-way that is 36 feet wide, in accordance with Woodburn Development Ordinance, Figure 3.01D. To satisfy this condition, the right-of-way to be dedicated is 6' wide and approximately 723 square feet.

Agenda Item Review: City Administrator ___x___ City Attorney __x____ Finance __x___

FINANCIAL IMPACT:

There is no cost to the City for the easements or right-of-way as this offer is a condition of Final Decision, dated March 9, 2023.

Attachments:

A copy of the easements and right-of-way dedication are provided with this agenda item.

AFTER RECORDING RETURN TO:

City of Woodburn
Woodburn City Recorder
270 Montgomery Street
Woodburn, OR 97071

CITY OF WOODBURN, OREGON

SIDEWALK EASEMENT
(Permanent)

Friedman Properties LLC ("GRANTOR"), grants to the CITY OF WOODBURN, OREGON ("CITY") a permanent easement and right-of-way for construction, including a grant of public access and unrestricted ingress and egress over and across GRANTOR's property on the following described land:

See attached Exhibit "A" Legal Description of Permanent Easement and attached Exhibit "B" Sketch for Legal Description of Permanent Easement, which are by this reference incorporated herein.

The true and actual consideration of this conveyance is (ZERO DOLLARS) $ 0.00 and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged by *GRANTOR*.

The Easement and all rights granted herein shall perpetually encumber the property.

GRANTOR reserves the right to use the surface of the land for any purpose that will not be inconsistent or interfere with the use of the easement by the *CITY*. No building, permanent structures, or fences shall be placed upon, under or within the property subject to the foregoing easement during the term thereof without the written permission of the *CITY*.

The *CITY* has no maintenance responsibilities for the easement granted herein, however, should it complete any maintenance or repair work that may result in disturbance to the surface of the easement area and any associated landscaping and vegetation, the *CITY* shall promptly restore the surface of the property and any associated landscaping and vegetation to its original condition.

CITY hereby agrees to indemnify, defend and hold harmless *GRANTOR* from and against any liens, claims, liability and costs (including court costs and reasonable attorney and witness fees) arising from or in connection with entry onto or activities on the property pursuant to this easement by *CITY* or any party affiliated with *CITY*.

GRANTOR covenants to *CITY* that *GRANTOR* is lawfully seized in fee simple of the above-granted premises, subject only to those encumbrances of public record, and that *GRANTOR* and their heirs and personal representatives shall warrant and forever defend the said premises and every part thereof to *CITY* against the lawful claims and demands of all persons claiming by, though, or under *GRANTOR*.

DATED THIS 24 DAY OF July, 2023.

FRIEDMAN PROPERTIES, an LLC

By: _____

Name: Scott Friedman

Title: Member

CORPORATE ACKNOWLEDGEMENT

State of Oregon)
) ss.
County of Marion)

This instrument was acknowledged before me on this 24 (day) day of July (month) 2023 (year),
by Scott Friedman (Signer's Name), as Member (Title; write N/A if not applicable)
of Friedman Properties, an LLC (Name of Entity of whose behalf record is executed; write N/A if not applicable)

OFFICIAL STAMP
JACKIE JOLENE COMBS
NOTARY PUBLIC - OREGON
COMMISSION NO. 1016929
MY COMMISSION EXPIRES SEPTEMBER 22, 2025

_____
Notary Public for Oregon
My Commission Expires 9/22/2025

CITY OF WOODBURN
270 Montgomery Street
Woodburn, OR 97071

_____

(Grantee's Name and Address)

By Signature below, the City of Woodburn, Oregon Approves and Accepts this Conveyance Pursuant to ORS 93.808.

City Recorder:

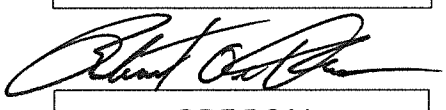
_____

By:_____

EXHIBIT A

COMMENCING AT A 5/8" IRON ROD, BEING THE SOUTHEAST CORNER OF THAT REAL PROPERTY AS DESCRIBED IN INSTRUMENT No.: 2019 00025849, RECORDED IN MARION COUNTY DEED RECORDS, LOCATED IN THE SOUTHEAST QUARTER OF SECTION 8, TOWNSHIP 5 SOUTH, RANGE 1 WEST OF THE WILLAMETTE MERIDIAN, WOODBURN, OREGON; THENCE NORTH 19°13'42" EAST 6.24 FEET TO THE TRUE POINT OF BEGINNING OF A 1.50 FOOT-WIDE SIDEWALK EASEMENT; THENCE NORTH 86°42'44" WEST 119.63 FEET; THENCE NORTH 32°03'01" EAST 1.71 FEET; THENCE SOUTH 86°42'44" EAST 119.24 FEET; THENCE SOUTH 19°13'42" WEST 1.56 FEET TO THE POINT OF BEGINNING AND CONTAINING 179 SQUARE FEET, MORE OR LESS.

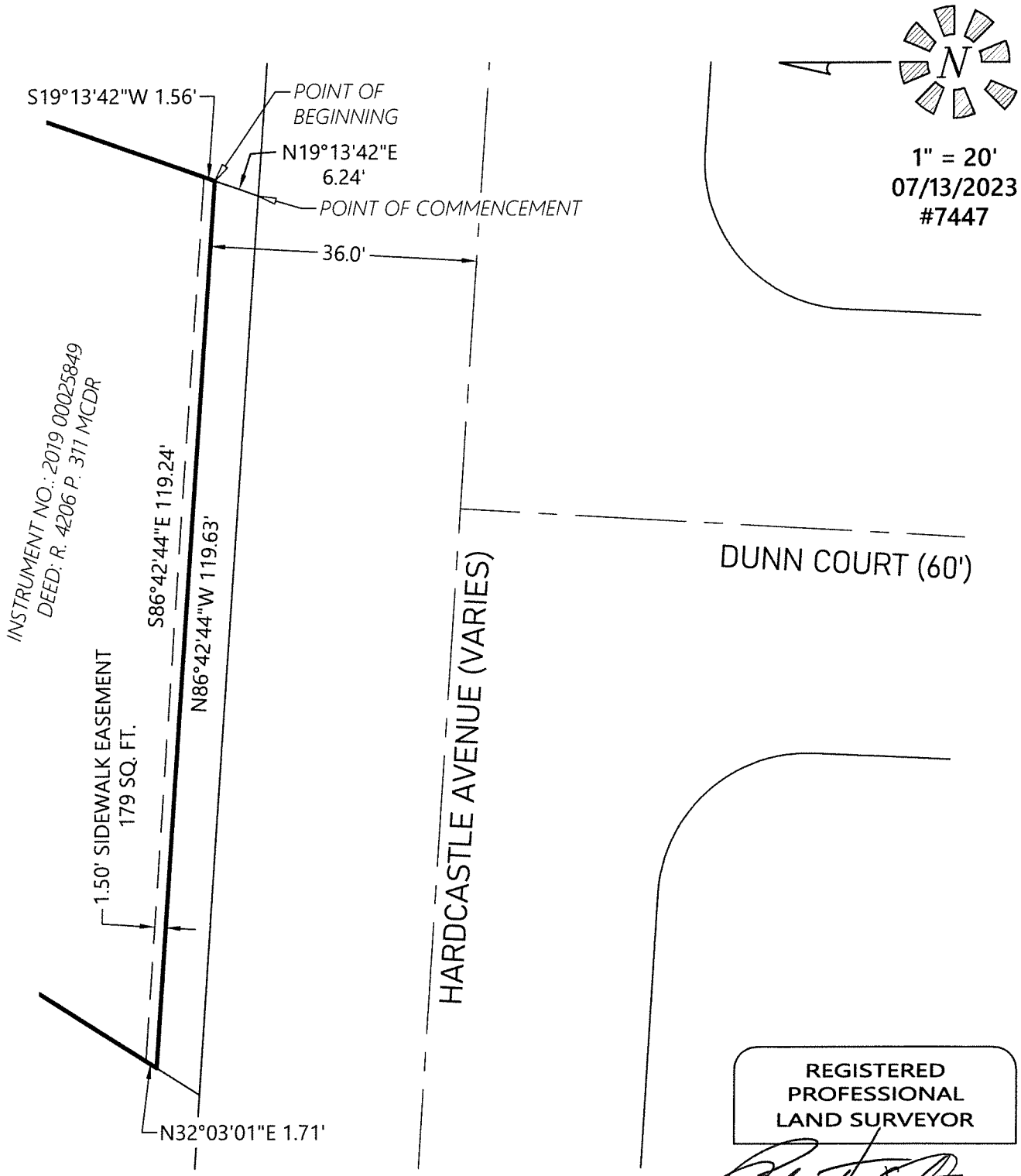
REGISTERED
PROFESSIONAL
LAND SURVEYOR



OREGON
JULY 13, 2004
ROBERT D. HAMMAN
64202LS

EXPIRES: 6-30-2025

EXHIBIT B



BY:
MULTI/TECH ENGINEERING SERVICES, INC.
1155 13TH ST. S.E. SALEM, OREGON 97302
503-363-9227

REGISTERED
PROFESSIONAL
LAND SURVEYOR

OREGON
JULY 13, 2004
ROBERT D. HAMMAN
64202LS

EXPIRES: 6-30-2025

PAGE 5 OF 5

AFTER RECORDING RETURN TO:

City of Woodburn
Woodburn City Recorder
270 Montgomery Street
Woodburn, OR 97071

CITY OF WOODBURN, OREGON

CROSS ACCESS EASEMENT
(Permanent)

Friedman Properties LLC ("GRANTOR"), grants to the CITY OF WOODBURN, OREGON ("CITY") a permanent easement and right-of-way, including a grant of public access and unrestricted ingress and egress over and across GRANTOR's property on the following described land:

See attached Exhibit "A" Legal Description of Permanent Easement and attached Exhibit "B" Sketch for Legal Description of Permanent Easement, which are by this reference incorporated herein.

Pursuant to Woodburn Development Ordinance (WDO) 3.04.03B.3, the public shared access (ingress and egress) right of this easement is revocable only with the written concurrence of the Community Development Director.

The true and actual consideration of this conveyance is (ZERO DOLLARS) $ 0.00 and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged by *GRANTOR.*

The Easement and all rights granted herein shall perpetually encumber the property.

GRANTOR reserves the right to use the surface of the land for any purpose that will not be inconsistent or interfere with the use of the easement by the *CITY.* No building, permanent structures, or fences shall be placed upon, under or within the property subject to the foregoing easement during the term thereof without the written permission of the *CITY.*

The *CITY* has no maintenance responsibilities for the easement granted herein, however, should it complete any maintenance or repair work that may result in disturbance to the surface of the easement area and any associated landscaping and vegetation, the *CITY* shall promptly restore the surface of the property and any associated landscaping and vegetation to its original condition.

CITY hereby agrees to indemnify, defend and hold harmless *GRANTOR* from and against any liens, claims, liability and costs (including court costs and reasonable attorney and witness fees) arising from or in connection with entry onto or activities on the property pursuant to this easement by *CITY* or any party affiliated with *CITY.*

GRANTOR covenants to *CITY* that *GRANTOR* is lawfully seized in fee simple of the above-granted premises, subject only to those encumbrances of public record, and that *GRANTOR* and their heirs and personal representatives shall warrant and forever defend the said premises and every part thereof to *CITY* against the lawful claims and demands of all persons claiming by, though, or under *GRANTOR*.

DATED THIS 26 DAY OF July, 2023.

FRIEDMAN PROPERTIES, an LLC

By: _____

Name: Scott Friedman

Title: Member

CORPORATE ACKNOWLEDGEMENT

State of Oregon)
) ss.
County of Marion)

This instrument was acknowledged before me on this 26 (day) day of July (month), 2023 (year).

by Scott Friedman (Signer's Name), as Member (Title; write N/A if not applicable)

of Friedman Properties (Name of Entity of whose behalf record is executed; write N/A if not applicable)

OFFICIAL STAMP
JACKIE JOLENE COMBS
NOTARY PUBLIC - OREGON
COMMISSION NO. 1016929
MY COMMISSION EXPIRES SEPTEMBER 22, 2025

_____
Notary Public for Oregon
My Commission Expires 09/22/2025

CITY OF WOODBURN
270 Montgomery Street
Woodburn, OR 97071

_____

(Grantee's Name and Address)

By Signature below, the City of Woodburn, Oregon Approves and Accepts this Conveyance Pursuant to ORS 93.808.

City Recorder:

_____
By:_____

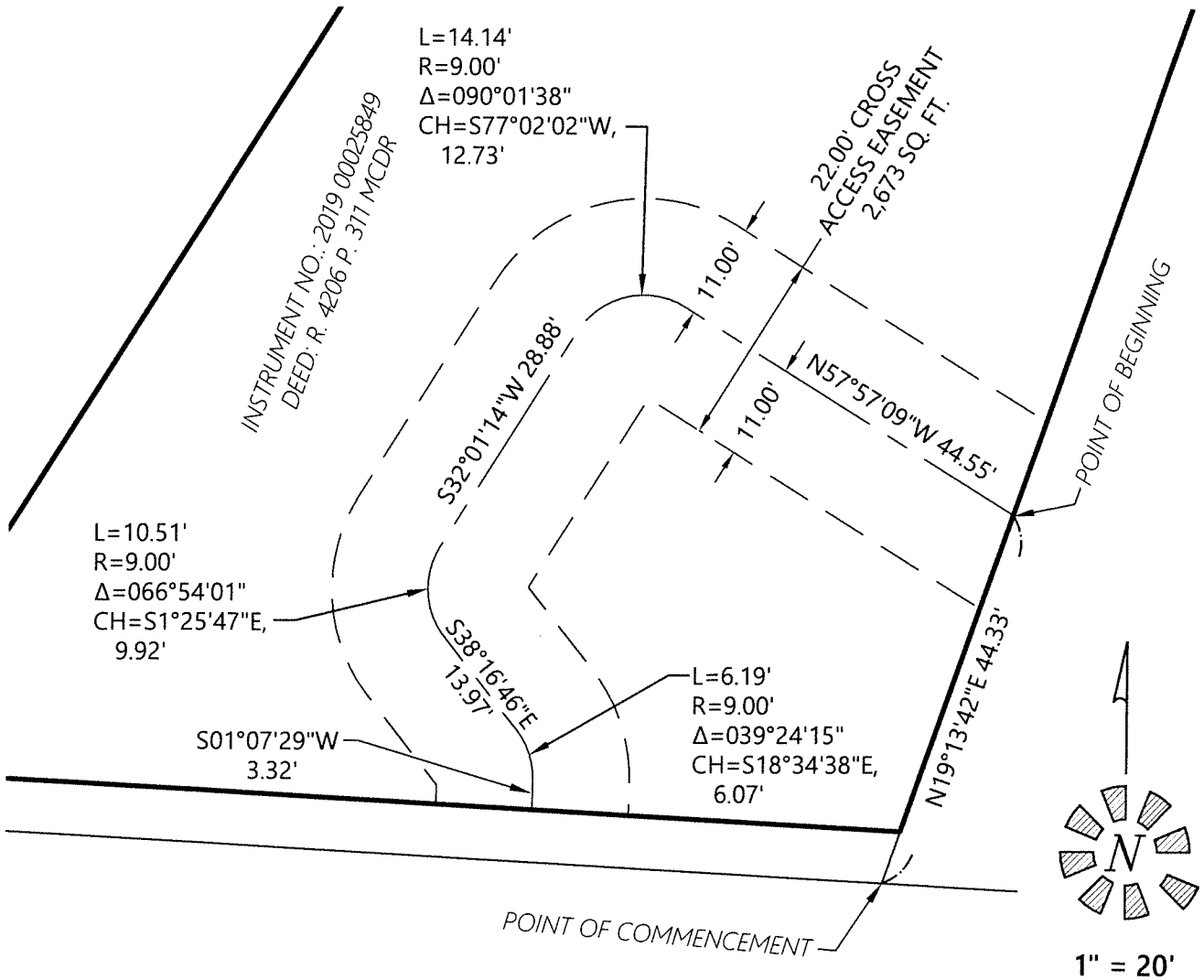
EXHIBIT A

COMMENCING AT A 5/8" IRON ROD, BEING THE SOUTHEAST CORNER OF THAT REAL PROPERTY AS DESCRIBED IN INSTRUMENT No.: 2019 00025849, RECORDED IN MARION COUNTY DEED RECORDS, LOCATED IN THE SOUTHEAST QUARTER OF SECTION 8, TOWNSHIP 5 SOUTH, RANGE 1 WEST OF THE WILLAMETTE MERIDIAN, CITY OF WOODBURN, MARION COUNTY OREGON; THENCE NORTH 19°13'42" EAST 44.33 FEET TO THE POINT OF BEGINNING OF A 22.00 FOOT-WIDE CROSS ACCESS EASEMENT, BEING 11.00 FEET ON EACH SIDE OF THE FOLLOWING DESCRIBED CENTERLINE; THENCE NORTH 57°57'09" WEST 44.55 FEET; THENCE 14.14 FEET ALONG A 9.00 FOOT RADIUS CURVE TO THE LEFT (THE CHORD OF WHICH BEARS SOUTH 77°02'02" WEST 12.73 FEET); THENCE SOUTH 32°01'14" WEST 28.88 FEET; THENCE 10.51 FEET ALONG A 9.00 FOOT RADIUS CURVE TO THE LEFT (THE CHORD OF WHICH BEARS SOUTH 01°25'47" EAST 9.92 FEET); THENCE SOUTH 38°16'46" EAST 13.97 FEET; THENCE 6.19 FEET ALONG A 9.00 FOOT RADIUS CURVE TO THE RIGHT (THE CHORD OF WHICH BEARS SOUTH 18°34'38" EAST 6.07 FEET); THENCE SOUTH 01°07'29" WEST 3.32 FEET TO THE POINT OF TERMINUS, BEING ALSO THE NORTHERLY RIGHT-OF-WAY LINE OF HARDCASTLE AVENUE, WITH THE SIDE LINES BEING EXTENDED OR SHORTENED AS-NEEDED TO TERMINATE AT SAID RIGHT-OF-WAY LINE, AND CONTAINING 2,673 SQUARE FEET, MORE OR LESS.

EXPIRES: 6-30-2025

PAGE 4 OF 5

EXHIBIT B



1" = 20'
07/26/2023
#7447

HARDCASTLE AVENUE (VARIES)

REGISTERED
PROFESSIONAL
LAND SURVEYOR

OREGON
JULY 13, 2004
ROBERT D. HAMMAN
64202LS

EXPIRES: 6-30-2025

BY:
MULTI/TECH ENGINEERING SERVICES, INC.
1155 13TH ST. S.E. SALEM, OREGON 97302
503-363-9227

PAGE 5 OF 5

AFTER RECORDING RETURN TO:

City of Woodburn
Woodburn City Recorder
270 Montgomery Street
Woodburn, OR 97071

CITY OF WOODBURN, OREGON

PUBLIC UTILITY EASEMENT
(Permanent)

Friedman Properties LLC ("GRANTOR"), grants to the CITY OF WOODBURN, OREGON ("CITY") a permanent easement and right-of-way, including a grant of public access and unrestricted ingress and egress over and across GRANTOR's property on the following described land:

See attached Exhibit "A" Legal Description of Permanent Easement and attached Exhibit "B" Sketch for Legal Description of Permanent Easement, which are by this reference incorporated herein.

The true and actual consideration of this conveyance is (ZERO DOLLARS) $ 0.00 and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged by *GRANTOR*.

The Easement and all rights granted herein shall perpetually encumber the property.

GRANTOR reserves the right to use the surface of the land for any purpose that will not be inconsistent or interfere with the use of the easement by the *CITY*. No building, permanent structures, or fences shall be placed upon, under or within the property subject to the foregoing easement during the term thereof without the written permission of the *CITY*.

The *CITY* has no maintenance responsibilities for the easement granted herein, however, should it complete any maintenance or repair work that may result in disturbance to the surface of the easement area and any associated landscaping and vegetation, the *CITY* shall promptly restore the surface of the property and any associated landscaping and vegetation to its original condition.

CITY hereby agrees to indemnify, defend and hold harmless *GRANTOR* from and against any liens, claims, liability and costs (including court costs and reasonable attorney and witness fees) arising from or in connection with entry onto or activities on the property pursuant to this easement by *CITY* or any party affiliated with *CITY*.

GRANTOR covenants to *CITY* that *GRANTOR* is lawfully seized in fee simple of the above-granted premises, subject only to those encumbrances of public record, and that *GRANTOR* and their heirs and personal representatives shall warrant and forever defend the said premises and every part thereof to *CITY* against the lawful claims and demands of all persons claiming by, though, or under *GRANTOR*.

DATED THIS 24 DAY OF July, 2023.

FRIEDMAN PROPERTIES, an LLC

By: _____

Name: Scott Friedman

Title: Member

CORPORATE ACKNOWLEDGEMENT

State of Oregon)
) ss.
County of Marion)

This instrument was acknowledged before me on this 24 (day) day of July (month), 2023 (year),

by Scott Friedman (Signer's Name), as Member (Title; write N/A if not applicable)

of Friedman Properties, an LLC (Name of Entity of whose behalf record is executed; write N/A if not applicable)

OFFICIAL STAMP
JACKIE JOLENE COMBS
NOTARY PUBLIC - OREGON
COMMISSION NO. 1016929
MY COMMISSION EXPIRES SEPTEMBER 22, 2025

_____
Notary Public for Oregon
My Commission Expires 9/22/2025

CITY OF WOODBURN
270 Montgomery Street
Woodburn, OR 97071

_____

(Grantee's Name and Address)

By Signature below, the City of Woodburn, Oregon Approves and Accepts this Conveyance Pursuant to ORS 93.808.

City Recorder:

_____

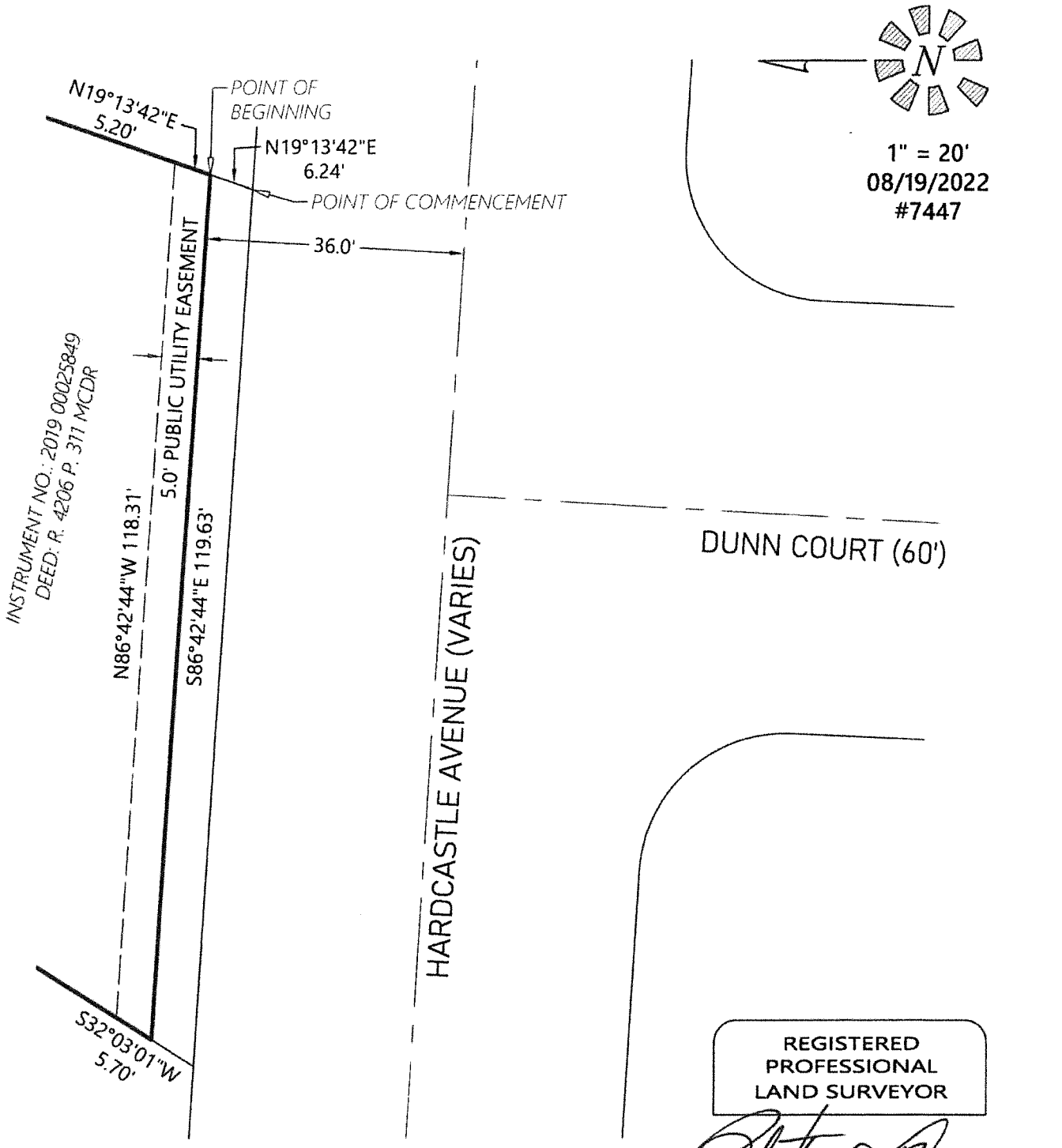
By:_____

EXHIBIT A

COMMENCING AT A 5/8" IRON ROD, BEING THE SOUTHEAST CORNER OF THAT REAL PROPERTY AS DESCRIBED IN INSTRUMENT No.: 2019 00025849, RECORDED IN MARION COUNTY DEED RECORDS, LOCATED IN THE SOUTHEAST QUARTER OF SECTION 8, TOWNSHIP 5 SOUTH, RANGE 1 WEST OF THE WILLAMETTE MERIDIAN, WOODBURN, OREGON; THENCE NORTH 19°13'42" EAST 6.24 FEET TO THE TRUE POINT OF BEGINNING OF A 5.00 FOOT-WIDE PUBLIC UTILITY EASEMENT; THENCE NORTH 19°13'42" EAST 5.20 FEET; THENCE NORTH 86°42'44" WEST 118.31 FEET; THENCE SOUTH 32°03'01" WEST 5.70 FEET; THENCE SOUTH 86°42'44" EAST 119.63 FEET TO THE POINT OF BEGINNING AND CONTAINING 594.86 SQUARE FEET, MORE OR LESS.

PAGE 4 of 5

EXHIBIT B



BY:
MULTI/TECH ENGINEERING SERVICES, INC.
1155 13TH ST. S.E. SALEM, OREGON 97302
503-363-9227

REGISTERED
PROFESSIONAL
LAND SURVEYOR

OREGON
JULY 13, 2004
ROBERT D. HAMMAN
64202LS

EXPIRES: 6-30-2023

PAGE 5 OF 5

AFTER RECORDING RETURN TO:

City of Woodburn
Woodburn City Recorder
270 Montgomery Street
Woodburn, OR 97071

CITY OF WOODBURN, OREGON

DONATION DEED
(Permanent)

Friedman Properties LLC ("GRANTOR"), grants to the CITY OF WOODBURN, OREGON ("CITY") a Partial Acquisition for permanent right-of-way, including a grant of public access and unrestricted ingress and egress over and across GRANTOR's property on the following described land:

See attached Exhibit "A" Legal Description of Permanent Easement and attached Exhibit "B" Sketch for Legal Description of Permanent Easement, which are by this reference incorporated herein.

The true and actual consideration of this conveyance is (ZERO DOLLARS) $ 0.00 and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged by *GRANTOR*.

The Easement and all rights granted herein shall perpetually encumber the property.

GRANTOR reserves the right to use the surface of the land for any purpose that will not be inconsistent or interfere with the use of the easement by the *CITY*. No building, permanent structures, or fences shall be placed upon, under or within the property subject to the foregoing easement during the term thereof without the written permission of the *CITY*.

The *CITY* has no maintenance responsibilities for the easement granted herein, however, should it complete any maintenance or repair work that may result in disturbance to the surface of the easement area and any associated landscaping and vegetation, the *CITY* shall promptly restore the surface of the property and any associated landscaping and vegetation to its original condition.

CITY hereby agrees to indemnify, defend and hold harmless *GRANTOR* from and against any liens, claims, liability and costs (including court costs and reasonable attorney and witness fees) arising from or in connection with entry onto or activities on the property pursuant to this easement by *CITY* or any party affiliated with *CITY*.

GRANTOR covenants to *CITY* that *GRANTOR* is lawfully seized in fee simple of the above-granted premises, subject only to those encumbrances of public record, and that *GRANTOR* and their heirs and personal representatives shall warrant and forever defend the said premises and every part thereof to *CITY* against the lawful claims and demands of all persons claiming by, though, or under *GRANTOR*.

DATED THIS 24 DAY OF July, 2023.

FRIEDMAN PROPERTIES, an LLC

By: _____

Name: Scott Friedman

Title: Member

CORPORATE ACKNOWLEDGEMENT

State of Oregon)
) ss.
County of Marion)

This instrument was acknowledged before me on this 24 (day) day of July (month), 2023 (year),
by Scott Friedman (Signer's Name), as Member (Title; write N/A if not applicable)
of Friedman Properties, an LLC (Name of Entity of whose behalf record is executed; write N/A if not applicable)

OFFICIAL STAMP
JACKIE JOLENE COMBS
NOTARY PUBLIC - OREGON
COMMISSION NO. 1016929
MY COMMISSION EXPIRES SEPTEMBER 22, 2025

_____
Notary Public for Oregon
My Commission Expires 9/22/2025

CITY OF WOODBURN
270 Montgomery Street
Woodburn, OR 97071

_____

(Grantee's Name and Address)

By Signature below, the City of Woodburn, Oregon Approves and Accepts this Conveyance Pursuant to ORS 93.808.

City Recorder:

_____

By:_____

EXHIBIT A

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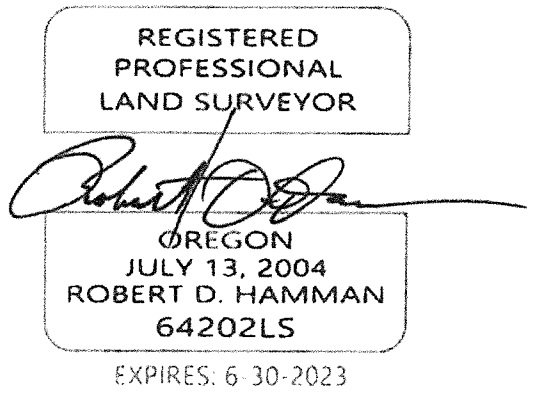
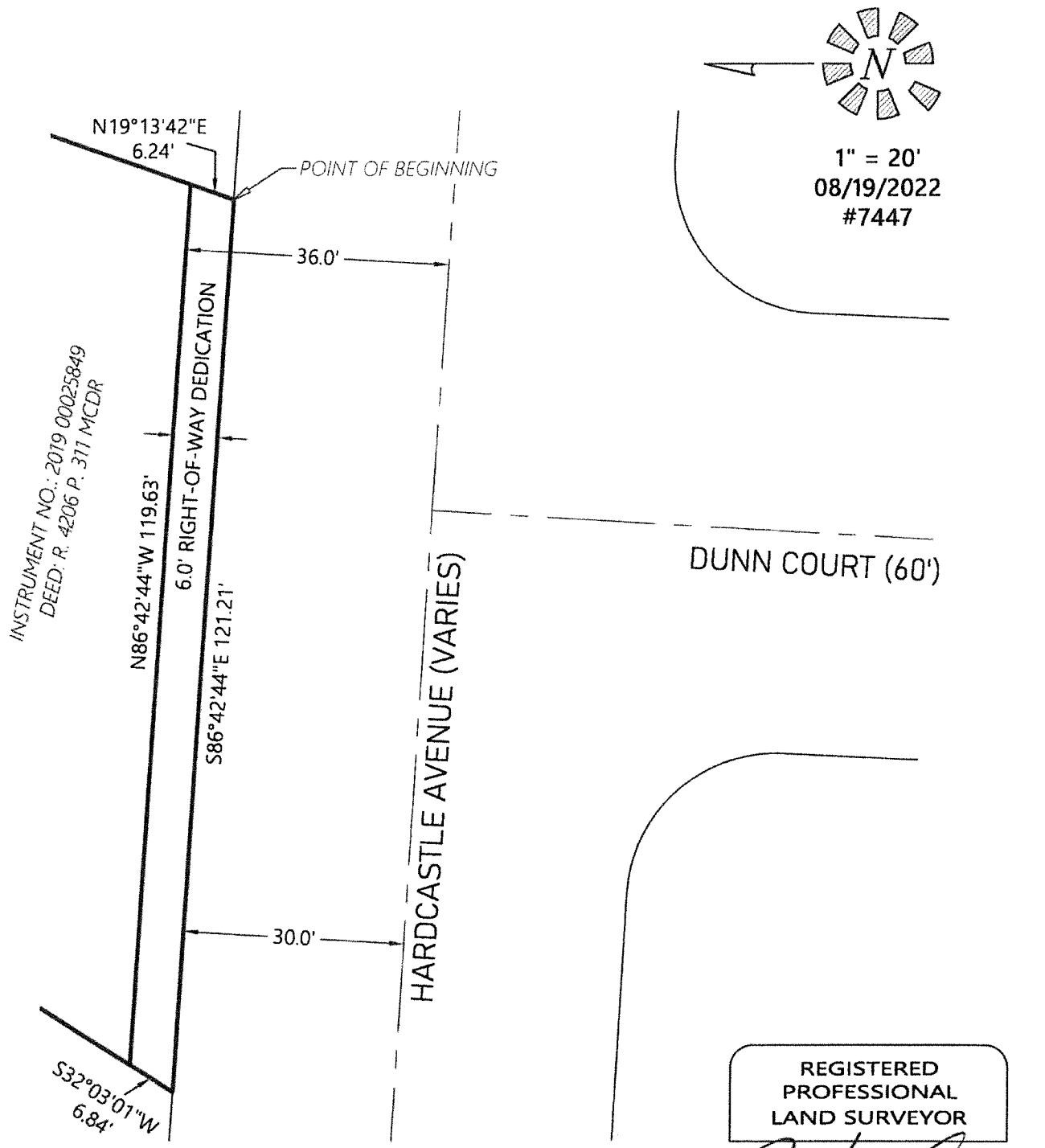


PAGE 4 OF 5

EXHIBIT B



BY:
MULTI/TECH ENGINEERING SERVICES, INC.
1155 13TH ST. S.E. SALEM, OREGON 97302
503-363-9227

REGISTERED
PROFESSIONAL
LAND SURVEYOR

OREGON
JULY 13, 2004
ROBERT D. HAMMAN
64202LS

EXPIRES: 6-30-2023

PAGE 5 OF 5

WOODBURN
OREGON
Incorporated 1889

Agenda Item

August 14, 2023

TO: Honorable Mayor and City Council through City Administrator

FROM: Curtis Stultz, Public Works Director

SUBJECT: **Intergovernmental Agreement between City of Woodburn and Oregon Department of Transportation**

RECOMMENDATION:

Authorize the City Administrator to sign the proposed Intergovernmental Agreement between the City of Woodburn and the Oregon Department of Transportation (ODOT) with regard to the maintenance of the new traffic signal at West Hayes Street and North Settlemier Avenue.

BACKGROUND:

Construction of the West Hayes Street Improvements Project began in June 2022, and is now nearing completion. The Project includes the complete reconstruction of West Hayes Street, from North Settlemier Avenue to Cascade Drive, and the installation of a traffic signal at the intersection of West Hayes Street and North Settlemier Avenue (Signal). The Signal will require routine and emergency maintenance, which is mutually beneficial for the City and ODOT if this maintenance is performed by ODOT. The proposed agreement provides the framework for this maintenance to occur.

DISCUSSION:

The Signal at West Hayes and North Settlemier Avenue is connected to the existing ODOT signal at OR-214 and North Settlemier Avenue via fiber optic cable. The connection allows ODOT to coordinate the City's Signal at West Hayes Street with the operations of the signals on OR-214, thereby optimizing traffic flows in the area. As part of this agreement ODOT is responsible for electrical maintenance of the Signal, detection, and intersection illumination. ODOT is also responsible for signal timing and operations, networking, and network security of the Signal controller, and the maintenance and repair of the fiber optic cabling. ODOT will provide all labor, materials, and equipment for this work.

Agenda Item Review: City Administrator __x____ City Attorney __x____ Finance __x___

FINANCIAL IMPACT:

The total cost of maintenance and operations performed by ODOT shall not exceed $10,000 per calendar year. Per the agreement, ODOT will submit monthly invoices to the City for all operations and maintenance costs incurred.

Attachments:

A copy of the Agreement is provided with this agenda item.

INTERGOVERNMENTAL AGREEMENT
Woodburn: Hayes St @ Settlemier Ave Signal Improvements
Maintenance Agreement
City of Woodburn

THIS AGREEMENT is made and entered into by and between the STATE OF OREGON, acting by and through its Department of Transportation, hereinafter referred to as “ODOT” or "State;” and the CITY OF WOODBURN, acting by and through its elected officials, hereinafter referred to as "Agency,” both herein referred to individually or collectively as “Party” or “Parties.”

RECITALS

1. North Settlemier Avenue and West Hayes Street are part of the city street system under the jurisdiction and control of Agency.

2. By the authority granted in Oregon Revised Statute (ORS) 190.110, 366.572 and 366.576, State may enter into cooperative agreements with counties, cities and units of local governments for the performance of work on certain types of improvement projects with the allocation of costs on terms and conditions mutually agreeable to the contracting parties.

3. Agency is designing and constructing a new traffic signal (Signal) and associated amenities at the intersection of North Settlemier Avenue and West Hayes Street in Woodburn, Oregon. The project includes fiber optic cable and electrical conduit from the intersection of North Settlemier Avenue and Hillsboro-Silverton Highway (OR 214) to the new Signal for remote monitoring by ODOT and for coordinated traffic signal operation.

4. State and Agency have determined that it is both to their mutual benefit and to the general public’s benefit if they jointly utilize State and Agency maintenance resources.

NOW THEREFORE, the premises being in general as stated in the foregoing Recitals, it is agreed by and between the Parties hereto as follows:

TERMS OF AGREEMENT

1. Under such authority, State and Agency enter into this Agreement to identify the maintenance, operations, and electrical energy responsibilities for the traffic signal (Signal) and maintenance and electrical energy responsibilities for the intersection illumination at the intersection of North Settlemier Avenue and West Hayes Street. The location of the Signal is approximately as shown on the sketch map attached hereto, marked Exhibit A, and by this reference made a part hereof.

2. The total cost of maintenance and operations shall not exceed $10,000.00 per signal, per calendar year. The total estimated not to exceed amount for maintenance

and operations during the term of this Agreement is $200,000.00 and is the responsibility of Agency. Said cost is subject to review for inflation, and any changes shall be by an amendment, signed by both Parties. Maintenance does not include repairs performed as a result of a construction project.

3. This Agreement shall become effective on the date all required signatures are obtained and shall remain in effect for the purpose of ongoing maintenance and power responsibilities for the useful life twenty (20) years of the facilities. Maintenance and electrical energy responsibilities shall survive any termination of this Agreement.

AGENCY OBLIGATIONS

1. Agency shall pay one-hundred percent (100%) of the electrical energy costs associated with the intersection traffic signal and illumination. Agency shall have the power company send bills directly to Agency.

2. Agency shall be responsible for all pavement markings and signs associated with the Signal.

3. Agency shall, upon receipt of invoice from State for maintenance and operations costs associated with detection, intersection illumination, signal operations, and communications, reimburse State for one-hundred percent (100%) of said costs. This includes the maintenance and repair that may be needed with the fiber optic cable from West Hayes Street at North Settlemier Avenue to Settlemier Avenue at OR 214 impacting traffic signal operation. Agency shall remit payment within forty-five (45) days to the Oregon Department of Transportation, Region 2 Electrical Manager, at 885 Airport Road, Building B, Salem, Oregon 97301.

4. Agency grants State the right to enter onto Agency right of way for the performance of duties as set forth in this Agreement.

5. Agency grants State authorization to use 12 strands of fiber cable (blue buffer tube) from West Hayes Street at North Settlemier Avenue to Settlemier Avenue at OR 214 for traffic signal communications and other broadband usage. Orange buffer tube (strands 13-24) shall be reserved for Agency. Any connections to orange buffer tube by Agency are the responsibility of Agency.

6. All employers, including Agency, that employ subject workers who work under this Agreement in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage unless such employers are exempt under ORS 656.126. Employers Liability insurance with coverage limits of not less than $500,000 must be included. Agency shall ensure that each of its contractors complies with these requirements.

7. Agency acknowledges and agrees that State, the Secretary of State's Office of the State of Oregon, the federal government, and their duly authorized representatives

shall have access to the books, documents, papers, and records of Agency which are directly pertinent to the specific Agreement for the purpose of making audit, examination, excerpts, and transcripts for a period of six (6) years after completion of Project. Copies of applicable records shall be made available upon request. Payment for costs of copies is reimbursable by State.

8. Agency's Project Manager for this Project is the Agency Traffic Engineer, Public Works Department, Cole Grube, P.E., Project Engineer; 190 Garfield Street, Woodburn, Oregon 97071; Cole.Grube@ci.woodburn.or.us; 503-982-5241, or assigned designee upon individual's absence. Agency shall notify the other Party in writing of any contact information changes during the term of this Agreement.

STATE OBLIGATIONS

1. State is responsible for the turn-on and commissioning of the Signal.

2. State is responsible for the electrical maintenance of the Signal, detection, and intersection illumination. State is also responsible for the Signal timing and operations, networking, and network security of the Signal controller, and the maintenance and repair of the fiber optic cabling from West Hayes Street at North Settlemier Avenue to North Settlemier Avenue at OR 214.

3. State shall, at Agency's expense, furnish labor, material, and equipment to perform maintenance, timing, and engineering work, as required for operation safety and efficiency on the Traffic Management Asset. The work shall include signal timing; analysis and troubleshooting of problems as they arise; modifications to signals; emergency repairs; signal equipment testing and evaluation; equipment upgrades; and general maintenance, as described herein.

4. State shall send monthly invoices to the City Maintenance Manager for maintenance and operations costs associated with detection intersection illumination, Signal operations, and communications.

5. State shall conduct the following work on the Signal on an as-needed basis, with no need for preauthorization from Agency:

   a. Emergency repair of any identified safety issues and equipment failures;

   b. Analysis and troubleshooting problems;

   c. Routine Signal and controller maintenance;

   d. Routine Signal and controller testing and evaluation (similar to what State would do for State-owned signals).

6. State shall conduct emergency repairs on illumination and other electrical installations on an as-needed basis, with no need for preauthorization from Agency.

7. State shall immediately notify City Maintenance Manager if the cost for any one repair is more than $10,000.00.

8. State shall perform the following work on the Signal when requested by Agency:

   - Modifications to Signal equipment;
   - Signal equipment testing (beyond routine testing);
   - Equipment upgrades;
   - Signal timing modifications;
   - Other Signal work as needed.

9. State shall perform annual preventive maintenance inspections of Signal equipment.

10. State shall not enter into any subcontracts for any of the planned maintenance, repair, or work on the Signal under this Agreement without obtaining Agency's prior written approval, except State may enter into subcontracts without prior approval during an emergency event or incident response when prior written approval is not feasible.

11. State's Project Manager for this Project is William Kelso, ODOT Region 2 Electrical Manager; 455 Airport Road SE, Bldg. B Salem, Oregon 97301; 503-602-2897; William.J.Kelso@odot.oregon.gov, or assigned designee upon individual's absence. State shall notify the other Party in writing of any contact information changes during the term of this Agreement.

GENERAL PROVISIONS

1. This Agreement may be terminated by mutual written consent of both Parties.

2. State may terminate this Agreement effective upon delivery of written notice to Agency, or at such later date as may be established by State, under any of the following conditions:

   a. If Agency fails to provide services called for by this Agreement within the time specified herein or any extension thereof.

   b. If Agency fails to perform any of the other provisions of this Agreement, or so fails to pursue the work as to endanger performance of this Agreement in accordance with its terms, and after receipt of written notice from State fails to correct such failures within ten (10) days or such longer period as State may authorize.

   c. If Agency fails to provide payment of its share of the cost of the Agreement.

d. If State fails to receive funding, appropriations, limitations or other expenditure authority sufficient to allow State, in the exercise of its reasonable administrative discretion, to continue to make payments for performance of this Agreement.

e. If federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the work under this Agreement is prohibited or State is prohibited from paying for such work from the planned funding source.

3. Agency may terminate this Agreement effective upon delivery of written notice to State, or at such later date as may be established by Agency, under any of the following conditions:

   a. If State fails to provide services called for by this Agreement within the time specified herein or any extension thereof.

   b. If State fails to provide payment of its share of the cost of the Agreement.

   c. If Agency fails to receive funding, appropriations, limitations, or other expenditure authority sufficient to allow Agency, in the exercise of its reasonable administrative discretion, to continue to make payments for performance of this Agreement.

   d. If federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the work under this Agreement is prohibited or Agency is prohibited from paying for such work from the planned funding source.

4. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the parties prior to termination.

5. Both Parties shall comply with all federal, state, and local laws, regulations, executive orders and ordinances applicable to the work under this Agreement, including, without limitation, the provisions of ORS 279B.220, 279B.225, 279B.230, 279B.235 and 279B.270 incorporated herein by reference and made a part hereof. Without limiting the generality of the foregoing, Both Parties expressly agrees to comply with (i) Title VI of Civil Rights Act of 1964; (ii) Title V and Section 504 of the Rehabilitation Act of 1973; (iii) the Americans with Disabilities Act of 1990, as amended, and ORS 659A.142; (iv) all regulations and administrative rules established pursuant to the foregoing laws; and (v) all other applicable requirements of federal and state civil rights and rehabilitation statutes, rules and regulations.

6. If any third party makes any claim or brings any action, suit or proceeding alleging a tort as now or hereafter defined in ORS 30.260 ("Third Party Claim") against State or Agency with respect to which the other Party may have liability, the notified Party must

promptly notify the other Party in writing of the Third Party Claim and deliver to the other Party a copy of the claim, process, and all legal pleadings with respect to the Third Party Claim. Each Party is entitled to participate in the defense of a Third Party Claim, and to defend a Third Party Claim with counsel of its own choosing. Receipt by a Party of the notice and copies required in this paragraph and meaningful opportunity for the Party to participate in the investigation, defense and settlement of the Third Party Claim with counsel of its own choosing are conditions precedent to that Party's liability with respect to the Third Party Claim.

7. With respect to a Third Party Claim for which the State is jointly liable with Agency (or would be if joined in the Third Party Claim), State shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by Agency in such proportion as is appropriate to reflect the relative fault of State on the one hand and of Agency on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of State on the one hand and of Agency on the other hand shall be determined by reference to, among other things, the Parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. State’s contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if State had sole liability in the proceeding.

8. With respect to a Third Party Claim for which Agency is jointly liable with State (or would be if joined in the Third Party Claim), Agency shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by State in such proportion as is appropriate to reflect the relative fault of Agency on the one hand and of State on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of Agency on the one hand and of State on the other hand shall be determined by reference to, among other things, the Parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. Agency's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if it had sole liability in the proceeding.

9. The Parties shall attempt in good faith to resolve any dispute arising out of this Agreement. In addition, the Parties may agree to utilize a jointly selected mediator or arbitrator (for non-binding arbitration) to resolve the dispute short of litigation.

10. This Agreement may be executed in several counterparts (facsimile or otherwise) all of which when taken together shall constitute one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.

11. This Agreement and attached exhibits constitute the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification, or change of terms of this Agreement shall bind either Party unless in writing and signed by both Parties and all necessary approvals have been obtained. Such waiver, consent, modification, or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of State to enforce any provision of this Agreement shall not constitute a waiver by State of that or any other provision.

12. Electronic Signatures. The Parties agree that signatures showing on PDF documents, including but not limited to PDF copies of the Agreement and amendments, submitted or exchanged via email are “Electronic Signatures” under ORS Chapter 84 and bind the signing Party and are intended to be and can be relied upon by the Parties. State reserves the right at any time to require the submission of the hard copy originals of any documents.

THE PARTIES, by execution of this Agreement, hereby acknowledge that their signing representatives have read this Agreement, understand it, and agree to be bound by its terms and conditions.

Signature Page to Follow

CITY OF WOODBURN by and through its elected officials

By _____

Title _____

Date_____

LEGAL REVIEW APPROVAL
(If required in Agency's process)

By _____
Agency Legal Counsel

Date _____

Agency Contacts:
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City of Woodburn - Public Works
190 Garfield Street
Woodburn, Oregon 97071
Cole.Grube@ci.woodburn.or.us
503-982-5241

Dago Garcia, City Engineer
City of Woodburn – Public Works
190 Garfield Street
Woodburn, Oregon 97071
Dago.Garcia@ci.woodburn.or.us
503-982-5248

State Contact:
William Kelso,
ODOT Region 2 Electrical Manager
455 Airport Road SE, Bldg. B
Salem, Oregon 97301
William.J.Kelso@odot.oregon.gov
503-602-2897

STATE OF OREGON, by and through its Department of Transportation

By _____
Region 2 Manager

Date _____

APPROVAL RECOMMENDED

By _____
State Traffic Engineer

Date _____

By _____
Region 2 Maintenance and Operations Manager

Date_____

By _____
Region 2 Electrical Manager

Date _____

APPROVED AS TO LEGAL SUFFICIENCY

By_Janet Borth via email_____
Assistant Attorney General

Date_8/7/2023_____
Email approval retained in file

EXHIBIT A
Project Location Maps

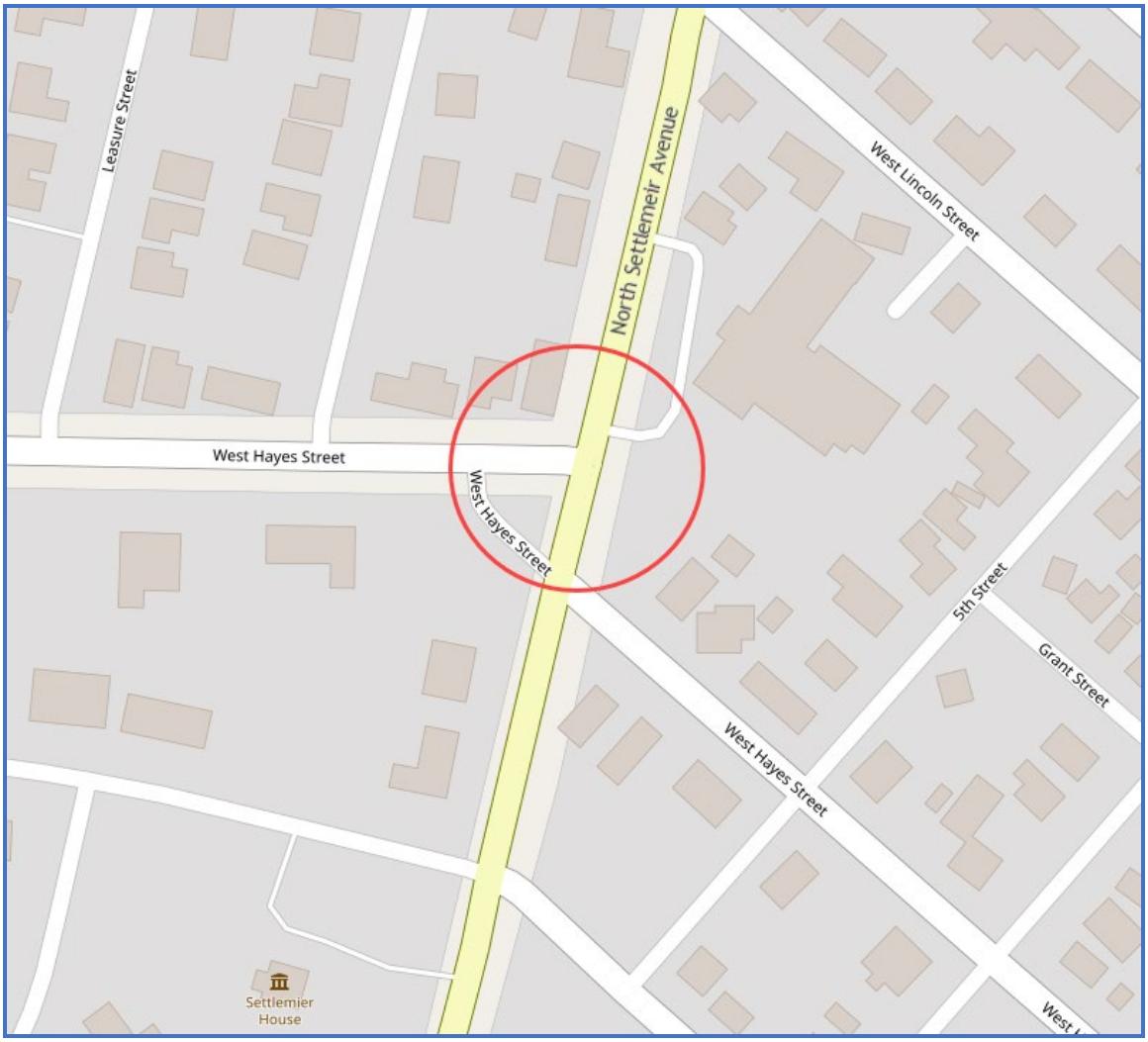
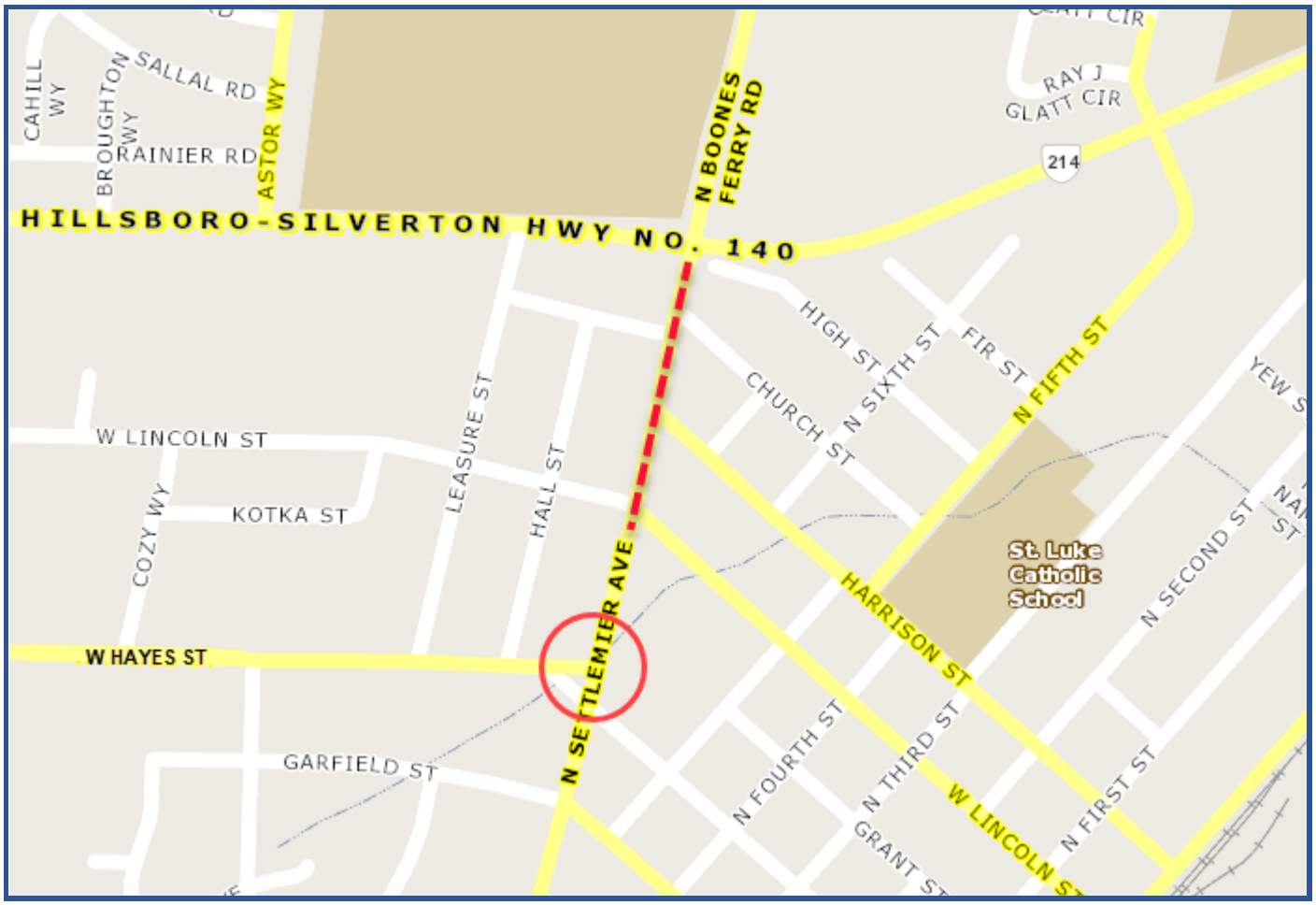


EXHIBIT A, Continued
Project Location Maps



WOODBURN
OREGON
Incorporated 1889

Agenda Item

August 14, 2023

To: Honorable Mayor and City Council

Through: Scott Derickson, City Administrator

From: Chris Kerr, Community Development Director C.K.
Colin Cortes, AICP, CNU-A, Senior Planner

Subject: **Council Briefing of Planning Commission approval of a Design Review & Variance application package for a Chick-fil-A fast-food restaurant at 300 [S.] Woodland Ave (DR 22-26 & VAR 22-15)**

Recommendation:

Staff recommends that the City Council take no action on this item and provides this summary pursuant to Woodburn Development Ordinance (WDO) Section 4.02.02. The Council may call up this item if desired and, by majority vote, initiate a review of the Planning Commission decision.

Background:

On July 27, 2023, the Planning Commission approved the consolidated land use applications package (land use review Type III) for proposed development through a building of 2,872 square feet (sq ft) with two drive-through lanes for a Chick-fil-A fast-food restaurant.

The subject property of approximately 1.39 acres is located at 300 [S.] Woodland Avenue, at the southeast corner of Oregon Highway 219. The property is zoned Commercial General (CG), is mostly open field bordered by ten trees.

The variance application with one variance request was to vary from the WDO to exceed *maximum* off-street parking of 23 spaces by 20 more for 43 parking spaces total.

There was no testimony other than by members of the applicant's team.

Agenda Item Review: City Administrator ___x___ City Attorney ____x__ Finance __x___

The unanimous motion to approve included all proposed conditions of approval, except that the Commission revised Conditions D1b, D9, T-A2, & T-A3 and struck Conditions T-A4 & V11 as follows:

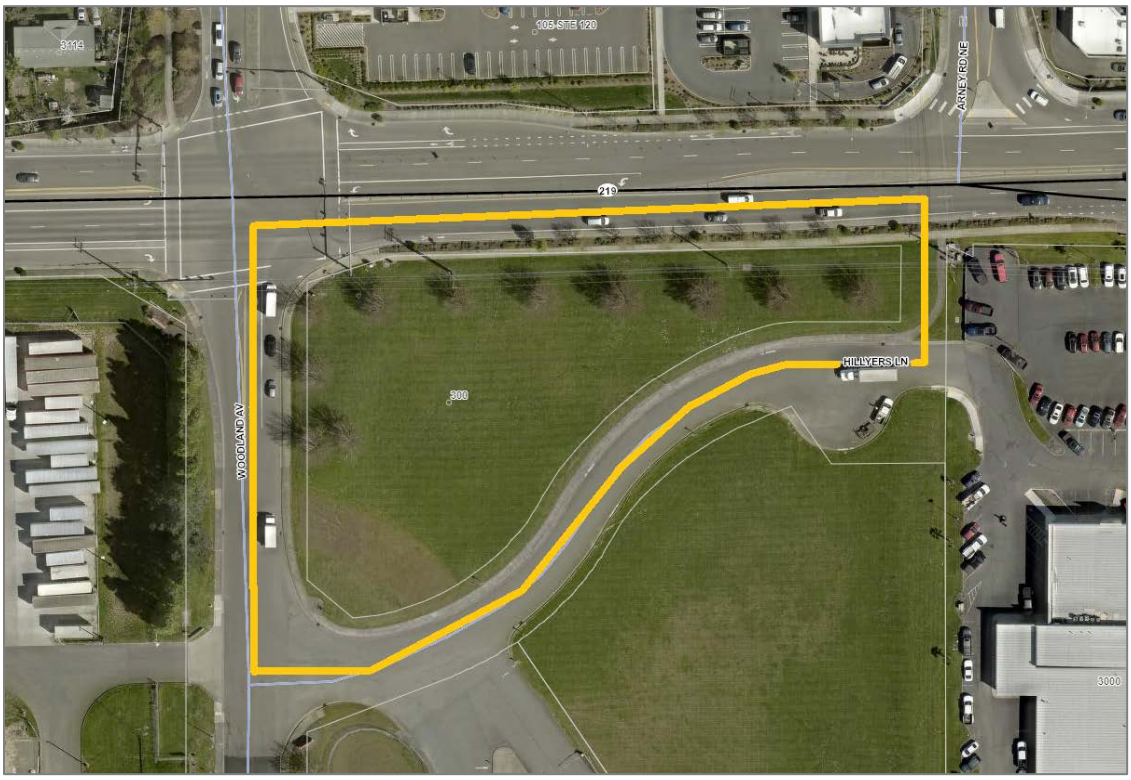
- D1b: Revised to not require along Woodland Ave any minimum length of the on-street parallel parking lane that WDO Figure 3.01E "Access Street" would've required and to allow the developer to pay fee in lieu of the 5 public parking spaces that likely would've constituted the feasible maximum length parking of lane.
- D9: Revised to specify that bollards may substitute for wheel stops and serve to conform with WDO 3.05.02H by precluding parked vehicles overhanging walking and cycling wide walkways.
- T-A2: Revised to:
  - Specify that traffic management measures are required during only the first 12 days the fast-food restaurant is open, not minimum 12 days.
  - Strike limitation on hours of operation during the first 12 days the fast-food restaurant is open that, regarding city traffic, would've limited opening to after morning rush hour and closing to before afternoon rush hour.
  - Strike a requirement that during the first 12 days the fast-food restaurant is open, employees would've had to park off-site.
- T-A3: Revised to specify that additional traffic management measures are required only the first 12 days the fast-food restaurant is open, not minimum 12 days.
- T-A4: Struck. Would've granted the developer the ability to request in writing and the Public Works Director discretion to consider and exempt the business from traffic management if opening period traffic either would've been too little to need management or would've needed management for fewer than 12 days.
- V11: Struck. Would've required prior to building permit issuance and once more prior to passing final inspection that the business submit a written estimate of number of shifts, starting and ending times, and duration of shifts as well as per shift the average number of employees, median number of employees, and the most commonly recurring number ("mode") of employees, with purpose to research if and how necessary the maximum parking variance was given that the developer stated in the application materials that the business would have an estimated 18-20 employees per shift.

The final decision document includes conditions of approval that relate to the following topics:

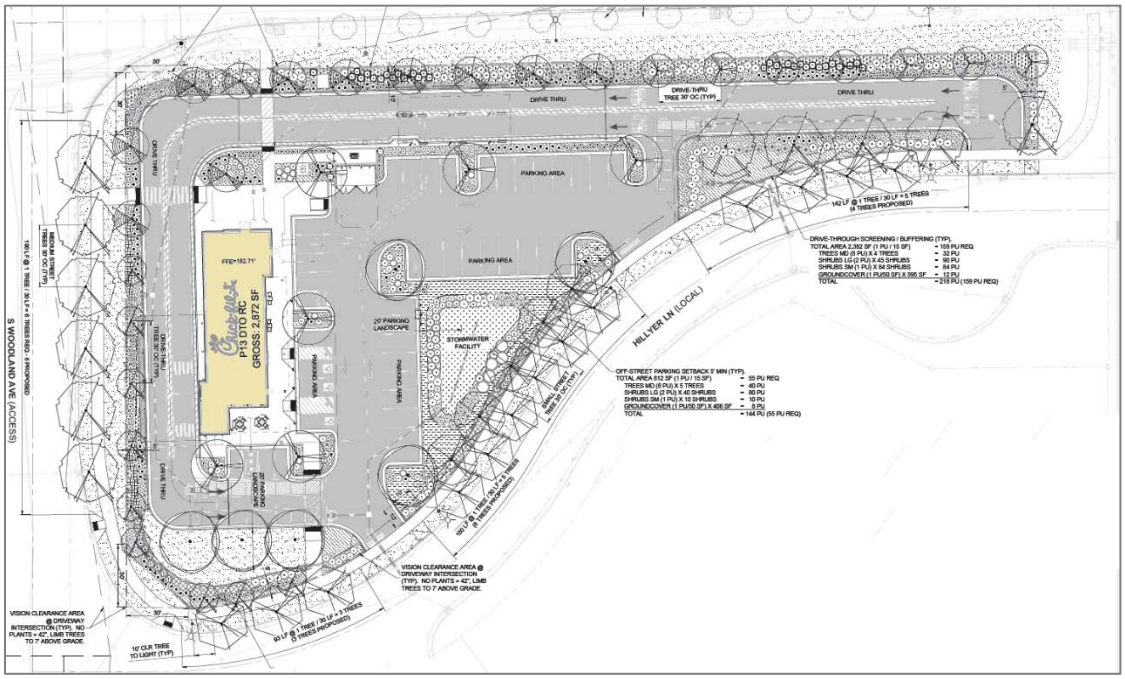
1. Woodland Avenue and Hillyer Lane frontage/street improvements including wide sidewalk along Woodland and street trees along all frontages;
2. The look and feel of street frontage for passers-by walking, cycling, and driving;
3. Urban design: How many and how large are windows; door canopies or fixed awnings that shelter from precipitation;
4. How safely and comfortably pedestrians and cyclist can access and circulate among on-site buildings through walkways and visibly distinct crossings of drive aisles;
5. Landscaping as buffering/screening of the drive-through and parking area;
6. Having an on-site trash receptacle near a sidewalk to lessen the likelihood of litter of yards along streets and street frontage by fast-food restaurant customers on foot;
7. Getting a highway electric power pole removal and line burial fee in-lieu paid to fund such elsewhere in town;
8. Carpool/vanpool (C/V) and electric vehicle (EV) parking stalls and EV charging;
9. Increase of street trees and on-site trees, and providing for fee in-lieu (of street trees that can't fit) to fund tree plantings elsewhere in town;
10. A fee for removal of all the nice trees from the property;
11. Having a few evergreen trees among newly planted trees on the property;
12. A bus transit / transit service fee to improve walking, cycling, and local and regional bus ridership;
13. An enhanced bus stop fee in-lieu based on the Transit Development Plan (TDP); and
14. Requiring a traffic management plan for opening period traffic.

Additional application materials are found via the DR 22-26 project webpage.

An aerial view, site plan, and elevations and/or perspective renderings are below:



Subject property outlined in yellow



Landscape plan (Sheet L1.0 excerpt colored by staff)

Top façade is south facing Hillyer; bottom is north facing Oregon Highway 219

Top façade is west facing Woodland; bottom is east facing parking area and Hillyer

Discussion:

n/a

Financial Impact:

n/a

Attachment(s):

None.

MEMORANDUM

FROM THE CITY ATTORNEY'S OFFICE

TO: Mayor and City Council

FROM: N. Robert Shields, City Attorney

DATE: **Legal framework concerning the use of public property**

SUBJECT: **August 9, 2023**

Introduction

The Mayor believes it is important that the City Council conduct a work session on the use of public property. This is scheduled for the August 14th City Council meeting.

This memorandum is intended only to provide a legal framework. How the City moves ahead with this issue will depend on policy decisions made by the City Council. In addition to legal staff, the City Administrator, Police Chief, and Community Development Director will be at the work session.

Background

There has been a flurry of recent activity by city officials across Oregon adopting ordinances to regulate the "time, place, and manner" of how public property can be used. As with most subjects, the quality of the press coverage reporting this has varied. The May 21, 2023 article in the *Statesman Journal* (Exhibit A) provides a good summary.

Martin v Boise

The City of Boise, Idaho had an ordinance that prohibited "sitting, lying, or sleeping" outside and imposed criminal penalties on violators. As a result, Boise was sued in federal court for violation of individual constitutional rights.

In 2018, the Ninth Circuit Court of Appeals ruled that the Eighth Amendment to the U.S. Constitution (addressing cruel and unusual punishment) "prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter . . . because sitting,

lying, and sleeping are ... universal and unavoidable consequences of being human." The court further stated that a city cannot "criminalize conduct that is an unavoidable consequence of being homeless - namely sitting, lying, or sleeping." *Martin v. Boise*, 902 F3d 1031, 1048 (2018) (Exhibit B).

After this ruling was issued, the Woodburn City Attorney's Office made the Mayor and City Council aware of its legal implications (Exhibit C). Legal rulings of the Ninth Circuit are binding on Woodburn. If the City violated this ruling, it could be sued in federal court and the public could be liable for payment of the plaintiff's attorney fees.

What *Boise* Says

Under *Boise*, a municipality may legally impose city-wide prohibitions against persons sitting, sleeping, or lying in public spaces if it provides a shelter that is accessible to the homeless person against whom the prohibition is being enforced. However, if no shelter is provided to the homeless person by the City, the Eighth Amendment is violated.

Johnson v Grants Pass

On July 5, 2023, the Ninth Circuit, in a 155 page opinion (Exhibit D), refused to have its entire judicial panel (30 judges) reconsider this case. Denial of review by the entire court (an "en banc" hearing) prompted scathing statements by some judges. Grants Pass attorneys are petitioning for review by the United States Supreme Court.

Grants Pass, a city of 38,000, was estimated to have 50 to 600 homeless individuals with nowhere to sleep other than on city streets or in city parks. City ordinances prohibited people from using a blanket, a pillow, or a cardboard box for protection from the elements while sleeping on public property.

In 2013, the Grants Pass City Council convened a Community Roundtable "to identify solutions to current vagrancy problems." Participants discussed the possibility of "driving repeat offenders out of town and leaving them there." One City Councilor made clear the City's goal should be "to make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road."

What *Grants Pass* Says

Following *Boise*, this case found that the anti-camping ordinances enforced by Grants Pass against homeless persons for the act of sleeping outside on public

property or for sleeping in a car at night, when there was no other place in the City for them to go, violated the Eighth Amendment.

Disagreement of Ninth Circuit Judges

It is apparent from the most recent opinion that a significant number of Ninth Circuit judges disagree with the *Grants Pass* ruling:

"This Circuit's jurisprudence now effectively guarantees a personal federal constitutional 'right' for individuals to camp or to sleep on sidewalks and in parks, playgrounds, and other public places in defiance of traditional health, safety, and welfare laws..."

"Local governments are hard-pressed to find any way to regulate the adverse health and safety effects of homeless encampments without running afoul of this court's case law—or, at a minimum, being saddled with litigation costs."

"The Eighth Amendment provides, 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' U.S. Const. amend. VIII (emphasis added). The Amendment's bar on excessive "bail," excessive "fines," and the infliction of cruel and unusual "punishments" indicates the Amendment's punitive focus. And the text of the Cruel and Unusual Punishments Clause itself provides no substantive limit on what conduct may be punished. Instead, it only prohibits "punishments" (i.e., pain or suffering inflicted for a crime or offense) that are "cruel" (i.e., marked by savagery and barbarity) and "unusual" (i.e., not in common use), reflecting a constitutional prohibition originally and traditionally understood to forbid the government from "authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed." Harmelin v. Michigan, 501 U.S. 957, 976 (1991) (opinion of Scalia, J.); id. at 979 ('[b]reaking on the wheel," "flaying alive," and "maiming, mutilating, and scourging to death.'"

Despite the apparent disagreement of some of the judges, Woodburn is legally obligated to follow the majority opinion. Interestingly, there is a distinct possibility that the U.S. Supreme Court could agree to hear this case.

ORS 195.530

After the ruling in *Boise*, the 2021 Oregon Legislature enacted ORS 195.530:

(1) As used in this section:

(a) "City or county law" does not include policies developed pursuant to ORS 195.500 or 195.505. (See Exhibit E)

(b)(A) "Keeping warm and dry" means using measures necessary for an individual to survive outdoors given the environmental conditions.

(B) "Keeping warm and dry" does not include using any measure that involves fire or flame.

(c) "Public property" has the meaning given that term in ORS 131.705. (See Exhibit F)

(2) Any city or county law that regulates the acts of sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to the public must be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness.

(3) It is an affirmative defense to a charge of violating a city or county law described in subsection (2) of this section that the law is not objectively reasonable.

(4) A person experiencing homelessness may bring suit for injunctive or declaratory relief to challenge the objective reasonableness of a city or county law described in subsection (2) of this section. The action must be brought in the circuit court of the county that enacted the law or of the county in which the city that enacted the law is located.

(5) For purposes of subsections (2) and (3) of this section, reasonableness shall be determined based on the totality of the circumstances, including, but not limited to, the impact of the law on persons experiencing homelessness.

(6) In any suit brought pursuant to subsection (4) of this section, the court, in its discretion, may award reasonable attorney fees to a prevailing plaintiff if the plaintiff:

(a) Was not seeking to vindicate if homeless individuals are subject to criminal penalties under a City ordinance for sitting, sleeping, or lying on public property; and

(b) At least 90 days before the action was filed, provided written notice to the governing body of the city or county that enacted the law being challenged of an intent to bring the action and the notice provided the governing body with actual notice of the basis upon which the plaintiff intends to challenge the law.

(7) Nothing in this section creates a private right of action for monetary damages for any person.

Note: 195.530 becomes operative July 1, 2023.

What ORS 195.530 Says

ORS 195.530 provides that all "city or county law" regulating "the acts of sitting, lying, sleeping, or keeping warm and dry outdoors on public property that is open to the public" be "objectively reasonable." There is no definition in this statute of "objectively reasonable," but it does state that "reasonableness shall be determined, based on the totality of the circumstances, including, but not limited to, the impact of the law, on persons experiencing homelessness." This indicates that, legally, what is "reasonable" will vary based upon the facts and circumstances involved in a particular situation.

In other words, in a legal challenge based upon ORS 195.530, the focus would be not specifically on the actual language of an ordinance, but upon how this ordinance is applied by those enforcing it (i.e., the facts and circumstances). Under this statute, if an ordinance is not "objectively reasonable," this is not only an affirmative defense to ordinance enforcement but constitutes the basis for a lawsuit against the city. However, prior to filing a lawsuit, the plaintiff must first provide 90 days written notice to the governing body that the plaintiff intends to file a legal action and the basis of the challenge.

Remedies under ORS 195.530 are limited to injunctive or declaratory relief, and do not include monetary damages. However, the trial court, at its discretion may award reasonable attorneys fees, to a prevailing plaintiff.

What Woodburn Ordinances are Impacted by ORS 195.530 and What Actions are Required

The passage of ORS 195.530 had a minimal impact on existing Woodburn city ordinances, with only three existing ordinances being potentially affected. These are Ordinance 2060 (the park ordinance), Ordinance 2577 (the camping in public right-of-way ordinance), and Ordinance 2578 (the camping site removal ordinance). (See Exhibit G) Woodburn currently has no "sit lie ordinance" like many cities.

Regardless of what policy decisions the City Council ultimately makes, the City Attorney's Office recommends that an ordinance be enacted acknowledging the passage of ORS 195.530 and that the City will not initiate any enforcement actions that are inconsistent with this state statute. Since this meeting has been

publicly noticed and the proposed ordinance has been drafted, it is legally possible for the City Council to enact such an ordinance at this meeting.

What Other Oregon Cities Have Done

The City Attorney's Office spent a significant amount of time researching what other Oregon cities have done and then placed this information in the attached spreadsheet (Exhibit H). Initially, we intended to incorporate this information into this narrative but did not do this because of the extensive amount of information collected and the variety of approaches taken by different municipalities. We decided that the spreadsheet format was more helpful both to demonstrate the different processes employed and to enable a comparison of these processes.

Some cities have enacted ordinances after engaging in an extensive public process. Others have proceeded to pass ordinances with apparently little public input. Finally, some jurisdictions have opted to further study the issues or to wait until later to address them.

Clearly, the scope of any action Woodburn takes, and the process employed is a policy matter to be decided by the City Council.

Attachments:

Exhibit A: Stateman Journal Article
Exhibit B: Martin v. City of Boise
Exhibit C: Legal Lightning Publication
Exhibit D: Johnson v. City of Grants Pass
Exhibit E: ORS 195.500 & ORS 195.505
Exhibit F: ORS 131.705
Exhibit G: Woodburn Ordinances
Exhibit H: Other Cities Response to ORS 195.530

statesman journal

LOCAL

Law intended to decriminalize homelessness but cities focus on where people can't sleep

Whitney Woodworth and Tatiana Parafiniuk-Talesnick Salem Statesman Journal

Published 6:00 a.m. PT May 21, 2023

Oregon cities are overhauling homeless camping ordinances ahead of a new state law that goes into effect this summer.

The law was created to change the way cities address homeless camps, reflecting federal court rulings that require governments to move away from criminalizing the unhoused and toward increasing housing solutions.

But many of the new ordinances in the Willamette Valley remain focused on where people aren't allowed to sleep, as opposed to where they can. And some warn they fail to comply with the new state law and legal precedent.

An estimated 14,476 people are homeless in Oregon. Cities have struggled to uphold the rights of those living unsheltered while also responding to other residents' concerns about public health and safety.

In 2021, the Oregon Legislature passed a law requiring cities to make “objectively reasonable” regulations about when, where and how people can sit, lie, sleep and keep warm and dry outdoors on public property.

House Bill 3115, introduced by then-House Speaker Tina Kotek, now Oregon's governor, required local governments to make sure their ordinances on urban camping aligned with the federal court rulings.

The law goes into effect July 1. It states that "reasonableness shall be determined based on the totality of the circumstances, including, but not limited to, the impact of the law on persons experiencing homelessness."

Those behind the bill shaped it so cities could decide what would be most reasonable for their individual community, as every municipality has a different shelter inventory and a different number of people experiencing homelessness, said Becky Straus, a staff attorney with Oregon Law Center who helped develop the law.

“Criminalizing homelessness is inhumane, and it doesn't work,” Straus said. “We came together on that principle to figure out how we can create a roadmap for cities to address public space issues.”

But as cities around the state adjust their ordinances, some appear focused on regulating where people cannot be and issuing costly citations.

In the Willamette Valley, Eugene, Salem and Springfield are proposing to trade broad camping bans for ordinances that specifically detail where people cannot sleep. The specific locations add up to cover most of the cities.

In Eugene, the maximum penalty for breaking the rule would be doubled, to a maximum fine of $500 or up to 10 days in jail.

“Any approach that is swinging more toward enforcement is counter to the spirit of House Bill 3115, which was meant to get away from that approach,” Straus said.

“I'm really hopeful that this process pushes cities to be thinking about the issue... in a solutions-based mindset that engages people who are living outside to what they need and what structure will work for them.”

Law built on past court decision

In 2019, in the case of Martin v Boise, the U.S. Court of Appeals for the 9th Circuit, which also covers Oregon, ruled ~~that~~ it is unconstitutional for the government to punish people for conduct such as lying, sitting or sleeping on the streets that is unavoidable as a result of homelessness when there is no place for them to shelter.

Past Coverage: Are downtown protest camps legal? It depends on who's talking

The court also determined that local governments could pass reasonable laws regulating when, where and how persons experiencing homelessness shelter on public property.

Years later, a case in Grants Pass reinforced this ruling. In Blake v Grants Pass, the same court again found cities cannot make it illegal for people to sleep or rest outside without providing sufficient indoor alternatives.

The new state law was intended to reinforce those rulings in Oregon.

Oregon judge: Cities cannot fine people for living outside

'An artful solution'

Homelessness tops city surveys of resident concerns.

Encampments popping up in parks and along thoroughfares have led to a variety of actions in recent years, including a blanket ban on tent camping, a sit-lie ordinance and the creation of emergency shelters.

Salem is in the midst of holding public hearings and votes on its proposed ordinance changes. Keizer is waiting to see whether their existing rules already are "objectively reasonable."

Keizer City Manager Adam Brown said leaders held a work group meeting with attorneys to discuss the impact of the laws, but the city has not made any changes. He said the city's current ordinance may already comply with state law.

"We have taken a proactive approach with our homeless to immediately contact them and have a conversation with them about what they need,” Brown said. “The city is committed to living the spirit of the laws, which is to treat all persons with dignity and compassion."

Keizer bans camping on sidewalks and in rights-of-way. Officials said they worked to avoid having to enforce the code citation, not a criminal charge, tied to the ban.

More: City of Keizer passes camping ban in a unanimous vote, concerns homeless advocates

In Salem, three codes and ordinances are under review:

- Salem Revised Code 95.720 prohibits camping on all public property.
- Ordinance 6-20, which the city does not currently enforce, restricts sitting and lying on sidewalks during daytime hours. Enforcement of this ordinance was dependent on having adequate shelter and restrooms.
- Salem Revised Code 95.730 prohibits leaving personal property unattended on a sidewalk for more than two hours. City officials said this code also was not enforced and may violate the new Oregon laws.

The City Council is proposing repealing the personal property ordinance and revising the camping code.

A new proposal would specify that camping is not allowed in parks, building entrances, residential zones, near existing shelters or in areas designated by the city manager as “no camping.”

Camping is not prohibited on most sidewalks within city limits, city spokeswoman Courtney Knox Busch said. Camps on sidewalks are required to maintain a three-foot ADA-accessible pedestrian path. Sidewalks typically run five to eight feet wide.

Salem law states that a violation of the camping rules carries of fine of up to $250.

Knox Busch said staff works with nonprofit and community-based service partners to engage and reach people living unsheltered to connect them with available services and housing or shelter options before reaching the point of citation.

In a report to council, city attorney Dan Atchison noted the regulations don’t “affirmatively” allow camping in public spaces. Rather, the rules prohibit camping in some locations while leaving other areas, like non-blocking spots on sidewalks, available.

The addition of allowing the city manager to prohibit camping in certain spots allows the city to protect sensitive areas or address camps that present public safety or public health risks, city staff said.

“The increase in homelessness over the past several years and lack of resources to address the impacts means that even with the ideal set of regulations, the impacts of the use of public spaces as places to live and rest will persist,” Atchison said in the report. “Given recent investments in emergency shelters, there are often shelter beds available for some eligible people. Not every person experiencing unsheltered homelessness is able to access available beds.”

Some shelters do have daily vacancies. But the number of shelter beds in Marion and Polk counties is outnumbered by the estimated 1,500 people living unsheltered in the region.

During the May 8 meeting, Mayor Chris Hoy said he felt the changes were the “best path forward," allowing the city to avoid criminalizing homelessness with a blanket ban on all camping while allowing staff to address camps that block sidewalks or present a public safety or health risk.

“We're codifying recent case law and new legislation from the state and then also factoring in our current practices,” Hoy said. “It's a kind of an artful solution that does all of those things and doesn't stray us too far from our current practice.”

If passed, the new ordinance will become effective June 22.

Local homeless advocates said they appreciate the city's recent movement away from criminalizing homelessness. By dropping the sit-lie ordinance and rule regarding unattended property, the city will have gotten rid of rules that would have created even more hardship for people living unsheltered.

“I am happy to see the council moving to set aside the tent camping ban and the sit-lie ordinance,” Jimmy Jones, executive director of the Mid-Willamette Valley Community Action Agency, said. “People have a fundamental right to shelter themselves from the elements. They’re American citizens and Oregon residents, and they deserve the same dignity and respect that each one of us do, no matter the poverty of their condition.”

Jones said the shift away from draconian laws and the addition of new services like the navigation center, microshelter villages, transitional living and permanent supportive housing in recent years point to a positive future where the city is safer for everyone, including those living unsheltered.

Eugene, Springfield respond

In Eugene and Springfield, city councilors also drafted ordinances that struck the cities' all-out camping bans and replaced them with detailed, location-specific bans.

Eugene's proposal would ban camping:

- Within 100 feet of the top of the high bank of the Willamette River.
- Within 60 feet of all other waterways.
- Within five feet of ditches, wetlands, and vegetative storm water facilities.
- 1,000 feet from educational facilities.
- Within five feet of property intended to be used primarily by motor vehicles.
- Sidewalks unless camps can provide four feet of clearance.
- Shared-use paths unless camps can provide 10 feet of clearance.

The proposed ordinance increases the penalty for willful violation from a maximum fine of $200 to $500 or up to 10 days in jail. It remains a misdemeanor to be in any park or open space during nighttime hours.

Advocates for the unhoused argue that while the proposed ordinance may change city code, it fails to provide a change useful for those in need of a place to rest and it actually expands criminal penalties.

Council and city officials have been reluctant to detail which areas of the city would be permissible to sleep under the proposed rules, saying mapping allowable spots would direct people to camp in areas without support.

In written testimony, Heather Marek, a staff attorney with the Oregon Law Center's Lane County Legal Aid Office, said the proposed ordinance “will only make matters worse for the community” and “fails to comply with state law."

While the city has grown its shelter inventory over the years, 1,251 shelter units exist in the county while there are 4,748 unhoused residents, Marek wrote.

At a public hearing, Brittany Quick-Warner, CEO of the Eugene Area Chamber of Commerce, expressed support for the ordinance. However, she asked to see a police officer assigned to enforce the rules in city parks and for council to continue work on more shelter and housing opportunities for those in need.

“We're supportive of what counsel has proposed and we recognize that it has to be paired with adequate shelter,” Quick-Warner told the Register-Guard. “Our community and communities across the West Coast have to find a way to balance accountability and safety ... and services and support.”

She said business leaders believe the council struck a good balance with the proposed ordinance.

Other speakers at the public hearing echoed a need for safety, as well as a need for more places people can go.

Springfield's proposed ordinance would ban all “established campsites," which would be defined as sites where camp materials have been set up for more than 24 hours.

- Residential zoned areas.
- Downtown.
- Within the riparian corridor of a Water Quality Limited Watercourse.
- Within any storm water quality facility.
- In the way of exits and entrances.
- On sidewalks, any street or public rights-of-way.
- Within 1,000 feet of any temporary emergency shelter.
- On any street or right-of-way the city has closed to camping.
- In any public park or multi-use path.

The locations where a person might be able to permissibly camp are subject to other rules:

- No obstructing sidewalks, fire hydrants, city infrastructure.
- No accumulating garbage.
- No open flames.
- No dumping gray water.
- No unauthorized connection or taps to electrical or other utilities.
- No structures that are not readily portable, such as tents.
- No storage of personal property other than what is related to camping, sleeping or keeping warm and dry.

"The proposed code revisions would allow for sleep/rest in some public areas zoned mixed commercial, commercial, and industrial subject to time and manner restrictions," a city spokesperson said.

Those who break the rules can be fined up to $720, the current maximum penalty, council decided May 15. This city will revisit rules around vehicle camping later in the summer.

The final version of the proposed ordinance will come to the council for approval June 5. Since it takes 30 days for ordinances to go into effect, Springfield will be slightly behind the July 1 deadline.

“I think that's an OK legal risk to get the ordinance the way you want it,” City Attorney Mary Bridget Smith told the council.

She added that council could direct her to adjust the ordinance after it's implemented if needed.

For questions, comments and news tips, email reporter Whitney Woodworth at wmwoodworth@statesmanjournal.com, call 503-910-6616 or follow on Twitter at @wmwoodworth

Contact reporter Tatiana Parafiniuk-Talesnick at Tatiana@registerguard.com or 541-521-7512, and follow her on Twitter @TatianaSophiaPT.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT MARTIN; LAWRENCE LEE SMITH; ROBERT ANDERSON; JANET F. BELL; PAMELA S. HAWKES; and BASIL E. HUMPHREY, *Plaintiffs-Appellants*, v. CITY OF BOISE, *Defendant-Appellee.*	No. 15-35845 D.C. No. 1:09-cv-00540-REB ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Idaho
Ronald E. Bush, Chief Magistrate Judge, Presiding

Argued and Submitted July 13, 2017
Portland, Oregon

Filed April 1, 2019

Before: Marsha S. Berzon, Paul J. Watford,
and John B. Owens, Circuit Judges.

Order;
Concurrence in Order by Judge Berzon;
Dissent to Order by Judge Milan D. Smith, Jr.;
Dissent to Order by Judge Bennett;
Opinion by Judge Berzon;
Partial Concurrence and Partial Dissent by Judge Owens

SUMMARY*

Civil Rights

The panel amended its opinion filed September 4, 2018, and reported at 902 F.3d 1031, denied a petition for panel rehearing, denied a petition for rehearing en banc on behalf of the court, and ordered that no further petitions shall be entertained.

In the amended opinion, the panel affirmed in part and reversed in part the district court's summary judgment in favor of the City of Boise in an action brought by six current or formerly homeless City of Boise residents who alleged that their citations under the City's Camping and Disorderly Conduct Ordinances violated the Eighth Amendment's prohibition on cruel and unusual punishment.

Plaintiffs sought damages for the alleged violations under 42 U.S.C. § 1983. Two plaintiffs also sought prospective declaratory and injunctive relief precluding future enforcement of the ordinances. In 2014, after this litigation began, the ordinances were amended to prohibit their enforcement against any homeless person on public property on any night when no shelter had an available overnight space.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel first held that two plaintiffs had standing to pursue prospective relief because they demonstrated a genuine issue of material fact as to whether they faced a credible risk of prosecution on a night when they had been denied access to the City's shelters. The panel noted that although the 2014 amendment precluded the City from enforcing the ordinances when shelters were full, individuals could still be turned away for reasons other than shelter capacity, such as for exceeding the shelter's stay limits, or for failing to take part in a shelter's mandatory religious programs.

The panel held that although the doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994), and its progeny precluded most — but not all — of the plaintiffs' requests for retrospective relief, the doctrine had no application to plaintiffs' request for an injunction enjoining prospective enforcement of the ordinances.

Turning to the merits, the panel held that the Cruel and Unusual Punishments Clause of the Eighth Amendment precluded the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter. The panel held that, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.

Concurring in part and dissenting in part, Judge Owens disagreed with the majority's opinion that *Heck v. Humphrey* did not bar plaintiffs' claim for declaratory and injunctive relief. Judge Owens stated that a declaration that the city ordinances are unconstitutional and an injunction against their future enforcement would necessarily demonstrate the

invalidity of plaintiffs' prior convictions. Judge Owens otherwise joined the majority in full.

Concurring in the denial of rehearing en banc, Judge Berzon stated that on the merits, the panel's opinion was limited and held only that municipal ordinances that criminalize sleeping, sitting, or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment. Judge Berzon further stated that a photograph featured in Judge M. Smith's dissent from the denial of rehearing en banc, depicting tents on a Los Angeles public sidewalk, was not part of the record, was unrelated, predated the panel's decision and did not serve to illustrate a concrete effect of the panel's holding. Judge Berzon stated that what the pre-*Martin* photograph did demonstrate was that the ordinances criminalizing sleeping in public places were never a viable solution to the homelessness problem.

Dissenting from the denial of rehearing en banc, Judge M. Smith, joined by Judges Callahan, Bea, Ikuta, Bennett and R. Nelson, stated that the panel severely misconstrued three areas of binding Supreme Court precedent, and that the panel's opinion created several splits with other appellate courts. Judge M. Smith further stated that the panel's holding has already begun wreaking havoc on local governments, residents, and businesses throughout the circuit. Judge M. Smith stated that the panel's reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination, and that the panel's opinion shackles the hands of public officials trying to redress the serious societal concern of homelessness.

Dissenting from the denial of rehearing en banc, Judge Bennett, joined by Judges Bea, Ikuta, R. Nelson, and joined by Judge M. Smith as to Part II, stated that the panel's decision, which allows pre-conviction Eighth Amendment challenges, is wholly inconsistent with the text and tradition of the Eighth Amendment.

COUNSEL

Michael E. Bern (argued) and Kimberly Leefatt, Latham & Watkins LLP, Washington, D.C.; Howard A. Belodoff, Idaho Legal Aid Services Inc., Boise, Idaho; Eric Tars, National Law Center on Homelessness & Poverty, Washington, D.C.; Plaintiffs-Appellants.

Brady J. Hall (argued), Michael W. Moore, and Steven R. Kraft, Moore Elia Kraft & Hall LLP, Boise, Idaho; Scott B. Muir, Deputy City Attorney; Robert B. Luce, City Attorney; City Attorney's Office, Boise, Idaho; for Defendant-Appellee.

ORDER

The Opinion filed September 4, 2018, and reported at 902 F.3d 1031, is hereby amended. The amended opinion will be filed concurrently with this order.

The panel has unanimously voted to deny the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

Future petitions for rehearing or rehearing en banc will not be entertained in this case.

BERZON, Circuit Judge, concurring in the denial of rehearing en banc:

I strongly disfavor this circuit's innovation in en banc procedure—ubiquitous dissents in the denial of rehearing en banc, sometimes accompanied by concurrences in the denial of rehearing en banc. As I have previously explained, dissents in the denial of rehearing en banc, in particular, often engage in a "distorted presentation of the issues in the case, creating the impression of rampant error in the original panel opinion although a majority—often a decisive majority—of the active members of the court . . . perceived no error." *Defs. of Wildlife Ctr. for Biological Diversity v. EPA*, 450 F.3d 394, 402 (9th Cir. 2006) (Berzon, J., concurring in denial of

rehearing en banc); *see also* Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 Calif. L. Rev. 1479 (2012). Often times, the dramatic tone of these dissents leads them to read more like petitions for writ of certiorari on steroids, rather than reasoned judicial opinions.

Despite my distaste for these separate writings, I have, on occasion, written concurrences in the denial of rehearing en banc. On those rare occasions, I have addressed arguments raised for the first time during the en banc process, corrected misrepresentations, or highlighted important facets of the case that had yet to be discussed.

This case serves as one of the few occasions in which I feel compelled to write a brief concurrence. I will not address the dissents' challenges to the *Heck v. Humphrey*, 512 U.S. 477 (1994), and Eighth Amendment rulings of *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), as the opinion sufficiently rebuts those erroneous arguments. I write only to raise two points.

First, the City of Boise did not initially seek en banc reconsideration of the Eighth Amendment holding. When this court solicited the parties' positions as to whether the Eighth Amendment holding merits en banc review, the City's initial submission, before mildly supporting en banc reconsideration, was that the opinion is quite "narrow" and its "interpretation of the [C]onstitution raises little actual conflict with Boise's Ordinances or [their] enforcement." And the City noted that it viewed prosecution of homeless individuals for sleeping outside as a "last resort," not as a principal weapon in reducing homelessness and its impact on the City.

The City is quite right about the limited nature of the opinion. On the merits, the opinion holds only that municipal ordinances that criminalize sleeping, sitting, or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment. *Martin*, 902 F.3d at 1035. Nothing in the opinion reaches beyond criminalizing the biologically essential need to sleep when there is no available shelter.

Second, Judge M. Smith's dissent features an unattributed color photograph of "a Los Angeles public sidewalk." The photograph depicts several tents lining a street and is presumably designed to demonstrate the purported negative impact of *Martin*. But the photograph fails to fulfill its intended purpose for several reasons.

For starters, the picture is not in the record of this case and is thus inappropriately included in the dissent. It is not the practice of this circuit to include outside-the-record photographs in judicial opinions, especially when such photographs are entirely unrelated to the case. And in this instance, the photograph is entirely unrelated. It depicts a sidewalk in Los Angeles, not a location in the City of Boise, the actual municipality at issue. Nor can the photograph be said to illuminate the impact of *Martin* within this circuit, as it predates our decision and was likely taken in 2017.[1]

[1] Although Judge M. Smith does not credit the photograph to any source, an internet search suggests that the original photograph is attributable to Los Angeles County. *See Implementing the Los Angeles County Homelessness Initiative*, L.A. County, http://homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/ [https://

But even putting aside the use of a pre-*Martin*, outside-the-record photograph from another municipality, the photograph does not serve to illustrate a concrete effect of *Martin*'s holding. The opinion clearly states that it is not outlawing ordinances "barring the obstruction of public rights of way or the erection of certain structures," such as tents, *id.* at 1048 n.8, and that the holding "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place," *id.* at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)).

What the pre-*Martin* photograph *does* demonstrate is that the ordinances criminalizing sleeping in public places were never a viable solution to the homelessness problem. People with no place to live will sleep outside if they have no alternative. Taking them to jail for a few days is both unconstitutional, for the reasons discussed in the opinion, and, in all likelihood, pointless.

The distressing homelessness problem—distressing to the people with nowhere to live as well as to the rest of society—has grown into a crisis for many reasons, among them the cost of housing, the drying up of affordable care for people with mental illness, and the failure to provide adequate treatment for drug addiction. *See, e.g.*, U.S. Interagency Council on Homelessness, *Homelessness in America: Focus on Individual Adults* 5–8 (2018), https://www.usich.gov/resources/?uploads/asset_library/HIA_Individual_Adults.pdf.

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web.archive.org/web/?20170405225036/homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/#]; *see also* Los Angeles County (@CountyofLA), Twitter (Nov. 29, 2017, 3:23 PM), https://twitter.com/CountyofLA/status/936012841533894657.

The crisis continued to burgeon while ordinances forbidding sleeping in public were on the books and sometimes enforced. There is no reason to believe that it has grown, and is likely to grow larger, because *Martin* held it unconstitutional to criminalize simply sleeping *somewhere* in public if one has nowhere else to do so.

For the foregoing reasons, I concur in the denial of rehearing en banc.

M. SMITH, Circuit Judge, with whom CALLAHAN, BEA, IKUTA, BENNETT, and R. NELSON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

In one misguided ruling, a three-judge panel of our court badly misconstrued not one or two, but three areas of binding Supreme Court precedent, and crafted a holding that has begun wreaking havoc on local governments, residents, and businesses throughout our circuit. Under the panel's decision, local governments are forbidden from enforcing laws restricting public sleeping and camping unless they provide shelter for every homeless individual within their jurisdictions. Moreover, the panel's reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination. Perhaps most unfortunately, the panel's opinion shackles the hands of public officials trying to redress the serious societal concern of homelessness.[1]

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[1] With almost 553,000 people who experienced homelessness nationwide on a single night in January 2018, this issue affects communities across our country. U.S. Dep't of Hous. & Urban Dev.,

I respectfully dissent from our court's refusal to correct this holding by rehearing the case en banc.

I.

The most harmful aspect of the panel's opinion is its misreading of Eighth Amendment precedent. My colleagues cobble together disparate portions of a fragmented Supreme Court opinion to hold that "an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them." *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018). That holding is legally and practically ill-conceived, and conflicts with the reasoning of every other appellate court[2] that has considered the issue.

A.

The panel struggles to paint its holding as a faithful interpretation of the Supreme Court's fragmented opinion in *Powell v. Texas*, 392 U.S. 514 (1968). It fails.

To understand *Powell*, we must begin with the Court's decision in *Robinson v. California*, 370 U.S. 660 (1962). There, the Court addressed a statute that made it a "criminal

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Office of Cmty. Planning & Dev., The 2018 Annual Homeless Assessment Report (AHAR) to Congress 1 (Dec. 2018), https://www.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf.

[2] Our court previously adopted the same Eighth Amendment holding as the panel in *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), but that decision was later vacated. 505 F.3d 1006 (9th Cir. 2007).

offense for a person to 'be addicted to the use of narcotics.'" *Robinson*, 370 U.S. at 660 (quoting Cal. Health & Safety Code § 11721). The statute allowed defendants to be convicted so long as they were drug addicts, regardless of whether they actually used or possessed drugs. *Id.* at 665. The Court struck down the statute under the Eighth Amendment, reasoning that because "narcotic addiction is an illness . . . which may be contracted innocently or involuntarily . . . a state law which imprisons a person thus afflicted as criminal, even though he has never touched any narcotic drug" violates the Eighth Amendment. *Id.* at 667.

A few years later, in *Powell*, the Court addressed the scope of its holding in *Robinson*. *Powell* concerned the constitutionality of a Texas law that criminalized public drunkenness. *Powell*, 392 U.S. at 516. As the panel's opinion acknowledges, there was no majority in *Powell*. The four Justices in the plurality interpreted the decision in *Robinson* as standing for the limited proposition that the government could not criminalize one's status. *Id.* at 534. They held that because the Texas statute criminalized conduct rather than alcoholism, the law was constitutional. *Powell*, 392 U.S. at 532.

The four dissenting Justices in *Powell* read *Robinson* more broadly: They believed that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 567 (Fortas, J., dissenting). Although the statute in *Powell* differed from that in *Robinson* by covering involuntary conduct, the dissent found the same constitutional defect present in both cases. *Id.* at 567–68.

Justice White concurred in the judgment. He upheld the defendant's conviction because Powell had not made a

showing that he was unable to stay off the streets on the night he was arrested. *Id.* at 552–53 (White, J., concurring in the result). He wrote that it was "unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place." *Id.* at 553.

The panel contends that because Justice White concurred in the judgment alone, the views of the dissenting Justices constitute the holding of *Powell*. *Martin*, 902 F.3d at 1048. That tenuous reasoning—which metamorphosizes the *Powell* dissent into the majority opinion—defies logic.

Because *Powell* was a 4–1–4 decision, the Supreme Court's decision in *Marks v. United States* guides our analysis. 430 U.S. 188 (1977). There, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who *concurred* in the judgments on the narrowest grounds.'" *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)) (emphasis added). When *Marks* is applied to *Powell*, the holding is clear: The defendant's conviction was constitutional because it involved the commission of an act. Nothing more, nothing less.

This is hardly a radical proposition. I am not alone in recognizing that "there is definitely no Supreme Court holding" prohibiting the criminalization of involuntary conduct. *United States v. Moore*, 486 F.2d 1139, 1150 (D.C. Cir. 1973) (en banc). Indeed, in the years since *Powell* was decided, courts—including our own—have routinely upheld state laws that criminalized acts that were allegedly

compelled or involuntary. *See, e.g.*, *United States v. Stenson*, 475 F. App'x 630, 631 (7th Cir. 2012) (holding that it was constitutional for the defendant to be punished for violating the terms of his parole by consuming alcohol because he "was not punished for his status as an alcoholic but for his conduct"); *Joshua v. Adams*, 231 F. App'x 592, 594 (9th Cir. 2007) ("Joshua also contends that the state court ignored his mental illness [schizophrenia], which rendered him unable to control his behavior, and his sentence was actually a penalty for his illness . . . . This contention is without merit because, in contrast to *Robinson*, where a statute specifically criminalized addiction, Joshua was convicted of a criminal offense separate and distinct from his 'status' as a schizophrenic."); *United States v. Benefield*, 889 F.2d 1061, 1064 (11th Cir. 1989) ("The considerations that make any incarceration unconstitutional when a statute punishes a defendant for his status are not applicable when the government seeks to punish a person's actions.").[3]

To be sure, *Marks* is controversial. Last term, the Court agreed to consider whether to abandon the rule *Marks* established (but ultimately resolved the case on other grounds and found it "unnecessary to consider . . . the proper application of *Marks*"). *Hughes v. United States*, 138 S. Ct. 1765, 1772 (2018). At oral argument, the Justices criticized the logical subset rule established by *Marks* for elevating the outlier views of concurring Justices to precedential status.[4]

[3] That most of these opinions were unpublished only buttresses my point: It is uncontroversial that *Powell* does not prohibit the criminalization of involuntary conduct.

[4] Transcript of Oral Argument at 14, *Hughes v. United States*, 138 S. Ct. 1765 (2018) (No. 17-155).

The Court also acknowledged that lower courts have inconsistently interpreted the holdings of fractured decisions under *Marks*.[5]

Those criticisms, however, were based on the assumption that *Marks* means what it says and says what it means: Only the views of the Justices concurring in the judgment may be considered in construing the Court's holding. *Marks*, 430 U.S. at 193. The Justices did not even think to consider that *Marks* allows dissenting Justices to create the Court's holding. As a *Marks* scholar has observed, such a method of vote counting "would paradoxically create a precedent that contradicted the judgment in that very case."[6] And yet the panel's opinion flouts that common sense rule to extract from *Powell* a holding that does not exist.

What the panel really does is engage in a predictive model of precedent. The panel opinion implies that if a case like *Powell* were to arise again, a majority of the Court would hold that the criminalization of involuntary conduct violates the Eighth Amendment. Utilizing such reasoning, the panel borrows the Justices' robes and adopts that holding on their behalf.

But the Court has repeatedly discouraged us from making such predictions when construing precedent. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). And, for good reason. Predictions about how

[5] *Id.* at 49.

[6] Richard M. Re, *Beyond the* Marks *Rule*, 132 Harv. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620.

Justices will rule rest on unwarranted speculation about what goes on in their minds. Such amateur fortunetelling also precludes us from considering new insights on the issues—difficult as they may be in the case of 4–1–4 decisions like *Powell*—that have arisen since the Court's fragmented opinion. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (noting "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

In short, predictions about how the Justices will rule ought not to create precedent. The panel's Eighth Amendment holding lacks any support in *Robinson* or *Powell*.

B.

Our panel's opinion also conflicts with the reasoning underlying the decisions of other appellate courts.

The California Supreme Court, in *Tobe v. City of Santa Ana*, rejected the plaintiffs' Eighth Amendment challenge to a city ordinance that banned public camping. 892 P.2d 1145 (1995). The court reached that conclusion despite evidence that, on any given night, at least 2,500 homeless persons in the city did not have shelter beds available to them. *Id.* at 1152. The court sensibly reasoned that because *Powell* was a fragmented opinion, it did not create precedent on "the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'" *Id.* at 1166 (quoting *Powell*, 392 U.S. at 533). Our panel—bound by the same Supreme Court precedent—invalidates identical California ordinances

previously upheld by the California Supreme Court. Both courts cannot be correct.

The California Supreme Court acknowledged that homelessness is a serious societal problem. It explained, however, that:

> Many of those issues are the result of legislative policy decisions. The arguments of many amici curiae regarding the apparently intractable problem of homelessness and the impact of the Santa Ana ordinance on various groups of homeless persons (e.g., teenagers, families with children, and the mentally ill) should be addressed to the Legislature and the Orange County Board of Supervisors, not the judiciary. Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems, but criminalizing conduct that is a product of those problems is not for that reason constitutionally impermissible.

Id. at 1157 n.12. By creating new constitutional rights out of whole cloth, my well-meaning, but unelected, colleagues improperly inject themselves into the role of public policymaking.[7]

[7] Justice Black has also observed that solutions for challenging social issues should be left to the policymakers:

> I cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem . . . . [I]t seems to me that the

The reasoning of our panel decision also conflicts with precedents of the Fourth and Eleventh Circuits. In *Manning v. Caldwell*, the Fourth Circuit held that a Virginia statute that criminalized the possession of alcohol did not violate the Eighth Amendment when it punished the involuntary actions of homeless alcoholics. 900 F.3d 139, 153 (4th Cir. 2018), *reh'g en banc granted* 741 F. App'x 937 (4th Cir. 2018).[8] The court rejected the argument that Justice White's opinion in *Powell* "requires this court to hold that Virginia's statutory scheme imposes cruel and unusual punishment because it criminalizes [plaintiffs'] status as homeless alcoholics." *Id.* at 145. The court found that the statute passed constitutional muster because "it is the act of possessing alcohol—not the status of being an alcoholic—that gives rise to criminal sanctions." *Id.* at 147.

Boise's Ordinances at issue in this case are no different: They do not criminalize the status of homelessness, but only the act of camping on public land or occupying public places without permission. *Martin*, 902 F.3d at 1035. The Fourth Circuit correctly recognized that these kinds of laws do not run afoul of *Robinson* and *Powell*.

> present use of criminal sanctions might possibly be unwise, but I am by no means convinced that any use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise.

Powell, 392 U.S. at 539–40 (Black, J., concurring).

[8] Pursuant to Fourth Circuit Local Rule 35(c), "[g]ranting of rehearing en banc vacates the previous panel judgment and opinion." I mention *Manning*, however, as an illustration of other courts' reasoning on the Eighth Amendment issue.

The Eleventh Circuit has agreed. In *Joel v. City of Orlando*, the court held that a city ordinance prohibiting sleeping on public property was constitutional. 232 F.3d 1353, 1362 (11th Cir. 2000). The court rejected the plaintiffs' Eighth Amendment challenge because the ordinance "targets conduct, and does not provide criminal punishment based on a person's status." *Id*. The court prudently concluded that "[t]he City is constitutionally allowed to regulate where 'camping' occurs." *Id.*

We ought to have adopted the sound reasoning of these other courts. By holding that Boise's enforcement of its Ordinances violates the Eighth Amendment, our panel has needlessly created a split in authority on this straightforward issue.

C.

One would think our panel's legally incorrect decision would at least foster the common good. Nothing could be further from the truth. The panel's decision generates dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein.

The panel opinion masquerades its decision as a narrow one by representing that it "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place." *Martin*, 902 F.3d at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)).

That excerpt, however, glosses over the decision's actual holding: "We hold only that . . . as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property." *Id.* Such a holding leaves cities with a Hobson's choice: They must either undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety. The Constitution has no such requirement.

* * *

Under the panel's decision, local governments can enforce certain of their public health and safety laws only when homeless individuals have the choice to sleep indoors. That inevitably leads to the question of how local officials ought to know whether that option exists.

The number of homeless individuals within a municipality on any given night is not automatically reported and updated in real time. Instead, volunteers or government employees must painstakingly tally the number of homeless individuals block by block, alley by alley, doorway by doorway. Given the daily fluctuations in the homeless population, the panel's opinion would require this labor-intensive task be done every single day. Yet in massive cities such as Los Angeles, that is simply impossible. Even when thousands of volunteers devote dozens of hours to such "a herculean task," it takes three days to finish counting—and

even then "not everybody really gets counted."[9] Lest one think Los Angeles is unique, our circuit is home to many of the largest homeless populations nationwide.[10]

If cities do manage to cobble together the resources for such a system, what happens if officials (much less volunteers) miss a homeless individual during their daily count and police issue citations under the false impression that the number of shelter beds exceeds the number of homeless people that night? According to the panel's opinion, that city has violated the Eighth Amendment, thereby potentially leading to lawsuits for significant monetary damages and other relief.

[9] Matt Tinoco, *LA Counts Its Homeless, But Counting Everybody Is Virtually Impossible*, LAist (Jan. 22, 2019, 2:08 PM), https://laist.com/2019/01/22/los_angeles_homeless_count_2019_how_volunteer.php. The panel conceded the imprecision of such counts in its opinion. *See Martin*, 902 F.3d at 1036 n.1 (acknowledging that the count of homeless individuals "is not always precise"). But it went on to disregard that fact when tying a city's ability to enforce its laws to these counts.

[10] The U.S. Department of Housing and Urban Development's 2018 Annual Homeless Assessment Report to Congress reveals that municipalities within our circuit have among the highest homeless populations in the country. In Los Angeles City and County alone, 49,955 people experienced homelessness in 2018. The number was 12,112 people in Seattle and King County, Washington, and 8,576 people in San Diego City and County, California. *See supra* note 1, at 18, 20. In 2016, Las Vegas had an estimated homeless population of 7,509 individuals, and California's Santa Clara County had 6,556. Joaquin Palomino, *How Many People Live On Our Streets*?, S.F. Chronicle (June 28, 2016), https://projects.sfchronicle.com/sf-homeless/numbers.

And what if local governments (understandably) lack the resources necessary for such a monumental task?[11] They have no choice but to stop enforcing laws that prohibit public sleeping and camping.[12] Accordingly, our panel's decision

[11] Cities can instead provide sufficient housing for every homeless individual, but the cost would be prohibitively expensive for most local governments. Los Angeles, for example, would need to spend $403.4 million to house every homeless individual not living in a vehicle. *See* Los Angeles Homeless Services Authority, Report on Emergency Framework to Homelessness Plan 13 (June 2018), https://assets.documentcloud.org/documents/4550980/LAHSA-Sheltering-Report.pdf. In San Francisco, building new centers to provide a mere 400 additional shelter spaces was estimated to cost between $10 million and $20 million, and would require $20 million to $30 million to operate each year. *See* Heather Knight, *A Better Model, A Better Result?*, S.F. Chronicle (June 29, 2016), https://projects.sfchronicle.com/sf-homeless/shelters. Perhaps these staggering sums are why the panel went out of its way to state that it "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless." *Martin*, 902 F.3d at 1048.

[12] Indeed, in the few short months since the panel's decision, several cities have thrown up their hands and abandoned any attempt to enforce such laws. *See, e.g.*, Cynthia Hubert, *Sacramento County Cleared Homeless Camps All Year. Now It Has Stopped Citing Campers*, Sacramento Bee (Sept. 18, 2019, 4:27 PM), https://www.sacbee.com/news/local/homeless/article218605025.html ("Sacramento County park rangers have suddenly stopped issuing citations altogether after a federal court ruling this month."); Michael Ellis Langley, *Policing Homelessness*, Golden State Newspapers (Feb. 22, 2019), http://www.goldenstatenewspapers.com/tracy_press/news/policing-homelessness/article_5fe6a9ca-3642-11e9-9b25-37610ef2dbae.html (Sheriff Pat Withrow stating that, "[a]s far as camping ordinances and things like that, we're probably holding off on [issuing citations] for a while" in light of *Martin v. City of Boise*); Kelsie Morgan, *Moses Lake Sees Spike in Homeless Activity Following 9th Circuit Court Decision*, KXLY (Oct. 2, 2018, 12:50 PM), https://www.kxly.com/news/moses-lake-sees-spike-in-homeless-activity-following-9th-circuit-court-decision/801772571 ("Because the City of Moses Lake does not currently have a homeless shelter, city officials can

effectively allows homeless individuals to sleep and live wherever they wish on most public property. Without an absolute confidence that they can house every homeless individual, city officials will be powerless to assist residents lodging valid complaints about the health and safety of their neighborhoods.[13]

As if the panel's actual holding wasn't concerning enough, the logic of the panel's opinion reaches even further in scope. The opinion reasons that because "resisting the need to . . . engage in [] life-sustaining activities is impossible," punishing the homeless for engaging in those actions in public violates the Eighth Amendment. *Martin*, 902 F.3d at 1048. What else is a life-sustaining activity? Surely bodily functions. By holding that the Eighth Amendment proscribes the criminalization of involuntary conduct, the panel's decision will inevitably result in the

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no longer penalize people for sleeping in public areas."); Brandon Pho, *Buena Park Residents Express Opposition to Possible Homeless Shelter*, Voice of OC (Feb. 14, 2019), https://voiceofoc.org/2019/02/buena-park-residents-express-opposition-to-possible-homeless-shelter/ (stating that Judge David Carter of the U.S. District Court for the Central District of California has "warn[ed] Orange County cities to get more shelters online or risk the inability the enforce their anti-camping ordinances"); Nick Welsh, *Court Rules to Protect Sleeping in Public: Santa Barbara City Parks Subject of Ongoing Debate*, Santa Barbara Indep. (Oct. 31, 2018), http://www.independent.com/news/2018/oct/31/court-rules-protect-sleeping-public/?jqm ("In the wake of what's known as 'the Boise decision,' Santa Barbara city police found themselves scratching their heads over what they could and could not issue citations for.").

[13] In 2017, for example, San Francisco received 32,272 complaints about homeless encampments to its 311-line. Kevin Fagan, *The Situation On The Streets*, S.F. Chronicle (June 28, 2018), https://projects.sfchronicle.com/sf-homeless/2018-state-of-homelessness.

striking down of laws that prohibit public defecation and urination.[14] The panel's reasoning also casts doubt on public safety laws restricting drug paraphernalia, for the use of hypodermic needles and the like is no less involuntary for the homeless suffering from the scourge of addiction than is their sleeping in public.

It is a timeless adage that states have a "universally acknowledged power and duty to enact and enforce all such laws . . . as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people." *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20 (1901) (internal quotations omitted). I fear that the panel's decision will prohibit local governments from fulfilling their duty to enforce an array of public health and safety laws. Halting enforcement of such laws will potentially wreak havoc on our communities.[15] As we have already begun to witness, our neighborhoods will soon feature "[t]ents . . .

[14] *See* Heater Knight, *It's No Laughing Matter—SF Forming Poop Patrol to Keep Sidewalks Clean*, S.F. Chronicle (Aug. 14, 2018), https://www.sfchronicle.com/bayarea/heatherknight/article/It-s-no-laughing-matter-SF-forming-Poop-13153517.php.

[15] *See* Anna Gorman and Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless*, The Atlantic (Mar. 8, 2019), https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/ (describing the recent outbreaks of typhus, Hepatitis A, and shigellosis as "disaster[s] and [a] public-health crisis" and noting that such "diseases spread quickly and widely among people living outside or in shelters").

equipped with mini refrigerators, cupboards, televisions, and heaters, [that] vie with pedestrian traffic" and "human waste appearing on sidewalks and at local playgrounds."[16]

A Los Angeles Public Sidewalk

II.

The panel's fanciful merits-determination is accompanied by a no-less-inventive series of procedural rulings. The panel's opinion also misconstrues two other areas of Supreme Court precedent concerning limits on the parties who can

[16] Scott Johnson and Peter Kiefer, *LA's Battle for Venice Beach: Homeless Surge Puts Hollywood's Progressive Ideals to the Test*, Hollywood Reporter (Jan. 11, 2019, 6:00 AM), https://www.hollywoodreporter.com/features/las-homeless- surge-puts-hollywoods-progressive-ideals-test-1174599.

bring § 1983 challenges for violations of the Eighth Amendment.

A.

The panel erred in holding that Robert Martin and Robert Anderson could obtain prospective relief under *Heck v. Humphrey* and its progeny. 512 U.S. 477 (1994). As recognized by Judge Owens's dissent, that conclusion cuts against binding precedent on the issue.

The Supreme Court has stated that *Heck* bars § 1983 claims if success on that claim would "necessarily demonstrate the invalidity of [the plaintiff's] confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005); *see also Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (stating that *Heck* applies to claims for declaratory relief). Martin and Anderson's prospective claims did just that. Those plaintiffs sought a declaration that the Ordinances under which they were convicted are unconstitutional and an injunction against their future enforcement on the grounds of unconstitutionality. It is clear that *Heck* bars these claims because Martin and Anderson necessarily seek to demonstrate the invalidity of their previous convictions.

The panel opinion relies on *Edwards* to argue that *Heck* does not bar plaintiffs' requested relief, but *Edwards* cannot bear the weight the panel puts on it. In *Edwards*, the plaintiff sought an injunction that would require prison officials to date-stamp witness statements at the time received. 520 U.S. at 643. The Court concluded that requiring prison officials to date-stamp witness statements did not necessarily imply the invalidity of previous determinations that the prisoner was

not entitled to good-time credits, and that *Heck*, therefore, did not bar prospective injunctive relief. *Id.* at 648.

Here, in contrast, a declaration that the Ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions. According to data from the U.S. Department of Housing and Urban Development, the number of homeless individuals in Boise exceeded the number of available shelter beds during each of the years that the plaintiffs were cited.[17] Under the panel's holding that "the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property" "as long as there is no option of sleeping indoors," that data necessarily demonstrates the invalidity of the plaintiffs' prior convictions. *Martin*, 902 F.3d at 1048.

B.

The panel also erred in holding that Robert Martin and Pamela Hawkes, who were cited but not convicted of violating the Ordinances, had standing to sue under the Eighth Amendment. In so doing, the panel created a circuit split with the Fifth Circuit.

The panel relied on *Ingraham v. Wright*, 430 U.S. 651 (1977), to find that a plaintiff "need demonstrate only the

[17] *See* U.S. Dep't of Hous. & Urban Dev., PIT Data Since 2007, https://www.hudexchange.info/resources/documents/2007-2018-PIT-Counts-by-CoC.xlsx; U.S. Dep't of Hous. & Urban Dev., HIC Data Since 2007, https://www.hudexchange.info/resources/documents/2007-2018-HIC-Counts-by-CoC.xlsx. Boise is within Ada County and listed under CoC code ID-500.

initiation of the criminal process against him, not a conviction," to bring an Eighth Amendment challenge. *Martin*, 902 F.3d at 1045. The panel cites *Ingraham*'s observation that the Cruel and Unusual Punishments Clause circumscribes the criminal process in that "it imposes substantive limits on what can be made criminal and punished as such." *Id.* at 1046 (citing *Ingraham*, 430 U.S. at 667). This reading of *Ingraham*, however, cherry picks isolated statements from the decision without considering them in their accurate context. The *Ingraham* Court plainly held that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." 430 U.S. at 671 n.40. And, "the State does not acquire the power to punish with which the Eighth Amendment is concerned until *after* it has secured a formal adjudication of guilt." *Id.* (emphasis added). As the *Ingraham* Court recognized, "[T]he decisions of [the Supreme] Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those *convicted* of crimes." *Id.* at 664 (emphasis added). Clearly, then, *Ingraham* stands for the proposition that to challenge a criminal statute as violative of the Eighth Amendment, the individual must be convicted of that relevant crime.

The Fifth Circuit recognized this limitation on standing in *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995). There, the court confronted a similar action brought by homeless individuals challenging a sleeping in public ordinance. *Johnson*, 61 F.3d at 443. The court held that the plaintiffs did not have standing to raise an Eighth Amendment challenge to the ordinance because although "numerous tickets ha[d] been issued . . . [there was] no indication that any Appellees ha[d] been convicted" of

violating the sleeping in public ordinance. *Id.* at 445. The Fifth Circuit explained that *Ingraham* clearly required a plaintiff be convicted under a criminal statute before challenging that statute's validity. *Id.* at 444–45 (citing *Robinson*, 370 U.S. at 663; *Ingraham*, 430 U.S. at 667).

By permitting Martin and Hawkes to maintain their Eighth Amendment challenge, the panel's decision created a circuit split with the Fifth Circuit and took our circuit far afield from "[t]he primary purpose of (the Cruel and Unusual Punishments Clause) . . . [which is] the method or kind of punishment imposed for the violation of criminal statutes." *Ingraham*, 430 U.S. at 667 (quoting *Powell*, 392 U.S. at 531–32.

III.

None of us is blind to the undeniable suffering that the homeless endure, and I understand the panel's impulse to help such a vulnerable population. But the Eighth Amendment is not a vehicle through which to critique public policy choices or to hamstring a local government's enforcement of its criminal code. The panel's decision, which effectively strikes down the anti-camping and anti-sleeping Ordinances of Boise and that of countless, if not all, cities within our jurisdiction, has no legitimate basis in current law.

I am deeply concerned about the consequences of our panel's unfortunate opinion, and I regret that we did not vote to reconsider this case en banc. I respectfully dissent.

BENNETT, Circuit Judge, with whom BEA, IKUTA, and R. NELSON, Circuit Judges, join, and with whom M. SMITH, Circuit Judge, joins as to Part II, dissenting from the denial of rehearing en banc:

I fully join Judge M. Smith's opinion dissenting from the denial of rehearing en banc. I write separately to explain that except in extraordinary circumstances not present in this case, and based on its text, tradition, and original public meaning, the Cruel and Unusual Punishments Clause of the Eighth Amendment does not impose substantive limits on what conduct a state may criminalize.

I recognize that we are, of course, bound by Supreme Court precedent holding that the Eighth Amendment encompasses a limitation "on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (citing *Robinson v. California*, 370 U.S. 660 (1962)). However, the *Ingraham* Court specifically "recognized [this] limitation as one to be applied sparingly." *Id.* As Judge M. Smith's dissent ably points out, the panel ignored *Ingraham*'s clear direction that Eighth Amendment scrutiny attaches only after a criminal conviction. Because the panel's decision, which allows pre-conviction Eighth Amendment challenges, is wholly inconsistent with the text and tradition of the Eighth Amendment, I respectfully dissent from our decision not to rehear this case en banc.

I.

The text of the Cruel and Unusual Punishments Clause is virtually identical to Section 10 of the English Declaration of

Rights of 1689,[1] and there is no question that the drafters of the Eighth Amendment were influenced by the prevailing interpretation of Section 10. *See Solem v. Helm*, 463 U.S. 277, 286 (1983) (observing that one of the themes of the founding era "was that Americans had all the rights of English subjects" and the Framers' "use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection"); *Timbs v. Indiana*, 586 U.S. ___ (2019) (Thomas, J., concurring) ("[T]he text of the Eighth Amendment was 'based directly on . . . the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.'" (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989)). Thus, "not only is the original meaning of the 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular 'rights of English subjects' it was designed to vindicate." *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (Scalia, J., concurring).

Justice Scalia's concurrence in *Harmelin* provides a thorough and well-researched discussion of the original public meaning of the Cruel and Unusual Punishments Clause, including a detailed overview of the history of Section 10 of the English Declaration of Rights. *See id*. at 966–85 (Scalia, J., concurring). Rather than reciting Justice Scalia's *Harmelin* discussion in its entirety, I provide only a broad description of its historical analysis. Although the issue Justice Scalia confronted in *Harmelin* was whether the

[1] 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689) (Section 10 of the English Declaration of Rights) ("excessive Baile ought not to be required, nor excessive Fines imposed; nor cruell and unusuall Punishments inflicted.").

Framers intended to graft a proportionality requirement on the Eighth Amendment, *see id.* at 976, his opinion's historical exposition is instructive to the issue of what the Eighth Amendment meant when it was written.

The English Declaration of Rights's prohibition on "cruell and unusuall Punishments" is attributed to the arbitrary punishments imposed by the King's Bench following the Monmouth Rebellion in the late 17th century. *Id.* at 967 (Scalia, J., concurring). "Historians have viewed the English provision as a reaction either to the 'Bloody Assize,' the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth, or to the perjury prosecution of Titus Oates in the same year." *Ingraham*, 430 U.S. at 664 (footnote omitted).

Presiding over a special commission in the wake of the Monmouth Rebellion, Chief Justice Jeffreys imposed "vicious punishments for treason," including "drawing and quartering, burning of women felons, beheading, [and] disemboweling." *Harmelin*, 501 U.S. at 968. In the view of some historians, "the story of The Bloody Assizes . . . helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual Punishments." *Furman v. Georgia*, 408 U.S. 238, 254 (1972) (Douglas, J., concurring).

More recent scholarship suggests that Section 10 of the Declaration of Rights was motivated more by Jeffreys's treatment of Titus Oates, a Protestant cleric and convicted perjurer. In addition to the pillory, the scourge, and life imprisonment, Jeffreys sentenced Oates to be "stript of [his] Canonical Habits." *Harmelin*, 501 U.S. at 970 (Scalia, J., concurring) (quoting Second Trial of Titus Oates, 10 How. St.

Tr. 1227, 1316 (K.B. 1685)). Years after the sentence was carried out, and months after the passage of the Declaration of Rights, the House of Commons passed a bill to annul Oates's sentence. Though the House of Lords never agreed, the Commons issued a report asserting that Oates's sentence was the sort of "cruel and unusual Punishment" that Parliament complained of in the Declaration of Rights. *Harmelin*, 501 U.S. at 972 (citing 10 Journal of the House of Commons 247 (Aug. 2, 1689)). In the view of the Commons and the dissenting Lords, Oates's punishment was "'out of the Judges' Power,' 'contrary to Law and ancient practice,' without 'Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' or imposed by 'Pretence to a discretionary Power.'" *Id.* at 973 (quoting 1 Journals of the House of Lords 367 (May 31, 1689); 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

Thus, Justice Scalia concluded that the prohibition on "cruell and unusuall punishments" as used in the English Declaration, "was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition." *Harmelin*, 501 U.S. at 974 (Scalia, J., concurring) (citing *Ingraham*, 430 U.S. at 665; 1 J. Chitty, Criminal Law 710–12 (5th Am. ed. 1847); Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Calif. L. Rev. 839, 859 (1969)).

But Justice Scalia was careful not to impute the English meaning of "cruell and unusuall" directly to the Framers of our Bill of Rights: "the ultimate question is not what 'cruell and unusuall punishments' meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment." *Id.* at 975. "Wrenched out of its common-law context, and applied to the actions of a

legislature . . . the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed." *Id.* at 976.

As support for his conclusion that the Framers of the Bill of Rights intended for the Eighth Amendment to reach only certain punishment methods, Justice Scalia looked to "the state ratifying conventions that prompted the Bill of Rights." *Id.* at 979. Patrick Henry, speaking at the Virginia Ratifying convention, "decried the absence of a bill of rights," arguing that "Congress will loose the restriction of not . . . inflicting cruel and unusual punishments. . . . What has distinguished our ancestors?—They would not admit of tortures, or cruel and barbarous punishment." *Id.* at 980 (quoting 3 J. Elliot, Debates on the Federal Constitution 447 (2d ed. 1854)). The Massachusetts Convention likewise heard the objection that, in the absence of a ban on cruel and unusual punishments, "racks and gibbets may be amongst the most mild instruments of [Congress's] discipline." *Id.* at 979 (internal quotation marks omitted) (quoting 2 J. Debates on the Federal Constitution, at 111). These historical sources "confirm[] the view that the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment." *Id.* (internal quotation marks omitted) (quoting Granucci, 57 Calif. L. Rev. at 842) (emphasis in *Harmelin*).

In addition, early state court decisions "interpreting state constitutional provisions with identical or more expansive wording (i.e., 'cruel or unusual') concluded that these provisions . . . proscribe[d] . . . only certain modes of punishment." *Id.* at 983; *see also id.* at 982 ("Many other Americans apparently agreed that the Clause only outlawed certain *modes* of punishment.").

In short, when the Framers drafted and the several states ratified the Eighth Amendment, the original public meaning of the Cruel and Unusual Punishments Clause was "to proscribe . . . methods of punishment." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). There is simply no indication in the history of the Eighth Amendment that the Cruel and Unusual Punishments Clause was intended to reach the substantive authority of Congress to criminalize acts or status, and certainly not before conviction. Incorporation, of course, extended the reach of the Clause to the States, but worked no change in its meaning.

II.

The panel here held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018). In so holding, the panel allows challenges asserting this prohibition to be brought in advance of any conviction. That holding, however, has nothing to do with the punishment that the City of Boise imposes for those offenses, and thus nothing to do with the text and tradition of the Eighth Amendment.

The panel pays only the barest attention to the Supreme Court's admonition that the application of the Eighth Amendment to substantive criminal law be "sparing[]," *Martin*, 902 F.3d at 1047 (quoting *Ingraham*, 430 U.S. at 667), and its holding here is dramatic in scope and completely unfaithful to the proper interpretation of the Cruel and Unusual Punishments Clause.

"The primary purpose of (the Cruel and Unusual Punishments Clause) has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes." *Ingraham*, 430 U.S. at 667 (internal quotation marks omitted) (quoting *Powell v. Texas*, 392 U.S. 514, 531–32 (1968)). It should, therefore, be the "rare case" where a court invokes the Eighth Amendment's criminalization component. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1146 (9th Cir. 2006) (Rymer, J., dissenting), *vacated*, 505 F.3d 1006 (9th Cir. 2007).[2] And permitting a pre-conviction challenge to a local ordinance, as the panel does here, is flatly inconsistent with the Cruel and Unusual Punishments Clause's core constitutional function: regulating the *methods* of punishment that may be inflicted upon one convicted of an offense. *Harmelin*, 501 U.S. at 977, 979 (Scalia, J., concurring). As Judge Rymer, dissenting in *Jones*, observed, "the Eighth Amendment's 'protections do not attach until after conviction and sentence.'"[3] 444 F.3d at 1147 (Rymer, J., dissenting)

[2] *Jones*, of course, was vacated and lacks precedential value. 505 F.3d 1006 (9th Cir. 2007). But the panel here resuscitated *Jones*'s errant holding, including, apparently, its application of the Cruel and Unusual Punishments Clause in the absence of a criminal conviction. We should have taken this case en banc to correct this misinterpretation of the Eighth Amendment.

[3] We have emphasized the need to proceed cautiously when extending the reach of the Cruel and Unusual Punishments Clause beyond regulation of the methods of punishment that may be inflicted upon conviction for an offense. *See United States v. Ritter*, 752 F.2d 435, 438 (9th Cir. 1985) (repeating *Ingraham*'s direction that "this particular use of the cruel and unusual punishment clause is to be applied sparingly" and noting that *Robinson* represents "the rare type of case in which the clause has been used to limit what may be made criminal"); *see also United States v. Ayala*, 35 F.3d 423, 426 (9th Cir. 1994) (limiting application of *Robinson*

(internal alterations omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 392 n.6 (1989)).[4]

The panel's holding thus permits plaintiffs who have never been convicted of any offense to avail themselves of a constitutional protection that, historically, has been concerned with prohibition of "only certain modes of punishment." *Harmelin*, 501 U.S. at 983; *see also United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir. 1997) (citing *Harmelin* for the proposition that a "plurality of the Supreme Court . . . has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed").

Extending the Cruel and Unusual Punishments Clause to encompass pre-conviction challenges to substantive criminal law stretches the Eighth Amendment past its breaking point. I doubt that the drafters of our Bill of Rights, the legislators of the states that ratified it, or the public at the time would ever have imagined that a ban on "cruel and unusual punishments" would permit a plaintiff to challenge a substantive criminal statute or ordinance that he or she had not even been convicted of violating. We should have taken this case en banc to confirm that an Eighth Amendment challenge does not lie in the absence of a punishment following conviction for an offense.

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to crimes lacking an actus reus). The panel's holding here throws that caution to the wind.

[4] Judge Friendly also expressed "considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence." *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973).

* * *

At common law and at the founding, a prohibition on "cruel and unusual punishments" was simply that: a limit on the types of punishments that government could inflict following a criminal conviction. The panel strayed far from the text and history of the Cruel and Unusual Punishments Clause in imposing the substantive limits it has on the City of Boise, particularly as to plaintiffs who have not yet even been convicted of an offense. We should have reheard this case en banc, and I respectfully dissent.

OPINION

BERZON, Circuit Judge:

> "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."
>
> — Anatole France, *The Red Lily*

We consider whether the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to. We conclude that it does.

The plaintiffs-appellants are six current or former residents of the City of Boise ("the City"), who are homeless or have recently been homeless. Each plaintiff alleges that, between 2007 and 2009, he or she was cited by Boise police

for violating one or both of two city ordinances. The first, Boise City Code § 9-10-02 (the "Camping Ordinance"), makes it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time." The Camping Ordinance defines "camping" as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence." *Id*. The second, Boise City Code § 6-01-05 (the "Disorderly Conduct Ordinance"), bans "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof."

All plaintiffs seek retrospective relief for their previous citations under the ordinances. Two of the plaintiffs, Robert Anderson and Robert Martin, allege that they expect to be cited under the ordinances again in the future and seek declaratory and injunctive relief against future prosecution.

In *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007), a panel of this court concluded that "so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]" for the homeless, Los Angeles could not enforce a similar ordinance against homeless individuals "for involuntarily sitting, lying, and sleeping in public." *Jones* is not binding on us, as there was an underlying settlement between the parties and our opinion was vacated as a result. We agree with *Jones*'s reasoning and central conclusion, however, and so hold that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them. Two of the plaintiffs, we further hold, may be entitled

to retrospective and prospective relief for violation of that Eighth Amendment right.

I. Background

The district court granted summary judgment to the City on all claims. We therefore review the record in the light most favorable to the plaintiffs. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014).

Boise has a significant and increasing homeless population. According to the Point-in-Time Count ("PIT Count") conducted by the Idaho Housing and Finance Association, there were 753 homeless individuals in Ada County — the county of which Boise is the seat — in January 2014, 46 of whom were "unsheltered," or living in places unsuited to human habitation such as parks or sidewalks. In 2016, the last year for which data is available, there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered.[1] The PIT Count likely underestimates the number of homeless individuals in Ada County. It is "widely recognized that a one-night point in

[1] The United States Department of Housing and Urban Development ("HUD") requires local homeless assistance and prevention networks to conduct an annual count of homeless individuals on one night each January, known as the PIT Count, as a condition of receiving federal funds. State, local, and federal governmental entities, as well as private service providers, rely on the PIT Count as a "critical source of data" on homelessness in the United States. The parties acknowledge that the PIT Count is not always precise. The City's Director of Community Partnerships, Diana Lachiondo, testified that the PIT Count is "not always the . . . best resource for numbers," but also stated that "the point-in-time count is our best snapshot" for counting the number of homeless individuals in a particular region, and that she "cannot give . . . any other number with any kind of confidence."

time count will undercount the homeless population," as many homeless individuals may have access to temporary housing on a given night, and as weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.

There are currently three homeless shelters in the City of Boise offering emergency shelter services, all run by private, nonprofit organizations. As far as the record reveals, these three shelters are the only shelters in Ada County.

One shelter — "Sanctuary" — is operated by Interfaith Sanctuary Housing Services, Inc. The shelter is open to men, women, and children of all faiths, and does not impose any religious requirements on its residents. Sanctuary has 96 beds reserved for individual men and women, with several additional beds reserved for families. The shelter uses floor mats when it reaches capacity with beds.

Because of its limited capacity, Sanctuary frequently has to turn away homeless people seeking shelter. In 2010, Sanctuary reached full capacity in the men's area "at least half of every month," and the women's area reached capacity "almost every night of the week." In 2014, the shelter reported that it was full for men, women, or both on 38% of nights. Sanctuary provides beds first to people who spent the previous night at Sanctuary. At 9:00 pm each night, it allots any remaining beds to those who added their names to the shelter's waiting list.

The other two shelters in Boise are both operated by the Boise Rescue Mission ("BRM"), a Christian nonprofit organization. One of those shelters, the River of Life Rescue Mission ("River of Life"), is open exclusively to men; the other, the City Light Home for Women and Children ("City Light"), shelters women and children only.

BRM's facilities provide two primary "programs" for the homeless, the Emergency Services Program and the New Life Discipleship Program.[2] The Emergency Services Program provides temporary shelter, food, and clothing to anyone in need. Christian religious services are offered to those seeking shelter through the Emergency Services Program. The shelters display messages and iconography on the walls, and the intake form for emergency shelter guests includes a religious message.[3]

Homeless individuals may check in to either BRM facility between 4:00 and 5:30 pm. Those who arrive at BRM facilities between 5:30 and 8:00 pm may be denied shelter, depending on the reason for their late arrival; generally, anyone arriving after 8:00 pm is denied shelter.

Except in winter, male guests in the Emergency Services Program may stay at River of Life for up to 17 consecutive

[2] The record suggests that BRM provides some limited additional non-emergency shelter programming which, like the Discipleship Program, has overtly religious components.

[3] The intake form states in relevant part that "We are a Gospel Rescue Mission. Gospel means 'Good News,' and the Good News is that Jesus saves us from sin past, present, and future. We would like to share the Good News with you. Have you heard of Jesus? . . . Would you like to know more about him?"

nights; women and children in the Emergency Services Program may stay at City Light for up to 30 consecutive nights. After the time limit is reached, homeless individuals who do not join the Discipleship Program may not return to a BRM shelter for at least 30 days.[4] Participants in the Emergency Services Program must return to the shelter every night during the applicable 17-day or 30-day period; if a resident fails to check in to a BRM shelter each night, that resident is prohibited from staying overnight at that shelter for 30 days. BRM's rules on the length of a person's stay in the Emergency Services Program are suspended during the winter.

The Discipleship Program is an "intensive, Christ-based residential recovery program" of which "[r]eligious study is the very essence." The record does not indicate any limit to how long a member of the Discipleship Program may stay at a BRM shelter.

The River of Life shelter contains 148 beds for emergency use, along with 40 floor mats for overflow; 78 additional beds serve those in non-emergency shelter programs such as the Discipleship Program. The City Light shelter has 110 beds for emergency services, as well as 40 floor mats to handle overflow and 38 beds for women in non-emergency shelter programs. All told, Boise's three homeless shelters contain 354 beds and 92 overflow mats for homeless individuals.

[4] The parties dispute the extent to which BRM actually enforces the 17- and 30-day limits.

A. The Plaintiffs

Plaintiffs Robert Martin, Robert Anderson, Lawrence Lee Smith, Basil E. Humphrey, Pamela S. Hawkes, and Janet F. Bell are all homeless individuals who have lived in or around Boise since at least 2007. Between 2007 and 2009, each plaintiff was convicted at least once of violating the Camping Ordinance, the Disorderly Conduct Ordinance, or both. With one exception, all plaintiffs were sentenced to time served for all convictions; on two occasions, Hawkes was sentenced to one additional day in jail. During the same period, Hawkes was cited, but not convicted, under the Camping Ordinance, and Martin was cited, but not convicted, under the Disorderly Conduct Ordinance.

Plaintiff Robert Anderson currently lives in Boise; he is homeless and has often relied on Boise's shelters for housing. In the summer of 2007, Anderson stayed at River of Life as part of the Emergency Services Program until he reached the shelter's 17-day limit for male guests. Anderson testified that during his 2007 stay at River of Life, he was required to attend chapel services before he was permitted to eat dinner. At the conclusion of his 17-day stay, Anderson declined to enter the Discipleship Program because of his religious beliefs. As Anderson was barred by the shelter's policies from returning to River of Life for 30 days, he slept outside for the next several weeks. On September 1, 2007, Anderson was cited under the Camping Ordinance. He pled guilty to violating the Camping Ordinance and paid a $25 fine; he did not appeal his conviction.

Plaintiff Robert Martin is a former resident of Boise who currently lives in Post Falls, Idaho. Martin returns frequently to Boise to visit his minor son. In March of 2009, Martin was

cited under the Camping Ordinance for sleeping outside; he was cited again in 2012 under the same ordinance.

B. Procedural History

The plaintiffs filed this action in the United States District Court for the District of Idaho in October of 2009. All plaintiffs alleged that their previous citations under the Camping Ordinance and the Disorderly Conduct Ordinance violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, and sought damages for those alleged violations under 42 U.S.C. § 1983. *Cf. Jones*, 444 F.3d at 1138. Anderson and Martin also sought prospective declaratory and injunctive relief precluding future enforcement of the ordinances under the same statute and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

After this litigation began, the Boise Police Department promulgated a new "Special Order," effective as of January 1, 2010, that prohibited enforcement of either the Camping Ordinance or the Disorderly Conduct Ordinance against any homeless person on public property on any night when no shelter had "an available overnight space." City police implemented the Special Order through a two-step procedure known as the "Shelter Protocol."

Under the Shelter Protocol, if any shelter in Boise reaches capacity on a given night, that shelter will so notify the police at roughly 11:00 pm. Each shelter has discretion to determine whether it is full, and Boise police have no other mechanism or criteria for gauging whether a shelter is full. Since the Shelter Protocol was adopted, Sanctuary has reported that it was full on almost 40% of nights. Although BRM agreed to the Shelter Protocol, its internal policy is never to turn any

person away because of a lack of space, and neither BRM shelter has ever reported that it was full.

If all shelters are full on the same night, police are to refrain from enforcing either ordinance. Presumably because the BRM shelters have not reported full, Boise police continue to issue citations regularly under both ordinances.

In July 2011, the district court granted summary judgment to the City. It held that the plaintiffs' claims for retrospective relief were barred under the *Rooker-Feldman* doctrine and that their claims for prospective relief were mooted by the Special Order and the Shelter Protocol. *Bell v. City of Boise*, 834 F. Supp. 2d 1103 (D. Idaho 2011). On appeal, we reversed and remanded. *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013). We held that the district court erred in dismissing the plaintiffs' claims under the *Rooker-Feldman* doctrine. *Id*. at 897. In so holding, we expressly declined to consider whether the favorable-termination requirement from *Heck v. Humphrey*, 512 U.S. 477 (1994), applied to the plaintiffs' claims for retrospective relief. Instead, we left the issue for the district court on remand. *Bell*, 709 F.3d at 897 n.11.

Bell further held that the plaintiffs' claims for prospective relief were not moot. The City had not met its "heavy burden" of demonstrating that the challenged conduct — enforcement of the two ordinances against homeless individuals with no access to shelter — "could not reasonably be expected to recur." *Id*. at 898, 901 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). We emphasized that the Special Order was a statement of administrative policy and so could be amended

or reversed at any time by the Boise Chief of Police. *Id*. at 899–900.

Finally, *Bell* rejected the City's argument that the plaintiffs lacked standing to seek prospective relief because they were no longer homeless. *Id*. at 901 & n.12. We noted that, on summary judgment, the plaintiffs "need not establish that they in fact have standing, but only that there is a genuine issue of material fact as to the standing elements." *Id.* (citation omitted).

On remand, the district court again granted summary judgment to the City on the plaintiffs' § 1983 claims. The court observed that *Heck* requires a § 1983 plaintiff seeking damages for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid" to demonstrate that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. at 486–87. According to the district court, "a judgment finding the Ordinances unconstitutional . . . necessarily would imply the invalidity of Plaintiffs' [previous] convictions under those ordinances," and the plaintiffs therefore were required to demonstrate that their convictions or sentences had already been invalidated. As none of the plaintiffs had raised an Eighth Amendment challenge as a defense to criminal prosecution, nor had any plaintiff successfully appealed their conviction, the district court held that all of the plaintiffs' claims for retrospective relief were barred by *Heck*. The district court also rejected as barred by *Heck* the plaintiffs' claim for prospective injunctive relief under § 1983, reasoning that "a ruling in favor of Plaintiffs on even a

prospective § 1983 claim would demonstrate the invalidity of any confinement stemming from those convictions."

Finally, the district court determined that, although *Heck* did not bar relief under the Declaratory Judgment Act, Martin and Anderson now lack standing to pursue such relief. The linchpin of this holding was that the Camping Ordinance and the Disorderly Conduct Ordinance were both amended in 2014 to codify the Special Order's mandate that "[l]aw enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter." Boise City Code §§ 6-01-05, 9-10-02. Because the ordinances, as amended, permitted camping or sleeping in a public place when no shelter space was available, the court held that there was no "credible threat" of future prosecution. "If the Ordinances are not to be enforced when the shelters are full, those Ordinances do not inflict a constitutional injury upon these particular plaintiffs . . . ." The court emphasized that the record "suggests there is no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity" and that "there has not been a single night when all three shelters in Boise called in to report they were simultaneously full for men, women or families."

This appeal followed.

II. Discussion

A. Standing

We first consider whether any of the plaintiffs has standing to pursue prospective relief.[5] We conclude that there are sufficient opposing facts in the record to create a genuine issue of material fact as to whether Martin and Anderson face a credible threat of prosecution under one or both ordinances in the future at a time when they are unable to stay at any Boise homeless shelter.[6]

"To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (citation omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes — that the injury is *certainly* impending." *Id*. (citation omitted). A plaintiff need not, however, await an arrest or prosecution to have standing to challenge the constitutionality of a criminal statute. "When the plaintiff has alleged an

[5] Standing to pursue retrospective relief is not in doubt. The only threshold question affecting the availability of a claim for retrospective relief — a question we address in the next section — is whether such relief is barred by the doctrine established in *Heck*.

[6] Although the SAC is somewhat ambiguous regarding which of the plaintiffs seeks prospective relief, counsel for the plaintiffs made clear at oral argument that only two of the plaintiffs, Martin and Anderson, seek such relief, and the district court considered the standing question with respect to Martin and Anderson only.

intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citation and internal quotation marks omitted). To defeat a motion for summary judgment premised on an alleged lack of standing, plaintiffs " need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

In dismissing Martin and Anderson's claims for declaratory relief for lack of standing, the district court emphasized that Boise's ordinances, as amended in 2014, preclude the City from issuing a citation when there is no available space at a shelter, and there is consequently no risk that either Martin or Anderson will be cited under such circumstances in the future. Viewing the record in the light most favorable to the plaintiffs, we cannot agree.

Although the 2014 amendments preclude the City from enforcing the ordinances when there is no room available at any shelter, the record demonstrates that the City is wholly reliant on the shelters to self-report when they are full. It is undisputed that Sanctuary is full as to men on a substantial percentage of nights, perhaps as high as 50%. The City nevertheless emphasizes that since the adoption of the Shelter Protocol in 2010, the BRM facilities, River of Life and City Light, have never reported that they are full, and BRM states that it will never turn people away due to lack space.

The plaintiffs have pointed to substantial evidence in the record, however, indicating that whether or not the BRM facilities are ever full or turn homeless individuals away *for lack of space*, they *do* refuse to shelter homeless people who exhaust the number of days allotted by the facilities. Specifically, the plaintiffs allege, and the City does not dispute, that it is BRM's policy to limit men to 17 consecutive days in the Emergency Services Program, after which they cannot return to River of Life for 30 days; City Light has a similar 30-day limit for women and children. Anderson testified that BRM has enforced this policy against him in the past, forcing him to sleep outdoors.

The plaintiffs have adduced further evidence indicating that River of Life permits individuals to remain at the shelter after 17 days in the Emergency Services Program only on the condition that they become part of the New Life Discipleship program, which has a mandatory religious focus. For example, there is evidence that participants in the New Life Program are not allowed to spend days at Corpus Christi, a local Catholic program, "because it's . . . a different sect." There are also facts in dispute concerning whether the Emergency Services Program itself has a religious component. Although the City argues strenuously that the Emergency Services Program is secular, Anderson testified to the contrary; he stated that he was once required to attend chapel before being permitted to eat dinner at the River of Life shelter. Both Martin and Anderson have objected to the overall religious atmosphere of the River of Life shelter, including the Christian messaging on the shelter's intake form and the Christian iconography on the shelter walls. A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment. *Inouye v.*

Kemna, 504 F.3d 705, 712–13 (9th Cir. 2007). Yet at the conclusion of a 17-day stay at River of Life, or a 30-day stay at City Light, an individual may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances), or enrolling in BRM programming that is antithetical to his or her religious beliefs.

The 17-day and 30-day limits are not the only BRM policies which functionally limit access to BRM facilities even when space is nominally available. River of Life also turns individuals away if they voluntarily leave the shelter before the 17-day limit and then attempt to return within 30 days. An individual who voluntarily leaves a BRM facility for any reason — perhaps because temporary shelter is available at Sanctuary, or with friends or family, or in a hotel — cannot immediately return to the shelter if circumstances change. Moreover, BRM's facilities may deny shelter to any individual who arrives after 5:30 pm, and generally will deny shelter to anyone arriving after 8:00 pm. Sanctuary, however, does not assign beds to persons on its waiting list until 9:00 pm. Thus, by the time a homeless individual on the Sanctuary waiting list discovers that the shelter has no room available, it may be too late to seek shelter at either BRM facility.

So, even if we credit the City's evidence that BRM's facilities have never been "full," and that the City has never cited any person under the ordinances who could not obtain shelter "due to a lack of shelter capacity," there remains a genuine issue of material fact as to whether homeless individuals in Boise run a credible risk of being issued a citation on a night when Sanctuary is full and they have been denied entry to a BRM facility for reasons other than shelter capacity. If so, then as a practical matter, no shelter is

available. We note that despite the Shelter Protocol and the amendments to both ordinances, the City continues regularly to issue citations for violating both ordinances; during the first three months of 2015, the Boise Police Department issued over 175 such citations.

The City argues that Martin faces little risk of prosecution under either ordinance because he has not lived in Boise since 2013. Martin states, however, that he is still homeless and still visits Boise several times a year to visit his minor son, and that he has continued to seek shelter at Sanctuary and River of Life. Although Martin may no longer spend enough time in Boise to risk running afoul of BRM's 17-day limit, he testified that he has unsuccessfully sought shelter at River of Life after being placed on Sanctuary's waiting list, only to discover later in the evening that Sanctuary had no available beds. Should Martin return to Boise to visit his son, there is a reasonable possibility that he might again seek shelter at Sanctuary, only to discover (after BRM has closed for the night) that Sanctuary has no space for him. Anderson, for his part, continues to live in Boise and states that he remains homeless.

We conclude that both Martin and Anderson have demonstrated a genuine issue of material fact regarding whether they face a credible risk of prosecution under the ordinances in the future on a night when they have been denied access to Boise's homeless shelters; both plaintiffs therefore have standing to seek prospective relief.

B. *Heck v. Humphrey*

We turn next to the impact of *Heck v. Humphrey* and its progeny on this case. With regard to retrospective relief, the

plaintiffs maintain that *Heck* should not bar their claims because, with one exception, all of the plaintiffs were sentenced to time served.[7] It would therefore have been impossible for the plaintiffs to obtain federal habeas relief, as any petition for a writ of habeas corpus must be filed while the petitioner is "in custody pursuant to the judgment of a State court." *See* 28 U.S.C. § 2254(a); *Spencer v. Kemna*, 523 U.S. 1, 7, 17–18 (1998). With regard to prospective relief, the plaintiffs emphasize that they seek only equitable protection against *future* enforcement of an allegedly unconstitutional statute, and not to invalidate any prior conviction under the same statute. We hold that although the *Heck* line of cases precludes most — but not all — of the plaintiffs' requests for retrospective relief, that doctrine has no application to the plaintiffs' request for an injunction enjoining prospective enforcement of the ordinances.

1. The *Heck* Doctrine

A long line of Supreme Court case law, beginning with *Preiser v. Rodriguez*, 411 U.S. 475 (1973), holds that a prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of his or her confinement, but must instead seek federal habeas corpus relief or analogous state relief. *Id.* at 477, 500. *Preiser* considered whether a prison inmate could bring a § 1983 action seeking an injunction to remedy an unconstitutional deprivation of good-time conduct credits. Observing that habeas corpus is the traditional instrument to obtain release from unlawful

[7] Plaintiff Pamela Hawkes was convicted of violating the Camping Ordinance or Disorderly Conduct Ordinance on twelve occasions; although she was usually sentenced to time served, she was twice sentenced to one additional day in jail.

confinement, *Preiser* recognized an implicit exception from § 1983's broad scope for actions that lie "within the core of habeas corpus" — specifically, challenges to the "fact or duration" of confinement. *Id*. at 487, 500. The Supreme Court subsequently held, however, that although *Preiser* barred inmates from obtaining an injunction to restore good-time credits via a § 1983 action, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the *prospective* enforcement of invalid prison regulations." *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (emphasis added).

Heck addressed a § 1983 action brought by an inmate seeking compensatory and punitive damages. The inmate alleged that state and county officials had engaged in unlawful investigations and knowing destruction of exculpatory evidence. *Heck*, 512 U.S. at 479. The Court in *Heck* analogized a § 1983 action of this type, which called into question the validity of an underlying conviction, to a cause of action for malicious prosecution, *id.* at 483–84, and went on to hold that, as with a malicious prosecution claim, a plaintiff in such an action must demonstrate a favorable termination of the criminal proceedings before seeking tort relief, *id*. at 486–87. "[T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id*.

Edwards v. Balisok, 520 U.S. 641 (1997) extended *Heck*'s holding to claims for declaratory relief. *Id.* at 648. The plaintiff in *Edwards* alleged that he had been deprived of earned good-time credits without due process of law, because the decisionmaker in disciplinary proceedings had concealed exculpatory evidence. Because the plaintiff's claim for declaratory relief was "based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed," *Edwards* held, it was "not cognizable under § 1983." *Id*. *Edwards* went on to hold, however, that a requested injunction requiring prison officials to date-stamp witness statements was not *Heck*-barred, reasoning that a "prayer for such *prospective* relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983." *Id*. (emphasis added).

Most recently, *Wilkinson v. Dotson*, 544 U.S. 74 (2005), stated that *Heck* bars § 1983 suits even when the relief sought is prospective injunctive or declaratory relief, "if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 81–82 (emphasis omitted). But *Wilkinson* held that the plaintiffs in that case *could* seek a prospective injunction compelling the state to comply with constitutional requirements in parole proceedings in the future. The Court observed that the prisoners' claims for future relief, "if successful, will not necessarily imply the invalidity of confinement or shorten its duration." *Id*. at 82.

The Supreme Court did not, in these cases or any other, conclusively determine whether *Heck*'s favorable-termination requirement applies to convicts who have no practical opportunity to challenge their conviction or sentence via a

petition for habeas corpus. *See Muhammad v. Close*, 540 U.S. 749, 752 & n.2 (2004). But in *Spencer*, five Justices suggested that *Heck* may not apply in such circumstances. *Spencer*, 523 U.S. at 3.

The petitioner in *Spencer* had filed a federal habeas petition seeking to invalidate an order revoking his parole. While the habeas petition was pending, the petitioner's term of imprisonment expired, and his habeas petition was consequently dismissed as moot. Justice Souter wrote a concurring opinion in which three other Justices joined, addressing the petitioner's argument that if his habeas petition were mooted by his release, any § 1983 action would be barred under *Heck*, yet he would no longer have access to a federal habeas forum to challenge the validity of his parole revocation. *Id*. at 18–19 (Souter, J., concurring). Justice Souter stated that in his view "*Heck* has no such effect," and that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id*. at 21. Justice Stevens, dissenting, stated that he would have held the habeas petition in *Spencer* not moot, but agreed that "[g]iven the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear . . . that he may bring an action under 42 U.S.C. § 1983." *Id*. at 25 n.8 (Stevens, J., dissenting).

Relying on the concurring and dissenting opinions in *Spencer*, we have held that the "unavailability of a remedy in habeas corpus because of mootness" permitted a plaintiff released from custody to maintain a § 1983 action for damages, "even though success in that action would imply the

invalidity of the disciplinary proceeding that caused revocation of his good-time credits." *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002). But we have limited *Nonnette* in recent years. Most notably, we held in *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), that even where a plaintiff had no practical opportunity to pursue federal habeas relief while detained because of the short duration of his confinement, *Heck* bars a § 1983 action that would imply the invalidity of a prior conviction if the plaintiff could have sought invalidation of the underlying conviction via direct appeal or state post-conviction relief, but did not do so. *Id*. at 1192 & n.12.

2. Retrospective Relief

Here, the majority of the plaintiffs' claims for *retrospective* relief are governed squarely by *Lyall.* It is undisputed that all the plaintiffs not only failed to challenge their convictions on direct appeal but expressly waived the right to do so as a condition of their guilty pleas. The plaintiffs have made no showing that any of their convictions were invalidated via state post-conviction relief. We therefore hold that all but two of the plaintiffs' claims for damages are foreclosed under *Lyall.*

Two of the plaintiffs, however, Robert Martin and Pamela Hawkes, also received citations under the ordinances that were dismissed before the state obtained a conviction. Hawkes was cited for violating the Camping Ordinance on July 8, 2007; that violation was dismissed on August 28, 2007. Martin was cited for violating the Disorderly Conduct Ordinance on April 24, 2009; those charges were dismissed on September 9, 2009. The complaint alleges two injuries stemming from these dismissed citations: (1) the continued

inclusion of the citations on plaintiffs' criminal records; and (2) the accumulation of a host of criminal fines and incarceration costs. Plaintiffs seek orders compelling the City to "expunge[] . . . the records of any homeless individuals unlawfully cited or arrested and charged under [the Ordinances]" and "reimburse[] . . . any criminal fines paid . . . [or] costs of incarceration billed."

With respect to these two incidents, the district court erred in finding that the plaintiffs' Eighth Amendment challenge was barred by *Heck*. Where there is no "conviction or sentence" that may be undermined by a grant of relief to the plaintiffs, the *Heck* doctrine has no application. 512 U.S. at 486–87; *see also Wallace v. Kato*, 549 U.S. 384, 393 (2007).

Relying on *Ingraham v. Wright*, 430 U.S. 651, 664 (1977), the City argues that the Eighth Amendment, and the Cruel and Unusual Punishments Clause in particular, have no application where there has been no conviction. The City's reliance on *Ingraham* is misplaced. As the Supreme Court observed in *Ingraham*, the Cruel and Unusual Punishments Clause not only limits the types of punishment that may be imposed and prohibits the imposition of punishment grossly disproportionate to the severity of the crime, but also "imposes substantive limits on what can be made criminal and punished as such." *Id*. at 667. "This [latter] protection governs the criminal law process as a whole, not only the imposition of punishment postconviction." *Jones*, 444 F.3d at 1128.

Ingraham concerned only whether "impositions outside the criminal process" — in that case, the paddling of schoolchildren — "constituted cruel and unusual

punishment." 430 U.S. at 667. *Ingraham* did not hold that a plaintiff challenging the state's power to criminalize a particular status or conduct in the first instance, as the plaintiffs in this case do, must first be convicted. If conviction were a prerequisite for such a challenge, "the state could in effect punish individuals in the preconviction stages of the criminal law enforcement process for being or doing things that under the [Cruel and Unusual Punishments Clause] cannot be subject to the criminal process." *Jones*, 444 F.3d at 1129. For those rare Eighth Amendment challenges concerning the state's very power to criminalize particular behavior or status, then, a plaintiff need demonstrate only the initiation of the criminal process against him, not a conviction.

3. Prospective Relief

The district court also erred in concluding that the plaintiffs' requests for prospective injunctive relief were barred by *Heck*. The district court relied entirely on language in *Wilkinson* stating that "a state prisoner's § 1983 action is barred (absent prior invalidation) . . . no matter the relief sought (damages or equitable relief) . . . *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson*, 544 U.S. at 81–82. The district court concluded from this language in *Wilkinson* that a person convicted under an allegedly unconstitutional statute may never challenge the validity or application of that statute after the initial criminal proceeding is complete, even when the relief sought is prospective only and independent of the prior conviction. The logical extension of the district court's interpretation is that an individual who does not successfully invalidate a first conviction under an unconstitutional statute will have no opportunity to challenge

that statute prospectively so as to avoid arrest and conviction for violating that same statute in the future.

Neither *Wilkinson* nor any other case in the *Heck* line supports such a result. Rather, *Wolff*, *Edwards*, and *Wilkinson* compel the opposite conclusion.

Wolff held that although *Preiser* barred a § 1983 action seeking restoration of good-time credits absent a successful challenge in federal habeas proceedings, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid . . . regulations." *Wolff*, 418 U.S. at 555. Although *Wolff* was decided before *Heck*, the Court subsequently made clear that *Heck* effected no change in the law in this regard, observing in *Edwards* that "[o]rdinarily, a prayer for . . . prospective [injunctive] relief will not 'necessarily imply' the invalidity of a *previous* loss of good-time credits, and so may properly be brought under § 1983." *Edwards*, 520 U.S. at 648 (emphasis added). Importantly, the Court held in *Edwards* that although the plaintiff could not, consistently with *Heck*, seek a declaratory judgment stating that the procedures employed by state officials that deprived him of good-time credits were unconstitutional, he *could* seek an injunction barring such allegedly unconstitutional procedures in the future. *Id*. Finally, the Court noted in *Wilkinson* that the *Heck* line of cases "has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies *when they seek to invalidate the duration of their confinement*," *Wilkinson*, 544 U.S. at 81 (emphasis added), alluding to an existing confinement, not one yet to come.

The *Heck* doctrine, in other words, serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge. In context, it is clear that *Wilkinson*'s holding that the *Heck* doctrine bars a § 1983 action "no matter the relief sought (damages or equitable relief) . . . if success in that action would necessarily demonstrate the invalidity of confinement or its duration" applies to equitable relief concerning an existing confinement, not to suits seeking to preclude an unconstitutional confinement in the future, arising from incidents occurring after any prior conviction and stemming from a possible later prosecution and conviction. *Id*. at 81–82 (emphasis added). As *Wilkinson* held, "claims for *future* relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration)" are distant from the "core" of habeas corpus with which the *Heck* line of cases is concerned, and are not precluded by the *Heck* doctrine. *Id*. at 82.

In sum, we hold that the majority of the plaintiffs' claims for retrospective relief are barred by *Heck*, but both Martin and Hawkes stated claims for damages to which *Heck* has no application. We further hold that *Heck* has no application to the plaintiffs' requests for prospective injunctive relief.

C. The Eighth Amendment

At last, we turn to the merits — does the Cruel and Unusual Punishments Clause of the Eighth Amendment preclude the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter? We hold that it does, for essentially the same reasons articulated in the now-vacated *Jones* opinion.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways." *Ingraham*, 430 U.S. at 667. First, it limits the type of punishment the government may impose; second, it proscribes punishment "grossly disproportionate" to the severity of the crime; and third, it places substantive limits on what the government may criminalize. *Id.* It is the third limitation that is pertinent here.

"Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California*, 370 U.S. 660, 667 (1962). Cases construing substantive limits as to what the government may criminalize are rare, however, and for good reason — the Cruel and Unusual Punishments Clause's third limitation is "one to be applied sparingly." *Ingraham*, 430 U.S. at 667.

Robinson, the seminal case in this branch of Eighth Amendment jurisprudence, held a California statute that "ma[de] the 'status' of narcotic addiction a criminal offense" invalid under the Cruel and Unusual Punishments Clause. 370 U.S. at 666. The California law at issue in *Robinson* was "not one which punishe[d] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration"; it punished addiction itself. *Id.* Recognizing narcotics addiction as an illness or disease — "apparently an illness which may be contracted innocently or involuntarily" — and observing that a "law which made a criminal offense of . . . a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment," *Robinson* held

the challenged statute a violation of the Eighth Amendment. *Id*. at 666–67.

As *Jones* observed, *Robinson* did not explain at length the principles underpinning its holding. *See Jones*, 444 F.3d at 1133. In *Powell v. Texas*, 392 U.S. 514 (1968), however, the Court elaborated on the principle first articulated in *Robinson*.

Powell concerned the constitutionality of a Texas law making public drunkenness a criminal offense. Justice Marshall, writing for a plurality of the Court, distinguished the Texas statute from the law at issue in *Robinson* on the ground that the Texas statute made criminal not alcoholism but *conduct* — appearing in public while intoxicated. "[A]ppellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home." *Id*. at 532 (plurality opinion).

The *Powell* plurality opinion went on to interpret *Robinson* as precluding only the criminalization of "status," not of "involuntary" conduct. "The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' . . . ." *Id*. at 533.

Four Justices dissented from the Court's holding in *Powell*; Justice White concurred in the result alone. Notably, Justice White noted that many chronic alcoholics are also homeless, and that for those individuals, public drunkenness may be unavoidable as a practical matter. "For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. . . . For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment — the act of getting drunk." *Id*. at 551 (White, J., concurring in the judgment).

The four dissenting Justices adopted a position consistent with that taken by Justice White: that under *Robinson*, "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change," and that the defendant, "once intoxicated, . . . could not prevent himself from appearing in public places." *Id*. at 567 (Fortas, J., dissenting). Thus, five Justices gleaned from *Robinson* the principle that "that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Jones*, 444 F.3d at 1135; *see also United States v. Roberston*, 875 F.3d 1281, 1291 (9th Cir. 2017).

This principle compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. As *Jones*

reasoned, "[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human." *Jones*, 444 F.3d at 1136. Moreover, any "conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." *Id.* As a result, just as the state may not criminalize the state of being "homeless in public places," the state may not "criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets." *Id*. at 1137.

Our holding is a narrow one. Like the *Jones* panel, "we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place." *Id*. at 1138. We hold only that "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]," the jurisdiction cannot prosecute homeless individuals for "involuntarily sitting, lying, and sleeping in public." *Id*. That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.[8]

[8] Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible. *See Jones*, 444 F.3d at 1123. So, too, might an ordinance barring the obstruction of public rights of way or the erection

We are not alone in reaching this conclusion. As one court has observed, "resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible. . . . As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment — sleeping, eating and other innocent conduct." *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992); *see also Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994) (holding that a "sleeping in public ordinance as applied against the homeless is unconstitutional"), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995).[9]

Here, the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with a

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of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the "universal and unavoidable consequences of being human" in the way the ordinance prescribes. *Id.* at 1136.

[9] In *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000), the Eleventh Circuit upheld an anti-camping ordinance similar to Boise's against an Eighth Amendment challenge. In *Joel*, however, the defendants presented unrefuted evidence that the homeless shelters in the City of Orlando had never reached capacity and that the plaintiffs had always enjoyed access to shelter space. *Id*. Those unrefuted facts were critical to the court's holding. *Id*. As discussed below, the plaintiffs here have demonstrated a genuine issue of material fact concerning whether they have been denied access to shelter in the past or expect to be so denied in the future. *Joel* therefore does not provide persuasive guidance for this case.

blanket or other basic bedding. The Disorderly Conduct Ordinance, on its face, criminalizes "[o]ccupying, lodging, or sleeping in *any* building, structure or place, whether public or private" without permission. Boise City Code § 6-01-05. Its scope is just as sweeping as the Los Angeles ordinance at issue in *Jones*, which mandated that "[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way." 444 F.3d at 1123.

The Camping Ordinance criminalizes using "any of the streets, sidewalks, parks or public places as a camping place at any time." Boise City Code § 9-10-02. The ordinance defines "camping" broadly:

> The term "camp" or "camping" shall mean the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at anytime between sunset and sunrise, or as a sojourn. Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).

Id. It appears from the record that the Camping Ordinance is frequently enforced against homeless individuals with some elementary bedding, whether or not any of the other listed

indicia of "camping" — the erection of temporary structures, the activity of cooking or making fire, or the storage of personal property — are present. For example, a Boise police officer testified that he cited plaintiff Pamela Hawkes under the Camping Ordinance for sleeping outside "wrapped in a blanket with her sandals off and next to her," for sleeping in a public restroom "with blankets," and for sleeping in a park "on a blanket, wrapped in blankets on the ground." The Camping Ordinance therefore can be, and allegedly is, enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements. We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.

III. Conclusion

For the foregoing reasons, we **AFFIRM** the judgment of the district court as to the plaintiffs' requests for retrospective relief, except as such claims relate to Hawkes's July 2007 citation under the Camping Ordinance and Martin's April 2009 citation under the Disorderly Conduct Ordinance. We **REVERSE** and **REMAND** with respect to the plaintiffs' requests for prospective relief, both declaratory and injunctive, and to the plaintiffs' claims for retrospective relief insofar as they relate to Hawkes' July 2007 citation or Martin's April 2009 citation.[10]

[10] Costs shall be awarded to the plaintiffs.

OWENS, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), bars the plaintiffs' 42 U.S.C. § 1983 claims for damages that are based on convictions that have not been challenged on direct appeal or invalidated in state post-conviction relief. *See Lyall v. City of Los Angeles*, 807 F.3d 1178, 1192 n.12 (9th Cir. 2015).

I also agree that *Heck* and its progeny have no application where there is no "conviction or sentence" that would be undermined by granting a plaintiff's request for relief under § 1983. *Heck*, 512 U.S. at 486–87; *see also Wallace v. Kato*, 549 U.S. 384, 393 (2007). I therefore concur in the majority's conclusion that *Heck* does not bar plaintiffs Robert Martin and Pamela Hawkes from seeking retrospective relief for the two instances in which they received citations, but not convictions. I also concur in the majority's Eighth Amendment analysis as to those two claims for retrospective relief.

Where I part ways with the majority is in my understanding of *Heck*'s application to the plaintiffs' claims for declaratory and injunctive relief. In *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the Supreme Court explained where the *Heck* doctrine stands today:

> [A] state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action

> would necessarily demonstrate the invalidity of confinement or its duration.

Id. at 81–82. Here, the majority acknowledges this language in *Wilkinson*, but concludes that *Heck*'s bar on any type of relief that "would necessarily demonstrate the invalidity of confinement" does not preclude the prospective claims at issue. The majority reasons that the purpose of *Heck* is "to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge," and so concludes that the plaintiffs' prospective claims may proceed. I respectfully disagree.

A declaration that the city ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions. Indeed, any time an individual challenges the constitutionality of a substantive criminal statute under which he has been convicted, he asks for a judgment that would necessarily demonstrate the invalidity of his conviction. And though neither the Supreme Court nor this court has squarely addressed *Heck*'s application to § 1983 claims challenging the constitutionality of a substantive criminal statute, I believe *Edwards v. Balisok*, 520 U.S. 641 (1997), makes clear that *Heck* prohibits such challenges. In *Edwards*, the Supreme Court explained that although our court had recognized that *Heck* barred § 1983 claims challenging the validity of a prisoner's confinement "as a substantive matter," it improperly distinguished as not *Heck*-barred *all* claims alleging only procedural violations. 520 U.S. at 645. In holding that *Heck* also barred those procedural claims that would necessarily imply the invalidity of a conviction, the Court did not question our conclusion that claims challenging a conviction "as a substantive matter" are barred by *Heck*.

Id.; *see also Wilkinson*, 544 U.S. at 82 (holding that the plaintiffs' claims could proceed because the relief requested would only "render invalid the state *procedures*" and "a favorable judgment [would] not 'necessarily imply the invalidity of [their] conviction[s] or sentence[s]'" (emphasis added) (quoting *Heck*, 512 U.S. at 487)).

Edwards thus leads me to conclude that an individual who was convicted under a criminal statute, but who did not challenge the constitutionality of the statute at the time of his conviction through direct appeal or post-conviction relief, cannot do so in the first instance by seeking declaratory or injunctive relief under § 1983. *See Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 405 F.3d 1298, 1316 n.9 (11th Cir. 2005) (assuming that a §1983 claim challenging "the constitutionality of the ordinance under which [the petitioner was convicted]" would be *Heck*-barred). I therefore would hold that *Heck* bars the plaintiffs' claims for declaratory and injunctive relief.

We are not the first court to struggle applying *Heck* to "real life examples," nor will we be the last. *See, e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Ginsburg, J., concurring) (alterations and internal quotation marks omitted) (explaining that her thoughts on *Heck* had changed since she joined the majority opinion in that case). If the slate were blank, I would agree that the majority's holding as to prospective relief makes good sense. But because I read *Heck* and its progeny differently, I dissent as to that section of the majority's opinion. I otherwise join the majority in full.

SUPREME COURT DOES NOT REVIEW CAMPING ORDINANCE

Yesterday the U.S. Supreme Court declined to review the Ninth Circuit Court of Appeal's ruling in the City of Boise case regarding the constitutionality of the city's camping ordinance. Since Woodburn is located in the Ninth Circuit, we have been closely monitoring this litigation.

It is interesting that Theodore Olson, a well-known advocate before the Supreme Court and a former Solicitor General, agreed to represent the City of Boise, reportedly at a greatly reduced rate. https://www.latimes.com/local/california/la-me-ln-homeless-encampment-sweep-boise-case-appeal-theodore-olson-supreme-court-20190702-story.html Idaho Legal Aid Services represented the six homeless people who originally filed the lawsuit. Nevertheless, the Court did not grant Boise review and the entire West Coast (including Woodburn) continues to be subject to this legal ruling.

The background is that Boise, like many cities, regulates camping and sleeping in public spaces to ensure that these areas remain safe, accessible, and sanitary for use of its residents. This case was brought on behalf of homeless people arguing that the camping ordinance was unconstitutional. The Ninth Circuit held that Boise's enforcement of its camping ordinance constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment of the U. S. Constitution when "there is a greater number of homeless individuals in [the jurisdiction] than the number of available beds [in shelters]."

Seen in a historical context, the Ninth Circuit ruling that the City of Boise violated the "cruel and unusual punishment" language contained in the Eighth Amendment by enforcing its camping ordinance is an extreme ruling. The phrase "cruel and unusual punishment" was copied by the constitutional framers from the 1689 English Declaration of Rights and was originally intended to address extreme punishments imposed as a matter of course (i.e., theft punished by death). The Ninth Circuit held that the ordinance barring public camping and sleeping is unconstitutional insofar as it applies to "any 'conduct [that] is involuntary and inseparable from status.'" The Supreme Court's prior decisions, however, confirm that the authority of local governments to enforce laws promoting public health, safety, and welfare is not contingent upon inquiries into the voluntariness of the regulated conduct.

Finally, it is somewhat surprising that the Supreme Court did not take review. The procedures in the Ninth Circuit are complicated and not worth going into here. However, six judges in the Ninth Circuit filed a dissenting opinion emphasizing that other courts, including the Fourth, Seventh, and Eleventh Circuits, as well as the California Supreme Court, "have routinely upheld state laws regulating acts that were allegedly compelled or involuntary," and warning that the decision will "prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination."

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLORIA JOHNSON; JOHN LOGAN, individuals, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellees*, v. CITY OF GRANTS PASS, *Defendant-Appellant*.	Nos. 20-35752 20-35881 D.C. No. 1:18-cv-01823-CL ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Oregon
Mark D. Clarke, Magistrate Judge, Presiding

Argued and Submitted December 6, 2021
San Francisco, California

Filed September 28, 2022
Amended July 5, 2023

Before: Ronald M. Gould and Daniel P. Collins, Circuit Judges, and Roslyn O. Silver,* District Judge.

* The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

Order;
Opinion By Judge Silver;
Dissent by Judge Collins;
Statement by Judges Silver and Gould;
Statement by Judge O'Scannlain;
Statement by Judge Graber;
Dissent by Judge M. Smith;
Dissent by Judge Collins;
Dissent by Judge Bress

SUMMARY**

Civil Rights / Homelessness

The panel issued an order amending the opinion and dissent filed September 28, 2002, and reported at 50 F.4th 787; filed an amended opinion and dissent concurrently with its order; and denied a petition for rehearing en banc after a request for a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration, in an action challenging City of Grants Pass ordinances which, among other things, preclude homeless persons from using a blanket, pillow, or cardboard box for protection from the elements while sleeping within City limits.

In the amended opinion, the panel affirmed in part and vacated in part the district court's summary judgment and

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

permanent injunction in favor of plaintiffs; affirmed certification pursuant to Fed. R. Civ. P. 23(b)(2), of a class of "involuntary homeless" persons; and remanded.

The five municipal ordinances, described as an "anti-sleeping" ordinance, two "anti-camping" ordinances, a "park exclusion" ordinance, and a "park exclusion appeals" ordinance, result in civil fines up to several hundred dollars per violation. Persons found to violate ordinances multiple times could be barred from all City property. If a homeless person is found on City property after receiving an exclusion order, they are subject to criminal prosecution for trespass.

The panel stated that this court's decision in *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), which held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter" served as the backdrop for this entire litigation. Pursuant to *Martin*, it is an Eight Amendment violation to criminally punish involuntarily homeless persons for sleeping in public if there are no other public areas or appropriate shelters where those individuals can sleep.

The panel first rejected the City's argument that the district court lacked jurisdiction because plaintiffs' claims were moot or because plaintiffs failed to identify any relief that was within a federal court's power to redress. The panel held that there was abundant evidence in the record establishing that homeless persons were injured by the City's enforcement actions in the past and it was undisputed that enforcements have continued. The panel further held that the relief sought by plaintiffs, enjoining enforcement of a few municipal ordinances aimed at involuntary homeless

persons, was redressable within the limits of Article III. The death of class representative Debra Blake while the matter was on appeal did not moot the class's claims as to all challenged ordinances except possibly the anti-sleeping ordinance. The panel vacated the summary judgment as to that ordinance and remanded to allow the district court the opportunity to substitute a class representative in Blake's stead. The remaining class representatives had standing to challenge the park exclusion, criminal trespass and anti-camping ordinances.

The panel held that, based on the record in this case, the district court did not err by finding plaintiffs satisfied the requirements of Fed. R. Civ. P. 23(a) such that a class could be certified under Rule 23(b)(2). Although the City appeared to suggest that *Martin*'s need for an individualized inquiry of each alleged involuntary homeless person's access to shelter defeated numerosity, commonality and typicality, the panel held that nothing in *Martin* precluded class actions. The panel held that the district court did not abuse its discretion in concluding the numerosity requirement was met; that plaintiffs' claims presented at least one question and answer common to the class; and that the class representatives' claims and defenses were typical of the class in that they were homeless persons who claimed that the City could not enforce the challenged ordinances against them when they have no shelter.

Addressing the merits, the panel affirmed the district court's ruling that the City of Grants Pass could not, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there was no other place in the City for them to go. The panel held that

Martin applied to civil citations where, as here, the civil and criminal punishments were closely intertwined.

There was no need to resolve whether the fines imposed under the anti-sleeping and anti-camping ordinances violated the Eighth Amendment's prohibition on excessive fines because the permanent injunction would result in no class member being fined for engaging in such protected activity. Finally, the panel held that it was unnecessary to decide whether plaintiffs properly pled their procedural due process challenge to the park exclusion appeals ordinance because subsequent to the district court's order, the City amended the ordinance.

The panel directed the district court on remand to narrow its injunction to enjoin only those portions of the anti-camping ordinances that prohibited conduct protected by *Martin* and this opinion. In particular, the district court should narrow its injunction to the anti-camping ordinances and enjoin enforcement of those ordinances only against involuntarily homeless persons for engaging in conduct necessary to protect themselves from the elements when there was no shelter space available.

Dissenting, Judge Collins stated that *Martin* seriously misconstrued the Eighth Amendment and the Supreme Court's caselaw construing it, but even assuming that *Martin* remains good law, today's decision—which both misreads and greatly expands *Martin*'s holding—is egregiously wrong. Although the majority's phrasing pays lip service to the fact that the persons at issue must be "involuntarily homeless," the majority also explicitly rejects the City's contention that the holding of *Martin* can only be applied after an individualized inquiry of each alleged involuntary homeless person's access to shelter. The net result, for class

certification purposes, is that any issue of individualized involuntariness is set aside and *Martin* is thereby reduced to a simplistic formula to be resolved on a classwide basis—into whether the number of homeless persons in the jurisdiction exceeds the number of available shelter beds. The majority's analysis fails because *Martin* does not allow the individualized inquiry into involuntariness to be set aside in this way. Further, the majority opinion combines its gross misreading of *Martin,* which requires an individualized inquiry, with a flagrant disregard of settled class-certification principles pertaining to commonality under Fed. R. Civ. P. 23(a) and the requirements of Fed. R. Civ. P. 23(b). The end result of this amalgamation of error is that the majority validates the core aspects of the district court's injunction in this case, which effectively requires the City of Grants Pass to allow all but one of its public parks to be used as homeless encampments.

In a joint statement regarding the denial of rehearing, District Judge Silver and Judge Gould wrote that Judge O'Scannlain's statement regarding the denial of rehearing and the dissent from Judge M. Smith significantly exaggerate the holding in *Johnson v. Grants Pass*. *Grants Pass*, relying on *Martin*, holds only that governments cannot criminalize the act of sleeping with the use of rudimentary protections from the elements in some public places when a person has nowhere else to sleep. It does not establish an unrestrained right for involuntarily homeless persons to sleep anywhere they choose. Nor does it require jurisdictions to cede all public spaces to involuntarily homeless persons. Judges Silver and Gould also explained that class certification was proper, that the commonality requirement was met, that the majority applied existing Supreme Court and Ninth Circuit authority to the record

presented by the parties, and that Judge O'Scannlain greatly overstated the extent to which *Martin* and *Grants Pass* fall on one side of an existing circuit split.

Respecting the denial of rehearing en banc, Judge O'Scannlain, joined by Judges Wallace, Callahan, Bea, Ikuta, Bennett, R. Nelson, Bade, Collins, Lee, Bress, Forrest, Bumatay, and VanDyke, and with whom Judge M. Smith joins as to all parts except Part II-A, states that with this decision, this Circuit's jurisprudence now effectively guarantees a personal federal constitutional 'right' for individuals to camp or to sleep on sidewalks and in parks, playgrounds, and other public places in defiance of traditional health, safety, and welfare laws—a dubious holding premised on a fanciful interpretation of the Eighth Amendment. Judge O'Scannlain writes that the *Boise* panel made no effort to ground its decision in the text, history, or tradition of the Eighth Amendment. Unfortunately, the problems created by *Boise* have now been visited upon the City of Grants Pass by the panel majority here, which has expanded *Boise*'s faulty holding to affirm an injunction effectively requiring the City to resign all but one of its public parks to be used as homeless encampments. This Circuit is the first and only federal circuit to have divined such a strange and sweeping mandate from the Cruel and Unusual Punishments Clause. The jurisprudence in this case is egregiously flawed and deeply damaging—at war with constitutional text, history, tradition, and Supreme Court precedent. And it conflicts with other circuits on a question of exceptional importance—paralyzing local communities from addressing the pressing issue of homelessness, and seizing policymaking authority that the federal system of government leaves to the democratic process.

Respecting the denial of rehearing en banc, Judge Graber agreed with the basic legal premise that the Eighth Amendment protects against criminal prosecution of the involuntary act of sleeping but stated that the injunctive relief in this case goes too far. The extension of *Martin* to classwide relief, enjoining civil statutes that may eventually lead to criminal violations but have never resulted in criminal convictions for any named plaintiff, is a step too far from the individualized inquiries inherent both in the Eighth Amendment context and in the context of injunctive relief. Even assuming that classwide injunctive relief were available against a prosecution for criminal trespass, the Eighth Amendment does not prohibit all civil remedies that could, in theory, lead to such a prosecution. In this way, *Johnson* unjustifiably expands the reach of the Eighth Amendment.

Dissenting from the denial of rehearing en banc, Judge M. Smith, joined by Judges Bennett, Bumatay, and VanDyke, and with whom Judges Ikuta, R. Nelson, Bade, Collins and Bress join as to Parts I and II, stated that *Martin* cannot be squared with the Supreme Court's Eighth Amendment precedent; that the amendment to the original opinion is not accompanied by any downstream changes to the majority's application of its rule to the facts or its ultimate conclusion; and that by wholly collapsing the merits into the class definition, the majority opinion certifies an impermissible "fail safe" class. Local governments are hard-pressed to find any way to regulate the adverse health and safety effects of homeless encampments without running afoul of this court's case law—or, at a minimum, being saddled with litigation costs. Judge M. Smith states that *Martin*, particularly now that it has been supercharged by *Grants Pass*, has proven to be a runaway train that has

derailed and done substantial collateral damage to the governmental units in which it has been applied and those living therein. These cases use a misreading of Supreme Court precedent to require unelected federal judges—often on the basis of sloppy, mixed preliminary-injunction records—to act more like homelessness policy czars than as Article III judges applying a discernible rule of law.

Dissenting from the denial of rehearing en banc, Judge Collins states that the panel majority's joint statement regarding the denial of rehearing confirms and illustrates the layers of self-contradiction that underlie its opinion in this case, and that the panel majority is wrong to suggest that a newly enacted Oregon statute regulating the application of local ordinances to homeless individuals provides another reason to not rehear this case en banc.

Dissenting from the denial of rehearing en banc, Judge Bress, joined by Judges Callahan, M. Smith, Ikuta, Bennett, R. Nelson, Miller, Bade, Lee, Forrest, Bumatay and VanDyke, states that with no mooring in the text of the Constitution, our history and traditions, or the precedent of the Supreme Court, the court has taken our national founding document and used it to enact judge-made rules governing who can sit and sleep where, rules whose ill effects are felt not merely by the States, and not merely by our cities, but block by block, building by building, doorway by doorway. Local leaders—and the people who elect them—must be allowed the latitude to address on the ground the distinctly local features of the present crisis of homelessness and lack of affordable housing. Not every challenge we face is constitutional in character. Not every problem in our country has a legal answer that judges can provide. This is one of those situations.

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ORDER

The Opinion filed September 28, 2022, and reported at 50 F.4th 787, is hereby amended. The amended opinion will be filed concurrently with this order.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. Judge Watford did not participate in the deliberations or vote in this case.

Future petitions for rehearing or rehearing en banc will not be entertained in this case.

The petition for rehearing en banc is **DENIED**.

OPINION

SILVER, District Judge:

The City of Grants Pass in southern Oregon has a population of approximately 38,000. At least fifty, and perhaps as many as 600, homeless persons live in the City.[1] And the number of homeless persons outnumber the available shelter beds. In other words, homeless persons have nowhere to shelter and sleep in the City other than on the streets or in parks. Nonetheless, City ordinances preclude homeless persons from using a blanket, a pillow, or a cardboard box for protection from the elements while sleeping within the City's limits. The ordinances result in civil fines up to several hundred dollars per violation and persons found to violate ordinances multiple times can be barred from all City property. And if a homeless person is found on City property after receiving an exclusion order, they are subject to criminal prosecution for trespass.

In September 2018, a three-judge panel issued *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), holding "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Id.* at 1048. Approximately six weeks after the initial *Martin* panel opinion, three homeless individuals filed a putative class action complaint against the City arguing a number of City ordinances were unconstitutional. The district court certified a class of "involuntarily homeless"

[1] During this litigation the parties have used different phrases when referring to this population. For simplicity, we use "homeless persons" throughout this opinion.

persons and later granted partial summary judgment in favor of the class.[2] After the plaintiffs voluntarily dismissed some claims not resolved at summary judgment, the district court issued a permanent injunction prohibiting enforcement against the class members of some City ordinances, at certain times, in certain places. The City now appeals, arguing this case is moot, the class should not have been certified, the claims fail on the merits, and Plaintiffs did not adequately plead one of their theories. On the material aspects of this case, the district court was right.[3]

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[2] Persons are involuntarily homeless if they do not "have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free." *See Martin*, 920 F.3d at 617 n.8. However, someone who has the financial means to obtain shelter, or someone who is staying in an emergency shelter is not involuntarily homeless. *See id.* at 617 n.8. Contrary to the City's argument, this definition of involuntary homelessness is not the same as the definition of "homeless" found in regulations for the Department of Housing and Urban Development, 24 C.F.R. § 582.5, or the McKinney-Vento Act, 42 U.S.C. § 11434a(2), the federal law regarding the right of homeless children to a public education. For example, the McKinney-Vento Act includes as "homeless children and youths" persons who may not qualify as involuntarily homeless under *Martin*, such as children and youths "living in emergency or transitional shelters." 42 U.S.C. § 11434a(2). Though the district court noted in part that Plaintiffs met the definition of homelessness set forth in 24 C.F.R. § 582.5, the district court also relied on the specific definition of unsheltered homeless persons set forth in the Department of Housing and Urban Development's regulations regarding point-in-time counts: "persons who are living in a place not designed or ordinarily used as a regular sleeping accommodation for humans must be counted as unsheltered homeless persons." 24 C.F.R. § 578.7(c)(2)(i).

[3] Our dissenting colleague's strong disagreement with the majority largely arises from his disapproval of *Martin*. *See, e.g.*, Dissent 56 ("Even assuming *Martin* remains good law . . ."); Dissent 90 (". . . and the gravity of *Martin*'s errors."); Dissent 92 (claiming, without evidence,

I.

This case involves challenges to five provisions of the Grants Pass Municipal Code ("GPMC"). The provisions can be described as an "anti-sleeping" ordinance, two "anti-camping" ordinances, a "park exclusion" ordinance, and a "park exclusion appeals" ordinance. When the district court entered judgment, the various ordinances consisted of the following.

First, the anti-sleeping ordinance stated, in full

> Sleeping on Sidewalks, Streets, Alleys, or Within Doorways Prohibited
>
> A. No person may sleep on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety.
>
> B. No person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk.
>
> C. In addition to any other remedy provided by law, any person found in violation of this section may be immediately removed from the premises.

GPMC 5.61.020. A violation of this ordinance resulted in a presumptive $75 fine. If unpaid, that fine escalated to $160. If a violator pled guilty, the fines could be reduced by a state

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that "it is hard to deny that *Martin* has 'generate[d] dire practical consequences") (modification in original and citation omitted). But *Martin* is controlling law in the Ninth Circuit, to which we are required to adhere.

circuit court judge to $35 for a first offense and $50 for a second offense. GPMC 1.36.010(K).

Next, the general anti-camping ordinance prohibited persons from occupying a "campsite" on all public property, such as parks, benches, or rights of way. GPMC 5.61.030. The term "campsite" was defined as

> any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed, established, or maintained for the purpose of maintaining a temporary place to live, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.

GPMC 5.61.010. A second overlapping anti-camping ordinance prohibited camping in public parks, including "[o]vernight parking" of any vehicle. GPMC 6.46.090. A homeless individual would violate this parking prohibition if she parked or left "a vehicle parked for two consecutive hours [in a City park] . . . between the hours of midnight and 6:00 a.m." *Id.* Violations of either anti-camping ordinance resulted in a fine of $295. If unpaid, the fine escalated to $537.60. However, if a violator pled guilty, the fine could be reduced to $180 for a first offense and $225 for a second offense. GPMC 1.36.010(J).

Finally, the "park exclusion" ordinance allowed a police officer to bar an individual from all city parks for 30 days if, within one year, the individual was issued two or more citations for violating park regulations. GPMC 6.46.350(A). Pursuant to the "park exclusion appeals" ordinance, exclusion orders could be appealed to the City Council.

GPMC 6.46.355. If an individual received a "park exclusion" order, but subsequently was found in a city park, that individual would be prosecuted for criminal trespass.

Since at least 2013, City leaders have viewed homeless persons as cause for substantial concern. That year the City Council convened a Community Roundtable ("Roundtable") "to identify solutions to current vagrancy problems." Participants discussed the possibility of "driving repeat offenders out of town and leaving them there." The City's Public Safety Director noted police officers had bought homeless persons bus tickets out of town, only to have the person returned to the City from the location where they were sent. A city councilor made clear the City's goal should be "to make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road." The planned actions resulting from the Roundtable included increased enforcement of City ordinances, including the anti-camping ordinances.

The year following the Roundtable saw a significant increase in enforcement of the City's anti-sleeping and anti-camping ordinances. From 2013 through 2018, the City issued a steady stream of tickets under the ordinances.[4] On September 4, 2018, a three-judge panel issued its opinion in

[4] The City issued the following number of tickets under the anti-sleeping and anti-camping ordinances:

2013: 74 total tickets
2014: 228 total tickets
2015: 80 total tickets
2016: 47 total tickets
2017: 99 total tickets
2018: 46 total tickets

Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018).[5] That case served as the backdrop for this entire litigation.

In *Martin*, six homeless or recently homeless individuals sued the city of Boise, Idaho, seeking relief from criminal prosecution under two city ordinances related to public camping. *Martin*, 920 F.3d at 603-04. As relevant here, *Martin* held the Cruel and Unusual Punishment Clause of the "Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Id.* at 616. *Martin* made clear, however, that a city is not required to "provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place." *Id.* at 617 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)) (omission in original).

[5] Following the opinion, the City of Boise petitioned for rehearing en banc. On April 1, 2019, an amended panel opinion was issued and the petition for rehearing was denied. Judge M. Smith, joined by five other judges, dissented from the denial of rehearing en banc. He argued the three-judge panel had, among other errors, misinterpreted the Supreme Court precedents regarding the criminalization of involuntary conduct. *Martin*, 920 F.3d at 591-92 (M. Smith, J., dissenting from denial of rehearing en banc). Judge Bennett, joined by four judges, also dissented from the denial of rehearing en banc. Judge Bennett argued the three-judge panel's opinion was inconsistent with the original public meaning of the Cruel and Unusual Punishment Clause. *Id.* at 599 (Bennett, J., dissenting from denial of rehearing en banc). The merits of those dissents do not alter the binding nature of the amended *Martin* panel opinion. Unless otherwise indicated, all citations to *Martin* throughout the remainder of this opinion are to the amended panel opinion.

Pursuant to *Martin*, it is an Eighth Amendment violation to criminally punish involuntarily homeless persons for sleeping in public if there are no other public areas or appropriate shelters where those individuals can sleep. *Id.* at 617 n.8 ("Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it."). When assessing the number of shelter spaces, *Martin* held shelters with a "mandatory religious focus" could not be counted as available due to potential violations of the First Amendment's Establishment Clause. *Id.* at 609-10 (citing *Inouye v. Kemna*, 504 F.3d 705, 712-13 (9th Cir. 2007)).

In October 2018, approximately six weeks after the *Martin* opinion, Debra Blake filed her putative class action complaint against the City. The complaint alleged enforcement of the City's anti-sleeping and anti-camping ordinances violated the Cruel and Unusual Punishment Clause of the Eighth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment. The complaint was amended to include additional named plaintiffs and to allege a claim that the fines imposed under the ordinances violated the Excessive Fines Clause of the Eighth Amendment. On January 2, 2019, a few months after the initial complaint was filed, and before Plaintiffs filed their class certification motion, the City amended its anti-camping ordinance in an attempt to come into compliance with *Martin*. Prior to this change, the anti-camping ordinance was worded such that "'sleeping' in parks . . . automatically constitut[ed] 'camping.'" According to the City, "in direct response to *Martin v. Boise*, the City amended [the anti-camping

ordinance] to make it clear that the act of 'sleeping' was to be distinguished from the prohibited conduct of 'camping.'" The City meant to "make it clear that those without shelter *could* engage in the involuntary acts of sleeping or resting in the City's parks." Shortly after the City removed "sleeping" from the "camping" definition, Plaintiffs moved to certify a class. Plaintiffs requested certification of a class defined as

> All involuntarily homeless individuals living in Grants Pass, Oregon, including homeless individuals who sometimes sleep outside city limits to avoid harassment and punishment by [the City] as addressed in this lawsuit.

Plaintiffs' class certification motion was accompanied by a declaration from the Chief Operating Officer and Director of Housing and Homeless Services for United Community Action Network ("UCAN"), a non-profit organization that serves homeless people in Josephine County, the county where the City is located.[6] UCAN had recently conducted a "point-in-time count of homeless individuals in Josephine County."[7] Based on that count, the Chief Operating

[6] The Department of Housing and Urban Development regulations impose obligations on the "continuum of care," which is defined as "the group composed of representatives of relevant organizations . . . that are organized to plan for and provide, as necessary, a system of outreach, engagement, and assessment . . . to address the various needs of homeless persons and persons at risk of homelessness for a specific geographic area." 24 C.F.R. § 576.2.

[7] As the "continuum of care" in the City, UCAN was required to conduct point-in-time counts ("PIT counts") of homeless persons within that geographic area. 24 C.F.R. § 578.7(c)(2). PIT counts measure the number of sheltered and unsheltered homeless individuals on a single night. 24 C.F.R. § 578.7(c)(2). The *Martin* court relied on PIT counts

Officer's declaration stated "[h]undreds of [homeless] people live in Grants Pass," and "almost all of the homeless people in Grants Pass are involuntarily homeless. There is simply no place in Grants Pass for them to find affordable housing or shelter. They are not choosing to live on the street or in the woods."

The City opposed class certification, arguing Plaintiffs had not provided sufficient evidence to meet any of the requirements for certifying a class. The district court disagreed and certified the class proposed by Plaintiffs. The parties proceeded with discovery and filed cross-motions for summary judgment.

At the time the parties filed their summary judgment motions, there were only four locations in the City that temporarily housed homeless persons, which proved inadequate. One location was run by the Gospel Rescue Mission, an explicitly religious organization devoted to helping the poor. The Gospel Rescue Mission operated a facility for single men without children, and another facility for women, including women with children. These two facilities required residents to work at the mission six hours a day, six days a week in exchange for a bunk for 30 days. Residents were required to attend an approved place of worship each Sunday and that place of worship had to espouse "traditional Christian teachings such as the Apostles Creed." Disabled persons with chronic medical or mental

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conducted by local non-profits to determine the number of homeless people in the jurisdiction. *See Martin*, 920 F.3d at 604. Courts and experts note that PIT counts routinely undercount homeless persons, but they appear to be the best available source of data on homelessness. *See, e.g.*, *id.*

health issues that prevented them from complying with the Mission's rules were prohibited.[8]

In addition to the Gospel Rescue Mission, the City itself operated a "sobering center" where law enforcement could transport intoxicated or impaired persons. That facility consisted of twelve locked rooms with toilets where intoxicated individuals could sober up. The rooms did not have beds. The City also provided financial support to the Hearts with a Mission Youth Shelter, an 18-bed facility where unaccompanied minors aged 10 to 17 could stay for up to 72 hours, and could stay even longer if they had parental consent.

Finally, on nights when the temperature was below 30 degrees (or below 32 degrees with snow), UCAN operated a "warming center" capable of holding up to 40 individuals. That center did not provide beds. The center reached capacity on every night it operated except the first night it opened, February 3, 2020. Between February 3 and March 19, 2020, the warming center was open for 16 nights. The center did not open at all during the winter of 2020-2021.

Presented with evidence of the number of homeless persons and the shelter spaces available, the district court concluded "[t]he record is undisputed that Grants Pass has far more homeless individuals than it has practically available shelter beds." The court then held that, based on the unavailability of shelter beds, the City's enforcement of its anti-camping and anti-sleeping ordinances violated the

[8] Multiple class members submitted uncontested declarations to the district court stating they did not stay at the Gospel Rescue Mission because they suffer from disqualifying disabilities and/or were unwilling to attend church.

Cruel and Unusual Punishment Clause. The fact that *Martin* involved criminal violations while the present case involved initial civil violations that matured into criminal violations made "no difference for Eight Amendment purposes." Next, the court held the system of fines violated the Eighth Amendment's Excessive Fines Clause.[9] Finally, the court held the appeals process for park exclusions violated procedural due process under the Due Process Clause of the Fourteenth Amendment.

In reaching its decision the district court was careful to point out that, consistent with *Martin*, the scope of its decision was limited. The court's order made clear that the City was not required to provide shelter for homeless persons and the City could still limit camping or sleeping at certain times and in certain places. The district court also noted the City may still "ban the use of tents in public parks," "limi[t] the amount of bedding type materials allowed per individual," and pursue other options "to prevent the

[9] Part of the City's argument on this issue was that the fines are not mandatory because state court judges retain discretion not to impose fines. This is inconsistent with the text of the ordinances and not supported by the record. The provision of the municipal code defining penalties for ordinance violations clarifies that the fines are mandatory. It provides, the fines "*shall* be $295" and "*shall* be $75." GPMC 1.36.010(J)-(K) (emphasis added). Conversely, it is only discretionary to reduce fines because the relevant ordinance provides that, "[u]pon a plea of guilty . . . the penalty *may* be reduced" to the amount listed for a first or second offense. *Id.* (emphasis added). After a second citation, there is no authority within the municipal code that permits judges to reduce fines, and there is no evidence in the record demonstrating circuit court judges have reduced fines except pursuant to GPMC 1.36.010.

erection of encampments that cause public health and safety concerns."[10]

Approximately one month after the summary judgment order, the district court issued a judgment which included a permanent injunction that provided a complicated mix of relief. First, the district court declared the ordinance regarding the appeals of park exclusions failed to provide "adequate procedural due process," but that ordinance was not permanently enjoined. Instead, the district court enjoined only the enforcement of the underlying park exclusion ordinance. Next, the district court declared enforcement of the anti-sleeping and anti-camping ordinances against class members "violates the Eighth Amendment prohibition against cruel and unusual punishment" and "violates the Eighth Amendment prohibition against excessive fines." Without explanation, however, the district court did not enjoin those ordinances in their entirety. Rather, the district court entered no injunctive relief regarding the anti-sleeping ordinance. But the district court permanently enjoined enforcement of the anti-camping ordinances, as well as an ordinance regarding "criminal trespassing on city property related to parks," in all City parks at night except for one park where the parties agreed the injunction need not apply.[11] The district court also permanently enjoined enforcement of the anti-camping ordinances during daytime hours unless an initial warning was given "at least 24 hours before enforcement."

[10] The district court denied summary judgment on other claims brought by Plaintiffs. Those claims were subsequently voluntarily dismissed.

[11] The City ordinance regarding "criminal trespass" was never at issue in the litigation until the permanent injunction. Plaintiffs explain it was included in the injunction "[b]y agreement of the parties."

Accordingly, under the permanent injunction, the anti-camping ordinances may be enforced under some circumstances during the day, but never at night.

The City appealed and sought initial en banc review to clarify the scope of *Martin*. The petition for initial hearing en banc was denied.

II.

The core issue involving enforcement of the anti-camping ordinances is governed in large part by *Martin*. While there are some differences between *Martin* and the present case, the City has not identified a persuasive way to differentiate its anti-camping ordinances from the questioned ordinances in *Martin*. Therefore, the district court's ruling that the Cruel and Unusual Punishment Clause bars enforcement of the anti-camping ordinances will be mostly affirmed. We need not address the potential excessiveness of the fines issue or whether Plaintiffs adequately pled their due process challenge.

Our analysis proceeds in five parts. First, we reject the City's argument that the district court lacked jurisdiction.[12] Second, we find no abuse of discretion in the district court's certification of a class of involuntarily homeless persons. Third, we agree with the district court that at least portions of the anti-camping ordinance violate the Cruel and Unusual Punishment clause under *Martin*. Fourth, we conclude there is no need to resolve whether the fines violate the Excessive

[12] However, we vacate summary judgment and remand as to the anti-sleeping ordinance to afford the district court the opportunity to substitute a class representative in place of Debra Blake, who passed away while this matter was on appeal.

Fines clause. Fifth, we hold it is unnecessary to decide Plaintiffs' procedural due process claim.

A.

Standing and mootness are questions of law that we review de novo. *Hartman v. Summers*, 120 F.3d 157, 159 (9th Cir. 1997); *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003). "Federal courts must determine that they have jurisdiction before proceeding to the merits," and plaintiffs must demonstrate standing as a necessary component of jurisdiction. *Lance v. Coffman*, 549 U.S. 437, 439 (2007). To have Article III standing, a plaintiff must show (1) a concrete and particularized injury, (2) caused by the challenged conduct, (3) that is likely redressable by a favorable judicial decision. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). For purposes of injunctive relief, "[a]bstract injury is not enough"—the plaintiff must have sustained or be in immediate danger "of sustaining some direct injury as the result of the challenged" law. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (quotation marks and citation omitted).

The City's appellate briefing makes two standing arguments. First, the City argues Plaintiffs' claims are now moot because Plaintiffs no longer face a risk of injury based on the City's changed behavior after *Martin*. Second, the City argues Plaintiffs have not identified any relief that is within a federal court's power to redress. Both arguments are without merit.

A claim becomes moot, and no longer justiciable in federal court, if it has been remedied independent of the court. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013). There is abundant evidence in the record establishing homeless persons were injured by the City's

enforcement actions in the past. The City argues, however, that it made changes after *Martin* such that there is no longer a threat of future injury. The problem for the City is that voluntary cessation of challenged practices rarely suffices to moot a case and, in any event, there is evidence the challenged practices have continued after *Martin*.

"It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). This is so "because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). Thus, the City "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190. Instead of the City making it "absolutely clear" it has stopped enforcement activities, the record shows ongoing enforcement.

The parties diverge substantially on how to characterize the degree of enforcement after *Martin* was issued in September 2018. The City argued in its briefing and at oral argument that it has largely complied with *Martin*, noting the 2019 amendment to an anti-camping ordinance, that citations were issued "sparingly" in 2019, and in particular it says it issued only two citations during the late evening and early morning since *Martin*. The City supports its petition with a declaration from a City police officer stating "[i]t is the regular practice of every officer I know of on this department to enforce these Ordinances sparingly and in recognition of the different circumstances we encounter."

As for Plaintiffs, they offered evidence showing enforcement continued after *Martin* such that class members received citations and exclusion orders for camping or sleeping and were prosecuted for criminal trespass between the point the lawsuit was filed and the close of discovery.

Although the record does show the rate of enforcement of the various ordinances decreased since *Martin*, even accepting the City's position the evidence is undisputed that enforcement continued.[13] It is plainly inaccurate for the City to claim all enforcement ceased. The ongoing enforcement activities establish the City did not meet its "formidable burden" of showing the challenged activities will not recur. *Friends of the Earth*, 528 U.S. at 190. The City's mootness argument fails.[14]

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[13] The City also argues "there was no evidence that anyone was ever cited for the simple act of sleeping in a City park" after *Martin*. But the citation issued to Dolores Nevin in late December 2019 pursuant to the City's "criminal trespass" ordinance included a narrative explaining, "[d]uring an area check of Riverside Park, Dolores Nevin was found *sleeping* during closed hours. Nevin, who has been warned in the past, was issued a citation for Trespass on City Property." (emphasis added). And on September 11, 2019, Grants Pass Police Officer Jason McGinnis issued citations to Debra Blake and Carla Thomas for being in Riverside Park at approximately 7:30 a.m. with sleeping bags and belongings spread around themselves. The citation given to Debra Blake, a named plaintiff, identified the offense as "Criminal Trespass on City Property." Debra Blake was later convicted of that offense and fined. Other individuals cited for camping in a city park in 2019 include class members: Gail Laine, William Stroh, Dawn Schmidt, Cristina Trejo, Kellie Parker, Colleen Bannon, Amanda Sirnio, and Michael and Louana Ellis.

[14] Mootness was also considered during the *Martin* litigation. *See Bell v. City of Boise*, 709 F.3d 890, 898, 900-01 (9th Cir. 2013). The City of Boise argued that a combination of an amended definition of "camping"

The City's other jurisdictional argument is that Plaintiffs' claims are not redressable. According to the City, any possible relief intrudes inappropriately upon matters of policy best left to executive and legislative discretion. We disagree. Consistent with *Martin*, the district court granted limited relief enjoining enforcement of a few municipal ordinances at certain times, in certain places, against certain persons. None of the cases cited by the City credibly support its argument that the district court injunction overstepped the judiciary's limited authority under the Constitution. Contrary to the City's position, enjoining enforcement of a few municipal ordinances aimed at involuntarily homeless persons cannot credibly be compared to an injunction seeking to require the federal government to "phase out fossil fuel emissions and draw down excess atmospheric CO2." *Juliana v. United States*, 947 F.3d 1159, 1164-65 (9th Cir. 2020). The relief sought by Plaintiffs was redressable within the limits of Article III. *See Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (holding a plaintiff's burden to demonstrate redressability is "relatively modest") (citation omitted).

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in the ordinance and a "Special Order," prohibiting police officers from enforcing the ordinances when a person is on public property and there is no available overnight shelter, mooted the case. *Id.* at 894-95. We rejected the argument that the change to the definition of "camping" rendered the case moot because "[m]ere clarification of the Camping Ordinance does not address the central concerns of the Plaintiffs' Eighth Amendment claims"—that the ordinance "effectively criminalized their status as homeless individuals." *Id.* at 898 n.12. And we held the adoption of a "Special Order" did not moot the case because the Special Order was not a legislative enactment, and as such it "could be easily abandoned or altered in the future." *Id.* at 901.

Finally, we raise *sua sponte* the possibility that the death of class representative Debra Blake while this matter was on the appeal has jurisdictional significance. *Cf. Fort Bend Cty. v. Davis*, 139 S.Ct. 1843, 1849 (2019) (holding courts must raise issues of subject matter jurisdiction *sua sponte*). We hold Blake's death does not moot the class's claims as to all challenged ordinances except possibly the anti-sleeping ordinance. As to that ordinance, we remand to allow the district court the opportunity to substitute a class representative in Blake's stead.

With respect to the park exclusion, criminal trespass, and anti-camping ordinances, the surviving class representatives, Gloria Johnson[15] and John Logan,[16] have standing in their

[15] The dissent suggests Gloria Johnson does not have standing to challenge the park exclusion and criminal trespass ordinances. Dissent 71-72. The dissent concedes, however, Johnson has standing to challenge the anti-camping ordinances, GPMC 5.61.030, 6.46.090. But the dissent does not provide a meaningful explanation why it draws this distinction between the ordinances that work in concert. It is true Johnson has not received a park exclusion order and has not been charged with criminal trespass in the second degree. However, there is little doubt that her continued camping in parks would lead to a park exclusion order and, eventually, criminal trespass charges. Johnson is positioned to bring a pre-enforcement challenge against the park exclusion and criminal trespass ordinances, because they will be used against her given the undisputed fact that she remains involuntarily homeless in Grants Pass. She established a credible threat of future enforcement under the anti-camping ordinances which creates a credible threat of future enforcement under the park exclusion and criminal trespass ordinances.

[16] The dissent claims John Logan has not established standing. Dissent 69-71. During the course of this case, Logan submitted two declarations. At the class certification stage, his declaration stated he "lived out of [his] truck on the streets in Grants Pass for about 4 years." During that time, he was "awakened by City of Grants Pass police officer and told that I cannot sleep in my truck anywhere in the city and ordered to move

own right. Although they live in their cars, they risk enforcement under all the same ordinances as Blake and the class (with the exception of the anti-sleeping ordinance, GPMC 5.61.020, which cannot be violated by sleeping in a car) and have standing in their own right as to all ordinances except GPMC 5.61.020.

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on." To avoid those encounters, Logan "usually sleep[s] in [his] truck just outside the Grants Pass city limits." However, Logan stated "[i]f there was some place in the city where [he] could legally sleep in [his] truck, [he] would because it would save valuable gas money and avoid . . . having to constantly move." Logan also explained he has "met dozens, if not hundreds, of homeless people in Grants Pass" over the years who had been ticketed, fined, arrested, and criminally prosecuted "for living outside." At summary judgment, Logan submitted a declaration stating he is "currently involuntarily homeless in Grants Pass and sleeping in [his] truck at night at a rest stop North of Grants Pass." He stated he "cannot sleep in the City of Grants Pass for fear that [he] will be awakened, ticketed, fined, moved along, trespassed and charged with Criminal Trespass." The dissent reads this evidence as indicating Logan failed to "provide[] any facts to establish" that he is likely to be issued a citation under the challenged ordinances. Dissent 70. We do not agree. The undisputed facts establish Logan is involuntarily homeless. When he slept in Grants Pass, he was awoken by police officers and ordered to move. His personal knowledge was that involuntarily homeless individuals in Grants Pass often are cited under the challenged ordinances and Grants Pass continues to enforce the challenged ordinances. And, but for the challenged ordinances, Logan would sleep in the city. Therefore, as the district court found, it is sufficiently likely Logan would be issued a citation that Logan's standing is established. That is especially true given the Supreme Court's instruction that a plaintiff need not wait for "an actual arrest, prosecution, or other enforcement action" before "challenging [a] law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Finally, even if Logan had not demonstrated standing, the dissent's analysis regarding Logan is irrelevant because this case could proceed solely based on the standing established by Gloria Johnson and the class. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d at 985 (9th Cir. 2007) (en banc).

With respect to the anti-sleeping ordinance, the law is less clear. Debra Blake is the only class representative who had standing in her own right to challenge the anti-sleeping ordinance. Under cases such as *Sosna v. Iowa*, 419 U.S. 393, 401 (1975), and *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), a class representative may pursue the live claims of a properly certified class—without the need to remand for substitution of a new representative[17]—even after his own claims become moot, provided that several requirements are met.[18] *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 987-88 (9th Cir. 2007) (en banc). If Debra Blake's challenge to the anti-sleeping ordinance became moot before she passed away, she could have continued to pursue the challenge on behalf of the class under the doctrine of *Sosna*. But we have not found any case applying *Sosna* and *Franks* to a situation such as this, in

[17] *See Sosna*, 419 U.S. at 403 ("[W]e believe that the test of Rule 23(a) is met."); *id.* at 416-17 (White, J., dissenting) ("It is claimed that the certified class supplies the necessary adverse parties for a continuing case or controversy . . . The Court cites no authority for this retrospective decision as to the adequacy of representation which seems to focus on the competence of counsel rather than a party plaintiff who is a representative member of the class. At the very least, the case should be remanded to the District Court.").

[18] The class must be properly certified, *see Franks*, 424 U.S. at 755-56, or the representative must be appealing denial of class certification. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980). The class representative must be a member of the class with standing to sue at the time certification is granted or denied. *See Sosna*, 419 U.S. at 403. The unnamed class members must still have a live interest in the matter throughout the duration of the litigation. *See Franks*, 424 U.S. at 755. And the court must be satisfied that the named representative will adequately pursue the interests of the class even though their own interest has expired. *See Sosna*, 419 U.S. at 403.

which the death of a representative causes a class to be unrepresented as to part (but not all) of a claim. The parties did not brief this issue and no precedent indicates whether this raises a jurisdictional question, which would deprive us of authority to review the merits of the anti-sleeping ordinance challenge, or a matter of Federal Rule of Civil Procedure 23, which might not.

Because Plaintiffs have not moved to substitute a class representative pursuant to Federal Rule of Appellate Procedure 43(a) or identified a representative who could be substituted, because no party has addressed this question in briefing, and because we are not certain of our jurisdiction to consider the challenge to the anti-sleeping ordinance, we think it appropriate to vacate summary judgment as to the anti-sleeping ordinance and remand to determine whether a substitute representative is available as to that challenge alone. *See Cobell v. Jewell*, 802 F.3d 12, 23-24 (D.C. Cir. 2015) (discussing substitution of a party during appeal). Substitution of a class representative may significantly aid in the resolution of the issues in this case. Remand will not cause significant delay because, as we explain below, remand is otherwise required so that the injunction can be modified. In the absence of briefing or precedent regarding this question, we do not decide whether this limitation is jurisdictional or whether it arises from operation of Rule 23.

We therefore hold the surviving class representatives at a minimum have standing to challenge every ordinance except the anti-sleeping ordinance. As to the anti-sleeping ordinance, we vacate summary judgment and remand for the district court to consider in the first instance whether an adequate class representative, such as class member Dolores Nevin, exists who may be substituted.

B.

The City's next argument is the district court erred in certifying the class. We "review a district court's order granting class certification for abuse of discretion, but give the district court 'noticeably more deference when reviewing a grant of class certification than when reviewing a denial.'" *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1275 (9th Cir. 2019) (internal citation omitted) (quoting *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1115 (9th Cir. 2017)). Factual findings underlying class certification are reviewed for clear error. *Parsons v. Ryan*, 754 F.3d 657, 673 (9th Cir. 2014).

A member of a class may sue as a representative party if the member satisfies Federal Rule of Civil Procedure 23(a)'s four prerequisites: numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). Assessing these requirements involves "rigorous analysis" of the evidence. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

If the initial requirements of Rule 23(a) are met, a putative class representative must also show the class falls into one of three categories under Rule 23(b). Plaintiffs brought this suit under Rule 23(b)(2), seeking injunctive or declaratory relief based on the City having "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

The district court found the Rule 23(a) requirements satisfied and certified a class under Rule 23(b)(2). The City's arguments against this class certification are obscure.

It appears the City's argument is that class certification was an abuse of discretion because the holding of *Martin* can only be applied after an individualized inquiry of each alleged involuntarily homeless person's access to shelter.[19] The City appears to suggest the need for individualized inquiry defeats numerosity, commonality, and typicality. While we acknowledge the *Martin* litigation was not a class action, nothing in that decision precluded class actions.[20] And based on the record in this case, the district court did not err by finding Plaintiffs satisfied the requirements of Rule 23 such that a class could be certified.

To satisfy the numerosity requirement a proposed class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). For purposes of this requirement, "'impracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Ests., Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964) (quotation omitted). There is no specific number of class members required. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980). However, proposed

[19] There is no reason to believe the putative class members are voluntarily homeless. To the contrary, at least 13 class members submitted declarations to the district court indicating that they are involuntarily homeless.

[20] Other courts have certified similar classes. *See e.g.*, *Lehr v. City of Sacramento*, 259 F.R.D. 479 (E.D. Cal. 2009) (addressing numerosity, commonality, and typicality for homeless persons in Sacramento); *Joyce v. City & Cty. of S.F.*, 1994 WL 443464 (N.D. Cal. Aug. 4, 1994), *dismissed as moot*, 87 F.3d 1320 (9th Cir. 1996) (finding typicality despite some differences among homeless class members); *Pottinger v. City of Miami*, 720 F.Supp. 955, 960 (S.D. Fla. 1989) (certifying a class of homeless persons).

classes of less than fifteen are too small while classes of more than sixty are sufficiently large. *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1051-52 (9th Cir. 2003).

When the district court certified the class on August 7, 2019, it found there were at least 600 homeless persons in the City based on the 2018 and 2019 PIT counts conducted by UCAN. The City does not identify how this finding was clearly erroneous. In fact, the City affirmatively indicated to Plaintiffs prior to the class certification order that the number of homeless persons residing in Grants Pass for the past 7 years was "unknown." Further, the only guidance offered by the City regarding a specific number of class members came long after the class was certified. A City police officer claimed in a declaration that he was "aware of less than fifty individuals total who do not have access to any shelter" in the City. The officer admitted, however, it "would be extremely difficult to accurately estimate the population of people who are homeless in Grants Pass regardless of the definition used."

The officer's guess of "less than fifty" homeless persons is inconsistent with the general understanding that PIT counts routinely undercount homeless persons. *See Martin*, 920 F.3d at 604 ("It is widely recognized that a one-night point in time count will undercount the homeless population.") (internal quotation marks omitted). But even accepting the officer's assessment that there were approximately fifty homeless persons in the City, the numerosity requirement is satisfied. Joining approximately fifty persons might be impracticable and especially so under the facts here because homeless persons obviously lack a fixed address and likely have no reliable means of

communications.[21] At the very least, the district court did not abuse its discretion in concluding the numerosity requirement was met.

A class satisfies Rule 23's commonality requirement if there is at least one question of fact or law common to the class. *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013). The Supreme Court has said the word "question" in Rule 23(a)(2) is a misnomer: "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to

[21] Moreover, there is a well-documented correlation between physical and mental illness and homelessness. *See, e.g.*, Sara K. Rankin, *Punishing Homelessness*, 22 N. CRIM. L. REV. 99, 105 (2019) ("Psychiatric disorders affect at least 30 to 40 percent of all people experiencing homelessness."); Stefan Gutwinski et al., *The prevalence of mental disorders among homeless people in high-income countries: An updated systematic review and meta-regression analysis*, 18(8) PLOS MED. 1, 14 (Aug. 23, 2021), ("Our third main finding was high prevalence rates for treatable mental illnesses, with 1 in 8 homeless individuals having either major depression (12.6%) or schizophrenia spectrum disorders (12.4%). This represents a high rate of schizophrenia spectrum disorders among homeless people, and a very large excess compared to the 12-month prevalence in the general population, which for schizophrenia is estimated around 0.7% in high-income countries."); Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness, and Mental Health: A National Study*, 59 PSYCHIATRIC SERVS. 170, 170 (2008) ("Homeless individuals may also be more likely to have health conditions . . . Severe mental illness is also more prevalent among homeless people than in the general population."); CTR. FOR DISEASE CONTROL & PREVENTION, HOMELESSNESS AS A PUBLIC HEALTH LAW ISSUE: SELECTED RESOURCES (Mar. 2, 2017) ("Homelessness is closely connected to declines in physical and mental health; homeless persons experience high rates of health problems such as HIV infection, alcohol and drug abuse, mental illness, tuberculosis, and other conditions.").

drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)) (emphasis and omission in original)). "[C]lass members' claims [must] 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke.'" *Mazza*, 666 F.3d at 588 (quoting *Wal-Mart*, 564 U.S. at 350).

As correctly identified by the district court, Plaintiffs' claims present at least one question and answer common to the class: "whether [the City's] custom, pattern, and practice of enforcing anti-camping ordinances, anti-sleeping ordinances, and criminal trespass laws . . . against involuntarily homeless individuals violates the Eighth Amendment of the Constitution." An answer on this question resolved a crucial aspect of the claims shared by all class members.

The City argues the commonality requirement was not met because some class members might have alternative options for housing, or might have the means to acquire their own shelter.[22] But this argument misunderstands the class

[22] The dissent adapts the City's argument that enforcement of the anti-camping ordinances depends on individual circumstances and is therefore not capable of resolution on a common basis. Dissent 77-79. That misunderstands how the present class was structured. The dissent attempts to reframe the common question as a very general inquiry. It appears the dissent interprets the question whether an Eighth Amendment violation must be determined by an individualized inquiry as whether each individual is "involuntarily homeless." To assess that, a court would have to conduct an individualized inquiry and determine if an individual was "involuntarily homeless." But that is not the common question in this case. Rather, the question is whether the City's enforcement of the anti-camping ordinances against all involuntarily homeless individuals violates the Eighth Amendment. This question is

definition. Pursuant to the class definition, the class includes only *involuntarily* homeless persons.[23] Individuals who have shelter or the means to acquire their own shelter simply

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capable of common resolution on a prospective class-wide basis, as the record establishes.

[23] The dissent argues this created a prohibited "fail safe" class. That is erroneous. As noted in a recent en banc decision, "a 'fail safe' class . . . is defined to include only those individuals who were injured by the allegedly unlawful conduct." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en banc). Such classes are prohibited "because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Id. See also Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016) (noting a fail safe class "is one that is defined so narrowly as to preclude[ ] membership unless the liability of the defendant is established"). No such class is present here. The class was defined, in relevant part, as "[a]ll involuntarily homeless individuals living in Grants Pass." Membership in that class has no connection to the success of the underlying claims. Put differently, the class would have consisted of exactly the same population whether Grants Pass won or lost on the merits. The obvious illustration of this is the class population would not change if a court determined the anti-camping ordinance violated the Eighth Amendment while the anti-sleeping ordinance did not. In that situation, class members would not be "defined out of the class." *Olean*, 31 F.4th at 669 n.14 (citation omitted). Rather, class members would be "bound by the judgment" regarding the anti-sleeping ordinance. *Id.* In any event, the dissent's concerns regarding individualized determinations are best made when the City attempts to enforce its ordinances. *Cf. McArdle v. City of Ocala*, 519 F.Supp.3d 1045, 1052 (M.D. Fla. 2021) (requiring that officers inquire into the availability of shelter space before an arrest could be made for violation of the City's "open lodging" ordinance). If it is determined at the enforcement stage that a homeless individual has access to shelter, then they do not benefit from the injunction and may be cited or prosecuted under the anti-camping ordinances. Moreover, as we noted above, several classes of homeless individuals have been certified in the past. *See supra* note 20.

are never class members.[24] Because we find there existed at least one question of law or fact common to the class, the district court did not abuse its discretion in concluding commonality was satisfied.

Typicality asks whether "the claims or defenses of the representative parties are typical" of the class. Fed. R. Civ. P. 23(a)(3). Typicality is a "permissive standard[]." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (citation omitted). It "refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Parsons*, 754 F.3d at 685 (citation omitted).

The class representatives' claims and defenses are typical of the class in that they are homeless persons who claim that the City cannot enforce the challenged ordinances against them when they have no shelter. The defenses that apply to class representatives and class members are identical. The claims of class representatives and class members are similar, except that some class representatives live in vehicles while other class members may live on streets or in parks, not vehicles. This does not defeat typicality. The class representatives with vehicles may violate the challenged ordinances in a different manner than some class members—*i.e.*, by sleeping in their vehicle, rather than on the ground. But they challenge the same ordinances under the same constitutional provisions as other

[24] We do not, as the dissent contends, "suggest[ ] that the class definition requires only an involuntary lack of access to regular or permanent shelter to qualify as 'involuntarily homeless.'" Dissent 84. It is unclear where the dissent finds this in the opinion. To be clear: A person with access to temporary shelter is not involuntarily homeless unless and until they no longer have access to shelter.

class members. *Cf. Staton*, 327 F.3d at 957 ("[R]epresentative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical.") (citation omitted). The district court did not abuse its discretion in finding the typicality requirement met.

The City does not present any other arguments regarding class certification, such as the propriety of certifying the class as an injunctive class under Rule 23(b)(2). We do not make arguments for parties and the arguments raised by the City regarding class certification fail.

C.

Having rejected the City's jurisdictional arguments, as well as its arguments regarding class certification, the merits can be addressed. The City's merits arguments regarding the Cruel and Unusual Punishment Clause take two forms. First, the City argues its system of imposing civil fines cannot be challenged as violating the Cruel and Unusual Clause because that clause provides protection only in criminal proceedings, after an individual has been convicted. That is incorrect. Second, the City argues *Martin* does not protect homeless persons from being cited under the City's amended anti-camping ordinance which prohibits use of any bedding or similar protection from the elements. The City appears to have conceded it cannot cite homeless persons merely for sleeping in public but the City maintains it is entitled to cite individuals for the use of rudimentary bedding supplies, such as a blanket, pillow, or sleeping bag "for bedding purposes." *See* GPMC 5.61.010(B). Again, the City is incorrect. Here, we focus exclusively on the anti-camping ordinances.

According to the City, citing individuals under the anti-camping ordinances cannot violate the Cruel and Unusual

Punishment Clause because citations under the ordinances are civil and civil citations are "categorically not 'punishment' under the Eight Amendment."[25] The City explains "the simple act of issuing a civil citation with a court date [has never] been found to be unconstitutional 'punishment' under the Eighth Amendment." While not entirely clear, the City appears to be arguing the Cruel and Unusual Punishment Clause provides no protection from citations categorized as "civil" by a governmental authority.[26]

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[25] This position is in significant tension with the City's actions taken immediately after *Martin* was issued. As noted earlier, the City amended its anti-camping ordinance "in direct response to *Martin v. Boise*" to allow for "the act of 'sleeping'" in City parks. If the City believed *Martin* has no impact on civil ordinances, it is unclear why the City believed a curative "response" to *Martin* was necessary.

[26] The primary support for this contention is *Ingraham v. Wright*, 430 U.S. 651 (1977). In *Ingraham*, the Supreme Court addressed whether the Cruel and Unusual Punishment Clause was implicated by corporal punishment in public schools. The Court stated the Cruel and Unusual Punishment Clause limits "the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such." *Id.* at 667. The Court interpreted the challenge to corporal punishment as, in effect, asserting arguments under only the first or second limitation. That is, the challenge was whether "the paddling of schoolchildren" was a permissible amount or type of punishment. *Id.* at 668. The *Ingraham* decision involved no analysis or discussion of the third limitation, *i.e.* the "substantive limits on what can be made criminal." *Id.* at 667. Thus, it was in the context of evaluating the amount or type of punishment that *Ingraham* stated "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Id.* at 671 n.40. When, as here, plaintiffs are raising challenges to the "substantive limits on what can be

Plaintiffs' focus on civil citations does involve an extra step from the normal Cruel and Unusual Clause analysis and the analysis of *Martin*. Usually, claims under the Cruel and Unusual Clause involve straightforward criminal charges. For example, the situation in *Martin* involved homeless persons allegedly violating criminal ordinances and the opinion identified its analysis as focusing on the "criminal" nature of the charges over ten times. 920 F.3d at 617. Here, the City has adopted a slightly more circuitous approach than simply establishing violation of its ordinances as criminal offenses. Instead, the City issues civil citations under the ordinances. If an individual violates the ordinances twice, she can be issued a park exclusion order. And if the individual is found in a park after issuance of the park exclusion order, she is cited for criminal trespass. *See* O.R.S. 164.245 (criminal trespass in the second degree). Multiple City police officers explained in their depositions this sequence was the standard protocol. The holding in *Martin* cannot be so easily evaded.

Martin held the Cruel and Unusual Punishment clause "prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." 920 F.3d at 616. A local government cannot avoid this ruling by issuing civil citations that, later, become criminal offenses. A recent decision by the en banc Fourth Circuit illustrates how the

made criminal," *Ingraham* does not prohibit a challenge before a criminal conviction. *See Martin*, 920 F.3d at 614 ("*Ingraham* did not hold that a plaintiff challenging the state's power to criminalize a particular status or conduct in the first instance, as the plaintiffs in this case do, must first be convicted.").

Cruel and Unusual Punishment Clause looks to the eventual criminal penalty, even if there are preliminary civil steps.

The disputes in *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264 (4th Cir. 2019) (en banc) arose from a Virginia law which allowed a state court to issue a civil order identifying an individual as a "habitual drunkard." *Id.* at 268. Once labeled a "habitual drunkard," the individual was "subject to incarceration for the mere possession of or attempt to possess alcohol, or for being drunk in public." *Id.* at 269. A group of homeless alcoholics filed suit claiming, among other theories, the "habitual drunkard" scheme violated the Cruel and Unusual Punishment Clause. In the plaintiffs' view, the scheme resulted in criminal prosecutions based on their "status," *i.e.* alcoholism. *See id.* at 281.

Using reasoning very similar to that in *Martin*, the Fourth Circuit found the statutory scheme unconstitutional because it provided punishment based on the plaintiffs' status. Of particular relevance here, the Fourth Circuit reasoned the fact that Virginia's "scheme operate[d] in two steps" did not change the analysis. *Id.* 283. Issuing a civil order first, followed by a criminal charge, was a "two-pronged statutory scheme" potentially "less direct" than straightforwardly criminalizing the status of alcohol addiction. *Id.* But the scheme remained unconstitutional because it "effectively criminalize[d] an illness." *Id.* The fact that Virginia "civilly brands alcoholics as 'habitual drunkards' before prosecuting them for involuntary manifestations of their illness does nothing to cure the unconstitutionality of this statutory scheme." *Id.*

The same reasoning applies here. The anti-camping ordinances prohibit Plaintiffs from engaging in activity they cannot avoid. The civil citations issued for behavior

Plaintiffs cannot avoid are then followed by a civil park exclusion order and, eventually, prosecutions for criminal trespass. Imposing a few extra steps before criminalizing the very acts *Martin* explicitly says cannot be criminalized does not cure the anti-camping ordinances' Eighth Amendment infirmity.

The City offers a second way to evade the holding in *Martin*. According to the City, it revised its anti-camping ordinances to allow homeless persons to sleep in City parks. However, the City's argument regarding the revised anti-camping ordinance is an illusion. The amended ordinance continues to prohibit homeless persons from using "bedding, sleeping bag, or other material used for bedding purposes," or using stoves, lighting fires, or erecting structures of any kind. GPMC 5.61.010. The City claims homeless persons are free to sleep in City parks, but only without items necessary to facilitate sleeping outdoors.[27]

The discrepancy between sleeping without bedding materials, which is permitted under the anti-camping ordinances, and sleeping with bedding, which is not, is intended to distinguish the anti-camping ordinances from *Martin* and the two Supreme Court precedents underlying *Martin*, *Robinson v. California*, 370 U.S. 660 (1962) and

[27] The Grants Pass ordinance does not specifically define "bedding" but courts give the words of a statute or ordinance their "ordinary, contemporary, common meaning" absent an indication to the contrary from the legislature. *See Williams v. Taylor*, 529 U.S. 420, 431 (2000) (citation omitted). The Oxford English Dictionary defines "bedding" as "[a] collective term for the articles which compose a bed." OXFORD ENGLISH DICTIONARY. And "bed" is defined as "a place for sleeping." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 108 (11th ed.). The City's effort to dissociate the use of bedding from the act of sleeping or protection from the elements is nonsensical.

Powell v. Texas, 392 U.S. 514 (1968). Under those cases, a person may not be prosecuted for conduct that is involuntary or the product of a "status." *See Martin*, 920 F.3d at 617 (citation omitted). The City accordingly argues that sleeping is involuntary conduct for a homeless person, but that homeless persons can choose to sleep without bedding materials and therefore can be prosecuted for sleeping *with* bedding.

In its order granting summary judgment, the district court correctly concluded the anti-camping ordinances violated the Cruel and Unusual Punishment Clause to the extent they prohibited homeless persons from "taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available." The only plausible reading of *Martin* is that it applies to the act of "sleeping" in public, including articles necessary to facilitate sleep. In fact, *Martin* expressed concern regarding a citation given to a woman who had been found sleeping on the ground, wrapped in blankets. 920 F.3d at 618. *Martin* noted that citation as an example of the anti-camping ordinance being "enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements." *Id.* *Martin* deemed such enforcement unconstitutional. *Id.* It follows that the City cannot enforce its anti-camping ordinances to the extent they prohibit "the most rudimentary precautions" a homeless person might take against the elements.[28] The City's position that it is

[28] Grants Pass is cold in the winter. The evidence in the record establishes that homeless persons in Grants Pass have struggled against frostbite. Faced with spending every minute of the day and night outdoors, the choice to use rudimentary protection of bedding to protect

entitled to enforce a complete prohibition on "bedding, sleeping bag, or other material used for bedding purposes" is incorrect.

The dissent claims we have misread *Martin* by "completely disregard[ing] the *Powell* opinions on which *Martin* relied, which make unmistakably clear that an individualized showing of involuntariness is required." Dissent 82. The dissent concedes that pursuant to *Martin*, the City cannot impose criminal penalties on involuntarily homeless individuals for sitting, sleeping, or lying outside on public property. Dissent 62. Thus, our purported "complete disregard[ ]" for *Martin* is not regarding the central holding that local governments may not criminalize involuntary conduct. Rather, the dissent believes, based on its interpretation of the Supreme Court opinions underlying *Martin*, that the Eighth Amendment provides only "a case-specific affirmative defense" that can never be litigated on a class basis. Dissent 59. To reach this counterintuitive conclusion, the dissent reads limitations into *Robinson*, *Powell*, and *Martin* that are nonexistent.

In *Robinson*, the Supreme Court struck down, under the Eighth Amendment, a California law that made "it a criminal offense for a person to 'be addicted to the use of narcotics.'" *Robinson*, 370 U.S. at 666. The law was unconstitutional, the Court explained, because it rendered the defendant "continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State." *Id.*

Six years later, in *Powell*, the Court divided 4-1-4 over whether Texas violated the Eighth Amendment under

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against snow, frost, or rain is not volitional; it is a life-preserving imperative.

Robinson by prosecuting an alcoholic for public drunkenness. In a plurality opinion, Justice Marshall upheld the conviction of Leroy Powell on the ground that he was not punished on the basis of his status as an alcoholic, but rather for the *actus reus* of being drunk in public. *Powell*, 392 U.S. at 535. Four justices dissented, in an opinion by Justice Fortas, on the ground that the findings made by the trial judge—that Powell was a chronic alcoholic who could not resist the impulse to drink—compelled the conclusion that Powell's prosecution violated the Eighth Amendment because Powell could not avoid breaking the law. *Id.* at 569-70 (Fortas, J., dissenting). Justice White concurred in the judgment. He stressed, "[i]f it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion." *Id.* at 549 (White, J., concurring). However, the reason for Justice White's concurrence was that he felt *Powell* failed to prove his status as an alcoholic compelled him to violate the law by appearing in public. *Id.* at 553 (White, J., concurring).

Pursuant to *Marks v. United States*, 430 U.S. 188 (1977), the narrowest position which gained the support of five justices is treated as the holding of the Court. In identifying that position, *Martin* held: "five Justices [in *Powell*] gleaned from *Robinson* the principle that 'that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'" *Martin*, 920 F.3d at 616 (quoting *Jones*, 443 F.3d at 1135). *Martin* did not—as the dissent alleges—hold that *Powell*'s "controlling opinion was Justice White's concurrence." Dissent 60. *See id.*, 920 F.3d at 616-17. It would have violated the rule of *Marks* to adopt portions of Justice White's concurrence that did not

receive the support of five justices. The dissent claims Justice White's concurrence requires that the individual claiming a status must prove the status compels the individual to violate the law—here, that each homeless individual must prove their status as an involuntarily homeless person to avoid prosecution.[29] Dissent 59-63. The

[29] The dissent's attempt to create a governing holding out of Justice White's concurrence is erroneous. By citing a word or two out of context in the *Powell* dissenting opinion (*e.g.*, "constitutional defense") our dissenting colleague argues both Justice White and the dissenting justices in *Powell* agreed any person subject to prosecution has, at most, "a case-specific affirmative 'defense.'" Dissent 59-60, 77. We disagree. Though status was litigated as a defense in the context of Leroy Powell's prosecution, no opinion in *Powell* held status may be raised only as a defense. The *Powell* plurality noted trial court evidence that Leroy Powell was an alcoholic, but that opinion contains no indication "status" may only be invoked as "a case-specific affirmative 'defense.'" As for Justice White, the opening paragraph of his concurrence indicates he was primarily concerned not with how a status must be invoked but with the fact that certain statuses should be beyond the reach of the criminal law:

> If it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless Robinson is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Powell, 392 U.S. at 548-49 (White, J., concurring) (internal citation omitted). Finally, neither the remainder of Justice White's concurrence

dissent claims this renders class action litigation inappropriate. But no opinion in either *Powell* or *Martin* discussed the propriety of litigating the constitutionality of such criminal statutes by way of a class action.[30]

The law that the dissent purports to unearth in Justice White's concurrence is not the "narrowest ground" which received the support of five justices. *No* opinion in *Powell* or *Martin* supports the dissent's assertion that *Powell* offers exclusively an "affirmative 'defense'" that cannot be litigated in a class action.[31] Dissent 59, 77. Although the

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nor the dissenting opinion explicitly indicates one's status may only be invoked as a defense. Rather, Justice White and the dissenters simply agreed that, if Powell's status made his public intoxication involuntary, he could not be prosecuted. There is no conceivable way to interpret *Martin* as adopting our dissenting colleague's position that one's status must be invoked as a defense. But even assuming the burden must be placed on the party wishing to invoke a status, the class representatives established there is no genuine dispute of material fact they have the relevant status of being involuntarily homeless.

[30] Federal courts have certified classes of homeless plaintiffs in the past, *see supra* note 20, which counsels against the City's and the dissent's position that such classes are impermissible under Rule 23.

[31] As noted above, *Martin* did not hold homeless persons bear the burden of demonstrating they are involuntarily homeless. *See supra* note 29. Because the record plainly demonstrates Plaintiffs are involuntarily homeless, there similarly is no reason for us to determine what showing would be required. We note, however, that some district courts have addressed circumstances in which the question of burden was somewhat relevant. *See, e.g.*, *McArdle*, 519 F.Supp.3d at 1052 (requiring, based in part on *Martin*, that officers inquire into the availability of shelter space before making an arrest for violation of the City's "open lodging" ordinance); *Butcher v. City of Marysville*, 2019 WL 918203, at *7 (E.D. Cal. Feb. 25, 2019) (holding plaintiffs failed to make the "threshold showing" of pleading that there was no shelter capacity and that they had no other housing at the time of enforcement).

dissent might prefer that these principles find support in the controlling law, they do not. We thus do not misread *Martin* by failing to apply the principles found solely in Justice White's concurrence. Rather, we adhere to the narrow holding of *Martin* adopting the narrowest ground shared by five justices in *Powell*: a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status.

In addition to erecting an absolute bar to class litigation of this sort, the dissent would also impose artificial limitations on claims brought pursuant to *Martin*. The dissent concedes Gloria Johnson has standing to bring individual challenges to most of the City's ordinances. But the dissent then speculates that Gloria Johnson may, in fact, not be involuntarily homeless in the City. The dissent would insist that Gloria Johnson, for example, leave the City to camp illegally on federal or state lands, provide the court an accounting of her finances and employment history, and indicate with specificity where she lived before she lost her job and her home. Dissent 85-88. There, of course, exists no law or rule requiring a homeless person to do any of these things. Gloria Johnson has adequately demonstrated that there is no available shelter in Grants Pass and that she is involuntarily homeless.

The undisputed evidence establishes Gloria Johnson is involuntarily homeless and there is undisputed evidence showing many other individuals in similar situations. It is undisputed that there are at least around 50 involuntarily homeless persons in Grants Pass, and PIT counts, which *Martin* relied on to establish the number of homeless persons in Boise, revealed more than 600. *See Martin*, 920 F.3d at 604. It is undisputed that there is no secular shelter space available to adults. Many class members, including the class

representatives, have sworn they are homeless and the City has not contested those declarations. The dissent claims this showing is not enough, implying that Plaintiffs must meet an extremely high standard to show they are involuntarily homeless. Even viewed in the light most favorable to the City, there is no dispute of material fact that the City is home to many involuntarily homeless individuals, including the class representatives. In fact, neither the City nor the dissent has demonstrated there is even one *voluntarily* homeless individual living in the City.[32] In light of the undisputed facts in the record underlying the district court's summary judgment ruling that show Plaintiffs are involuntarily homeless, and the complete absence of evidence that Plaintiffs are voluntarily homeless, we agree with the district court that Plaintiffs such as Gloria Johnson are not voluntarily homeless and that the anti-camping ordinances are unconstitutional as applied to them unless there is some place, such as shelter, they can lawfully sleep.[33]

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[32] The dissent claims we have "shifted the burden to the City to establish the voluntariness of the behavior targeted by the ordinances." Dissent 87 n.13 (emphasis omitted). To the contrary, as we have explained, we do not decide who would bear such a burden because undisputed evidence demonstrates Plaintiffs are involuntarily homeless. Rather, without deciding who would bear such a burden if involuntariness were subject to serious dispute, we note Plaintiffs have demonstrated involuntariness and there is no evidence in the record showing any class member has adequate alternative shelter.

[33] Following *Martin*, several district courts have held that the government may evict or punish sleeping in public in some locations, provided there are other lawful places within the jurisdiction for involuntarily homeless individuals to sleep. *See, e.g.*, *Shipp v. Schaaf*, 379 F.Supp.3d 1033, 1037 (N.D. Cal. 2019) ("However, even assuming (as Plaintiffs do) that [eviction from a homeless encampment by citation or arrest] might occur, remaining at a particular encampment on public

Our holding that the City's interpretation of the anti-camping ordinances is counter to *Martin* is not to be interpreted to hold that the anti-camping ordinances were properly enjoined in their entirety. Beyond prohibiting bedding, the ordinances also prohibit the use of stoves or fires, as well as the erection of any structures. The record has not established the fire, stove, and structure prohibitions deprive homeless persons of sleep or "the most rudimentary precautions" against the elements.[34] Moreover, the record does not explain the City's interest in these prohibitions.[35]

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property is not conduct protected by *Martin*, especially where the closure is temporary in nature."); *Aitken v. City of Aberdeen*, 393 F.Supp.3d 1075, 1082 (W.D. Wash. 2019) ("*Martin* does not limit the City's ability to evict homeless individuals from particular public places."); *Gomes v. Cty. of Kauai*, 481 F.Supp.3d 1104, 1109 (D. Haw. 2020) (holding the County of Kauai could prohibit sleeping in a public park because it had not prohibited sleeping on other public lands); *Miralle v. City of Oakland*, 2018 WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018) (holding the City could clear out a specific homeless encampment because "*Martin* does not establish a constitutional right to occupy public property indefinitely at Plaintiffs' option"); *Le Van Hung v. Schaaf*, 2019 WL 1779584, at *5 (N.D. Cal. Apr. 23, 2019) (holding *Martin* does not "create a right for homeless residents to occupy indefinitely any public space of their choosing"). Because the City has not established any realistically available place within the jurisdiction for involuntarily homeless individuals to sleep we need not decide whether alternate outdoor space would be sufficient under *Martin*. The district court may consider this issue on remand, if it is germane to do so.

[34] The dissent claims we establish "the right to use (at least) a tent." Dissent 89 n.15. This assertion is obviously false. The district court's holding that the City may still "ban the use of tents in public parks" remains undisturbed by our opinion.

[35] The dissent asserts, "it is hard to deny that *Martin* has 'generate[d] dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein.'" Dissent 92 (quoting *Martin*, 920 F.3d at 594 (M. Smith, J., dissenting from denial

Consistent with *Martin*, these prohibitions may or may not be permissible. On remand, the district court will be required to craft a narrower injunction recognizing Plaintiffs' limited right to protection against the elements, as well as limitations when a shelter bed is available.[36]

D.

The district court concluded the fines imposed under the anti-sleeping and anti-camping ordinances violated the Eighth Amendment's prohibition on excessive fines. A central portion of the district court's analysis regarding these fines was that they were based on conduct "beyond what the City may constitutionally punish." With this in mind, the district court noted "[a]ny fine [would be] excessive" for the conduct at issue.

The City presents no meaningful argument on appeal regarding the excessive fines issue. As for Plaintiffs, they argue the fines at issue were properly deemed excessive because they were imposed for "engaging in involuntary, unavoidable life sustaining acts." The permanent injunction will result in no class member being fined for engaging in such protected activity. Because no fines will be imposed

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of rehearing en banc)) (modification in original). There are no facts in the record to establish that *Martin* has generated "dire" consequences for the City. Our review of this case is governed only by the evidence contained in the record.

[36] The district court enjoined the park exclusion ordinance in its entirety. The parties do not address this in their appellate briefing but, on remand, the district court should consider narrowing this portion as well because the park exclusion ordinance presumably may be enforced against Plaintiffs who engage in prohibited activity unrelated to their status as homeless persons.

for protected activity, there is no need for us to address whether hypothetical fines would be excessive.

E.

The final issue is whether Plaintiffs properly pled their challenge to the park exclusion appeals ordinance. GPMC 6.46.355. That ordinance provided a mechanism whereby an individual who received an exclusion order could appeal to the City Council. Subsequent to the district court's order, the City amended its park exclusion appeals ordinance. Therefore, the district court's determination the previous ordinance violated Plaintiffs' procedural due process rights has no prospective relevance. Because of this, we need not decide if Plaintiffs adequately pled their challenge to the previous ordinance.

III.

We affirm the district court's ruling that the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go. On remand, however, the district court must narrow its injunction to enjoin only those portions of the anti-camping ordinances that prohibit conduct protected by *Martin* and this opinion. In particular, the district court should narrow its injunction to the anti-camping ordinances and enjoin enforcement of those ordinances only against involuntarily homeless person for engaging in conduct necessary to protect themselves from the elements when there is no shelter space available. Finally, the district court on remand should consider whether there is an adequate representative who may be substituted for Debra Blake.

We are careful to note that, as in *Martin*, our decision is narrow. As in *Martin*, we hold simply that it is "unconstitutional to [punish] simply sleeping *somewhere* in public if one has nowhere else to do so." *Martin*, 920 F.3d at 590 (Berzon, J., concurring in denial of rehearing en banc). Our decision reaches beyond *Martin* slightly. We hold, where *Martin* did not, that class certification is not categorically impermissible in cases such as this, that "sleeping" in the context of *Martin* includes sleeping with rudimentary forms of protection from the elements, and that *Martin* applies to civil citations where, as here, the civil and criminal punishments are closely intertwined. Our decision does not address a regime of purely civil infractions, nor does it prohibit the City from attempting other solutions to the homelessness issue.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

COLLINS, Circuit Judge, dissenting:

In *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), we held that "the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to." *Id*. at 603. Even assuming that *Martin* remains good law, today's decision—which both misreads and greatly expands *Martin*'s holding—is egregiously wrong. To make things worse, the majority opinion then combines its gross misreading of *Martin* with a flagrant disregard of settled

class-certification principles. The end result of this amalgamation of error is that the majority validates the core aspects of the district court's extraordinary injunction in this case, which effectively requires the City of Grants Pass to allow all but one of its public parks to be used as homeless encampments.[1] I respectfully dissent.

I

Because our opinion in *Martin* frames the issues here, I begin with a detailed overview of that decision before turning to the facts of the case before us.

A

In *Martin*, six individuals sued the City of Boise, Idaho, under 42 U.S.C. § 1983, alleging that the City had violated their Eighth Amendment rights in enforcing two ordinances that respectively barred, *inter alia*, (1) camping in public spaces and (2) sleeping in public places without permission. 920 F.3d at 603–04, 606. All six plaintiffs had been convicted of violating at least one of the ordinances, *id*. at 606, but we held that claims for retrospective relief based on those convictions were barred by the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994). *See Martin*, 920 F.3d at 611–12 (noting that, under *Heck*, a § 1983 action may not be maintained if success in the suit would necessarily show the invalidity of the plaintiff's criminal conviction, unless that conviction has already been set aside or invalidated). What remained, after application of the *Heck* bar, were the claims

[1] The majority's decision is all the more troubling because, in truth, the foundation on which it is built is deeply flawed: *Martin* seriously misconstrued the Eighth Amendment and the Supreme Court's caselaw construing it. *See infra* at 90–92. But I am bound by *Martin*, and—unlike the majority—I faithfully apply it here.

for retrospective relief asserted by two plaintiffs (Robert Martin and Pamela Hawkes) in connection with citations they had received that did *not* result in convictions, and the claims for prospective injunctive and declaratory relief asserted by Martin and one additional plaintiff (Robert Anderson). *Id*. at 604, 610, 613–15; *see also id*. at 618–20 (Owens, J., dissenting in part) (dissenting from the majority's holding that the prospective relief claims survived *Heck*). On the merits of those three plaintiffs' Eighth Amendment claims, the *Martin* panel held that the district court had erred in granting summary judgment for the City. *Id*. at 615–18.

Although the text of the Eighth Amendment's Cruel and Unusual Punishments Clause states only that "cruel and unusual *punishments*" shall not be "inflicted," U.S. CONST., amend. VIII (emphasis added), the *Martin* panel nonetheless held that the Clause "places substantive limits" on the government's ability to *criminalize* "sitting, sleeping, or lying outside on public property," 920 F.3d at 615–16. In reaching this conclusion, the *Martin* panel placed dispositive reliance on the Supreme Court's decisions in *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968). I therefore briefly review those two decisions before returning to *Martin*.

Robinson held that a California law that made "it a criminal offense for a person to 'be addicted to the use of narcotics,'" 370 U.S. at 660 (quoting CAL. HEALTH & SAFETY CODE § 11721 (1957 ed.)), and that did so "even though [the person] has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment," *id*. at 667. The California statute, the Court emphasized, made the "'*status*' of narcotic

addiction a criminal offense," regardless of whether the defendant had "ever *used or possessed* any narcotics within the State" or had "been guilty of any antisocial *behavior* there." *Id*. at 666 (emphasis added).

In *Powell*, a fractured Supreme Court rejected Powell's challenge to his conviction, under a Texas statute, for being "found in a state of intoxication in any public place." 392 U.S. at 517 (quoting TEX. PENAL CODE art. 477 (1952)). A four-Justice plurality distinguished *Robinson* on the ground that, because Powell "was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion," Texas had "not sought to punish a mere status, as California did in *Robinson*." *Id*. at 532 (plurality). The plurality held that *Robinson* did not address, much less establish, that "certain *conduct* cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'" *Id*. at 533 (emphasis added).

Justice White concurred in the judgment on the narrower ground that Powell had failed to establish the "prerequisites to the possible invocation of the Eighth Amendment," which would have required him to "satisfactorily show[] that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue." *Id*. at 552 (White, J., concurring). And because, in Justice White's view, the Eighth Amendment at most provided a case-specific affirmative "defense" to application of the statute, *id*. at 552 n.4, he agreed that the Texas statute was "constitutional insofar as it authorizes a police officer to *arrest* any seriously intoxicated person when he is encountered in a public place," *id*. at 554 n.5 (emphasis added). Emphasizing that Powell himself "did not show that *his* conviction offended the Constitution" and

that Powell had "made no showing that *he* was unable to stay off the streets on the night in question," Justice White concurred in the majority's affirmance of Powell's conviction. *Id.* at 554 (emphasis added).

The four dissenting Justices in *Powell* agreed that the Texas statute "differ[ed] from that in *Robinson*" inasmuch as it "covers more than a mere status." 392 U.S. at 567 (Fortas, J., dissenting). There was, as the dissenters noted, "no challenge here to the validity of public intoxication statutes in general or to the Texas public intoxication statute in particular." *Id*. at 558. Indeed, the dissenters agreed that, in the ordinary case "when the State proves such [public] presence in a state of intoxication, this will be sufficient for conviction, and the punishment prescribed by the State may, of course, be validly imposed." *Id*. at 569. Instead, the dissenters concluded that the application of the statute to Powell was unconstitutional "*on the occasion in question*" in light of the Texas trial court's findings about Powell's inability to control his condition. *Id*. at 568 n.31 (emphasis added). Those findings concerning Powell's "constitutional defense," the dissenters concluded, established that Powell "was powerless to avoid drinking" and "that, once intoxicated, he could not prevent himself from appearing in public places." *Id*. at 558, 568; *see also id*. at 525 (plurality) (describing the elements of the "constitutional defense" that Powell sought to have the Court recognize).

While acknowledging that the plurality in *Powell* had "interpret[ed] *Robinson* as precluding only the criminalization of 'status,' not of 'involuntary' conduct," the *Martin* panel held that the controlling opinion was Justice White's concurrence. 920 F.3d at 616. As I have noted, Justice White concluded that the Texas statute against public drunkenness could constitutionally be applied, even to an

alcoholic, if the defendant failed to "satisfactorily show[] that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue." *Powell*, 392 U.S. at 552 (White, J., concurring).[2] Under *Marks v. United States*, 430 U.S. 188 (1977), this narrower reasoning given by Justice White for joining the *Powell* majority's judgment *upholding* the conviction constitutes the Court's holding in that case. *See id*. at 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (citation omitted)); *see also United States v. Moore*, 486 F.2d 1139, 1151 (D.C. Cir. 1973) (en banc) (Wilkey, J., concurring) (concluding that the judgment in *Powell* rested on the overlap in the views of "four members of the Court" who held that Powell's acts of public drunkenness "were punishable without question" and the view of Justice White that Powell's acts "were punishable so long as the acts had not been proved to be the product of an established irresistible compulsion").

The *Martin* panel quoted dicta in Justice White's concurrence suggesting that, if the defendant could make the requisite "showing" that "resisting drunkenness is

[2] Justice White, however, did not resolve the further question of whether, if such a showing *had* been made, the Eighth Amendment would have been violated. He stated that the Eighth Amendment "*might* bar conviction" in such circumstances, but he found it "unnecessary" to decide whether that "novel construction of that Amendment" was ultimately correct. 392 U.S. at 552–53 & n.4 (emphasis added).

impossible and that avoiding public places when intoxicated is also impossible," then the Texas statute "[a]s applied" to such persons might violate "the Eighth Amendment." 920 F.3d at 616 (quoting *Powell*, 392 U.S. at 551 (White, J., concurring)). These dicta, *Martin* noted, overlapped with similar statements in the dissenting opinion in *Powell*, and from those two opinions, the *Martin* panel derived the proposition that "five Justices" had endorsed the view that "the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Id*. (citation omitted). Applying that principle, *Martin* held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Id*. Because "human beings are biologically compelled to rest, whether by sitting, lying, or sleeping," *Martin* held that prohibitions on such activities in public cannot be applied to those who simply have "no option of sleeping indoors." *Id*. at 617.

The *Martin* panel emphasized that its "holding is a narrow one." *Id*. *Martin* recognized that, if there are sufficient available shelter beds for all homeless persons within a jurisdiction, then of course there can be no Eighth Amendment impediment to enforcing laws against sleeping and camping in public, because those persons engaging in such activities cannot be said to have "no option of sleeping indoors." *Id*. But "so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters, the jurisdiction cannot prosecute homeless individuals for *involuntarily* sitting, lying, and sleeping in public." *Id*. (simplified) (emphasis added). Consistent with Justice White's concurrence, the *Martin*

panel emphasized that, in determining whether the defendant was being punished for conduct that was "involuntary and inseparable from status," *id*. (citation omitted), the specific individual circumstances of the defendant must be considered. Thus, *Martin* explained, the panel's "holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it." *Id*. at 617 n.8. But *Martin* held that, where it is shown that homeless persons "do not have a single place where they can lawfully be," an ordinance against sleeping or camping in public, "as applied to them, effectively punish[es] them for something for which they may not be convicted under the Eighth Amendment." *Id*. at 617 (simplified). Concluding that the remaining plaintiffs had "demonstrated a genuine issue of material fact" as to their lack of any access to indoor shelter, *Martin* reversed the district court's grant of summary judgment to the City. *Id*. at 617 n.9; *see also id*. at 617–18.

B

With that backdrop in place, I turn to the specific facts of this case.

In the operative Third Amended Complaint, named Plaintiffs Debra Blake, Gloria Johnson, and John Logan sought to represent a putative class of "all involuntarily homeless people living in Grants Pass, Oregon" in pursuing a variety of claims under 42 U.S.C. § 1983 against the City of Grants Pass. In particular, they asserted that the following three sections of the Grants Pass Municipal Code ("GPMC"), which generally prohibited sleeping and camping in public, violated the Eighth Amendment's Cruel

and Unusual Punishments Clause and its Excessive Fines Clause:

> **5.61.020 Sleeping on Sidewalks, Streets, Alleys, or Within Doorways Prohibited**
>
> A. No person may sleep on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety.
>
> B. No person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk.
>
> C. In addition to any other remedy provided by law, any person found in violation of this section may be immediately removed from the premises.
>
> **5.61.030 Camping Prohibited**
>
> No person may occupy a campsite in or upon any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct, [subject to specified exceptions].[3]
>
> **6.46.090 Camping in Parks**
>
> A. It is unlawful for any person to camp, as defined in GPMC Title 5, within the boundaries of the City parks.
>
> B. Overnight parking of vehicles shall be unlawful. For the purposes of this section,

[3] The definition of "campsite" for purposes of GPMC 5.61.030 includes using a "vehicle" as a temporary place to live. *See* GPMC 5.61.010(B).

> anyone who parks or leaves a vehicle parked for two consecutive hours or who remains within one of the parks as herein defined for purposes of camping as defined in this section for two consecutive hours, without permission from the City Council, between the hours of midnight and 6:00 a.m. shall be considered in violation of this Chapter.

Plaintiffs' complaint also challenged the following "park exclusion" ordinance as a violation of their "Eighth and Fourteenth Amendment rights":

> **6.46.350 Temporary Exclusion from City Park Properties**
>
> An individual may be issued a written exclusion order by a police officer of the Public Safety Department barring said individual from all City Park properties for a period of 30 days, if within a one-year period the individual:
>
> A. Is issued 2 or more citations for violating regulations related to City park properties, or
>
> B. Is issued one or more citations for violating any state law(s) while on City park property.[4]

[4] This latter ordinance was amended in September 2020 to read as follows:

> An individual may be issued a written exclusion order by a police officer of the Public Safety Department barring said

In an August 2019 order, the district court certified a class seeking declaratory and injunctive relief with respect to Plaintiffs' Eighth Amendment claims, pursuant to Federal Rule of Civil Procedure 23(b)(2).[5] As defined in the court's order, the class consists of "[a]ll involuntarily homeless individuals living in Grants Pass, Oregon, including homeless individuals who sometimes sleep outside city limits to avoid harassment and punishment by Defendant as addressed in this lawsuit."

After the parties filed cross-motions for summary judgment, the district court in July 2020 granted Plaintiffs' motion in relevant part and denied the City's motion. The district court held that, under *Martin*, the City's enforcement of the above-described ordinances violated the Cruel and Unusual Punishments Clause. The court further held that, for similar reasons, the ordinances imposed excessive fines

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individual from a City park for a period of 30 days, if within a one-year period the individual:

> A. Is issued two or more citations in the same City park for violating regulations related to City park properties, or
>
> B. Is issued one or more citations for violating any state law(s) while on City park property.

The foregoing exclusion order shall only apply to the particular City park in which the offending conduct under 6.46.350(A) or 6.46.350(B) occurred.

[5] At the time that the district court certified the class, the operative complaint was the Second Amended Complaint. That complaint was materially comparable to the Third Amended Complaint, with the exception that it did not mention the park-exclusion ordinance or seek injunctive relief with respect to it.

in violation of the Eighth Amendment's Excessive Fines Clause.

After Plaintiffs voluntarily dismissed those claims as to which summary judgment had been denied to both sides, the district court entered final judgment declaring that the City's enforcement of the anti-camping and anti-sleeping ordinances (GPMC §§ 5.61.020, 5.61.030, 6.46.090) violates "the Eighth Amendment prohibition against cruel and unusual punishment" and its "prohibition against excessive fines." Nonetheless, the court's final injunctive relief did not prohibit all enforcement of these provisions. Enforcement of § 5.61.020 (the anti-sleeping ordinance) was not enjoined at all. The City was enjoined from enforcing the anti-camping ordinances (GPMC §§ 5.61.030 and 6.46.090) "without first giving a person a warning of at least 24 hours before enforcement." It was further enjoined from enforcing those ordinances, and a related ordinance against criminal trespass on city property, in all but one City park during specified evening and overnight hours, which varied depending upon the time of year. Finally, the City was enjoined from enforcing the park-exclusion ordinance.[6]

[6] The district court's summary judgment order and judgment also declared that a separate ordinance (GPMC § 6.46.355), which addressed the procedures for appealing park-exclusion orders under § 6.46.350, failed to provide sufficient procedural due process. The parties dispute whether this claim was adequately raised and reached below, but as the majority notes, this claim for purely prospective relief has been mooted by the City's subsequent amendment of § 6.46.355 in a way that removes the features that had led to its invalidation. *See* Opin. at 55. Accordingly, this aspect of the district court's judgment should be vacated and remanded with instructions to dismiss as moot Plaintiffs' challenge to § 6.46.355.

The City timely appealed from that judgment and from the district court's subsequent award of attorneys' fees.

II

Before turning to the merits, I first address the question of our jurisdiction under Article III of the Constitution. *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) (holding that courts "bear an independent obligation to assure [them]selves that jurisdiction is proper before proceeding to the merits").

"In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). "The doctrine of standing is one of several doctrines that reflect this fundamental limitation," and in the context of a request for prospective injunctive or declaratory relief, that doctrine requires a plaintiff to "show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Id*. at 493. The requirement to show an actual threat of *imminent* injury-in-fact in order to obtain prospective relief is a demanding one: the Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S 398, 409 (2013) (simplified).

As "an indispensable part of the plaintiff's case," each of these elements of Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Because, as in *Lujan*, this case arises from a grant of summary judgment, the question is whether, in seeking summary judgment, Plaintiffs "'set forth' by affidavit or other evidence 'specific facts'" in support of each element of standing. *Id*. (citation omitted). Moreover, "standing is not dispensed in gross," and therefore "a plaintiff must demonstrate standing for *each* claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352–53 (2006) (emphasis added) (citation omitted).

Plaintiffs' operative complaint named three individual plaintiffs as class representatives (John Logan, Gloria Johnson, and Debra Blake), and we have jurisdiction to address the merits of a particular claim if any one of them sufficiently established Article III standing as to that claim. *See Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other [plaintiffs], whose position here is identical to the State's."); *see also Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements."). Accordingly, I address the showing made by each named Plaintiff in support of summary judgment.

In my view, Plaintiff John Logan failed to establish that he has standing to challenge any of the ordinances in question. In support of his motion for summary judgment, Logan submitted a half-page declaration stating, in

conclusory fashion, that he is "involuntarily homeless in Grants Pass," but that he is "sleeping in [his] truck at night at a rest stop North of Grants Pass." He asserted that he "cannot sleep in the City of Grants Pass for fear that [he] will be awakened, ticketed, fined, moved along, trespassed[,] and charged with Criminal Trespass." Logan also previously submitted two declarations in support of his class certification motion. In them, Logan stated that he has been homeless in Grants Pass for nearly seven of the last 10 years; that there have been occasions in the past in which police in Grants Pass have awakened him in his car and instructed him to move on; and that he now generally sleeps in his truck outside of Grants Pass. Logan has made no showing that, over the seven years that he has been homeless, he has ever been issued a citation for violating the challenged ordinances, nor has he provided any facts to establish either that the threat of such a citation is "certainly impending" or that "there is a substantial risk" that he may be issued a citation. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation and internal quotation marks omitted). At best, his declarations suggest that he would *prefer* to sleep in his truck within the City limits rather than outside them, and that he is subjectively deterred from doing so due to the City's ordinances. But such "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972). Nor has Logan provided any facts that would show that he has any actual intention or plans to stay overnight in the City. *See Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir. 2010) ("[W]e have concluded that pre-enforcement plaintiffs who failed to allege a concrete intent to violate the challenged law could not establish a credible threat of enforcement."). Even if his

declarations could be generously construed as asserting an intention to stay in the City at some future point, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that [the Court's] cases require." *Lujan*, 504 U.S. at 564; *cf. Driehaus*, 573 U.S. at 161 (permitting pre-enforcement challenge against ordinance regulating election-related speech where plaintiffs' allegations identified "specific statements they intend[ed] to make in future election cycles"). And, contrary to what the majority suggests, *see* Opin. at 30–31 n.16, Logan's vaguely described knowledge about what has happened to *other* people cannot establish his standing. Accordingly, Logan failed to carry his burden to establish standing for the prospective relief he seeks.

By contrast, Plaintiff Gloria Johnson made a sufficient showing that she has standing to challenge the general anti-camping ordinance, GPMC § 5.61.030, and the parks anti-camping ordinance, GPMC § 6.46.090. Although Johnson's earlier declaration in support of class certification stated that she "often" sleeps in her van outside the City limits, she also stated that she "*continue[s]* to live without shelter in Grants Pass" and that, consequently, "[a]t any time, I could be arrested, ticketed, fined, and prosecuted for sleeping outside in my van or for covering myself with a blanket to stay warm" (emphasis added). Her declaration also recounts "dozens of occasions" in which the anti-camping ordinances have been enforced against her, either by instructions to "move along" or, in one instance, by issuance of a citation for violating the parks anti-camping ordinance, GPMC § 6.46.090. Because Johnson presented facts showing that she continues to violate the anti-camping ordinances and

that, in light of past enforcement, she faces a credible threat of future enforcement, she has standing to challenge those ordinances. *Lujan*, 504 U.S. at 564. Johnson, however, presented no facts that would establish standing to challenge either the anti-sleeping ordinance (which, unlike the anti-camping ordinances, does not apply to sleeping in a vehicle), the park-exclusion ordinance, or the criminal trespass ordinance.[7]

Debra Blake sufficiently established her standing, both in connection with the class certification motion and the summary judgment motion. Although she was actually

[7] The majority concludes that Johnson's standing to challenge the anti-camping ordinances necessarily establishes her standing to challenge the park-exclusion and criminal-trespass ordinances. *See* Opin. at 30 n.15. But as the district court explained, the undisputed evidence concerning Grants Pass's enforcement policies established that "Grants Pass first issues fines for violations and *then* either issues a trespass order or excludes persons from all parks *before* a person is charged with misdemeanor criminal trespass" (emphasis added). Although Johnson's continued intention to sleep in her vehicle in Grants Pass gives her standing to challenge the anti-camping ordinances, Johnson has wholly failed to plead any facts to show, *inter alia*, that she intends to engage in the *further* conduct that might expose her to a "credible threat" of prosecution under the park-exclusion or criminal trespass ordinances. *Driehaus*, 573 U.S. at 159 (citation omitted). Johnson's declaration states that she has been homeless in Grants Pass for three years, but it does not contend that she has ever been issued, or threatened with issuance of, a trespass order, a park-exclusion order, or a criminal trespass charge or that she has "an intention to engage in a course of conduct" that would lead to such an order or charge. *Id*. (citation omitted). Because "standing is not dispensed in gross," *see DaimlerChrysler*, 547 U.S. at 353 (citation omitted), Johnson must separately establish her standing with respect to each ordinance, and she has failed to do so with respect to the park-exclusion and criminal-trespass ordinances.

living in temporary housing at the time she submitted her declarations in support of class certification in March and June 2019, she explained that that temporary housing would soon expire; that she would become homeless in Grants Pass again; and that she would therefore again be subject to being "arrested, ticketed and prosecuted for sleeping outside or for covering myself with a blanket to stay warm." And, as her declaration at summary judgment showed, that is exactly what happened: in September 2019, she was cited for sleeping in the park in violation of GPMC § 6.46.090, convicted, and fined. Her declarations also confirmed that Blake's persistence in sleeping and camping in a variety of places in Grants Pass had also resulted in a park-exclusion order (which she successfully appealed), and in citations for violation of the anti-sleeping ordinance, GPMC § 5.61.020 (for sleeping in an alley), and for criminal trespass on City property. Based on this showing, I conclude that Blake established standing to challenge each of the ordinances at issue in the district court's judgment.

However, Blake subsequently passed away during this litigation, as her counsel noted in a letter to this court submitted under Federal Rule of Appellate Procedure 43(a). Because the only relief she sought was prospective declaratory and injunctive relief, Blake's death moots her claims. *King v. County of Los Angeles*, 885 F.3d 548, 553, 559 (9th Cir. 2018). And because, as explained earlier, Blake was the only named Plaintiff who established standing with respect to the anti-sleeping, park-exclusion, and criminal trespass ordinances that are the subject of the district court's classwide judgment, her death raises the question whether we consequently lack jurisdiction over those additional claims. Under *Sosna v. Iowa*, 419 U.S. 393 (1975), the answer to that question would appear to be no.

Blake established her standing at the time that the class was certified and, as a result, "[w]hen the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [Blake]." *Id*. at 399. "Although the controversy is no longer alive as to [Blake], it remains very much alive for the class of persons she [had] been certified to represent." *Id*. at 401; *see also Nielsen v. Preap*, 139 S. Ct. 954, 963 (2019) (finding no mootness where "there was at least one named plaintiff with a live claim when the class was certified"); *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 987–88 (9th Cir. 2007) (en banc).

There is, however, presently no class representative who meets the requirements for representing the certified class with respect to the anti-sleeping, park-exclusion, and criminal trespass ordinances.[8] Although that would

[8] Because—in contrast to the named representative in *Sosna*, who had Article III standing at the time of certification—Johnson and Logan *never* had standing to represent the class with respect to the anti-sleeping ordinance, they may not represent the class as to such claims. *See Sosna*, 419 U.S. at 403 (holding that a *previously proper* class representative whose claims had become moot on appeal could continue to represent the class for purposes of that appeal); *see also Bates*, 511 F.3d at 987 (emphasizing that the named plaintiff "had standing at the time of certification"); *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 966 (9th Cir. 2019) (stating that "class representatives must have Article III standing"); *cf. NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. SW., Inc.*, 926 F.3d 528, 533 (9th Cir. 2019) (holding that, where the named plaintiffs never had standing, the class "must be decertified"). The majority correctly concedes this point. *See* Opin. at 32–33. Nonetheless, the majority wrongly allows Johnson and Logan to represent the class as to the park-exclusion and criminal-trespass

normally require a remand to permit the possible substitution of a new class member, *see Kuahulu v. Employers Ins. of Wausau*, 557 F.2d 1334, 1336–37 (9th Cir. 1977), I see no need to do so here, and that remains true even if one assumes that the failure to substitute a new class representative might otherwise present a potential jurisdictional defect. As noted earlier, we have jurisdiction to address all claims concerning the two anti-camping ordinances, as to which Johnson has sufficient standing to represent the certified class. And, as I shall explain, the class as to those claims should be decertified, and the reasons for that decertification rest on cross-cutting grounds that apply equally to all claims. As a result, I conclude that we have jurisdiction to order the complete decertification of the class as to all claims, without the need for a remand to substitute a new class representative as to the anti-sleeping, park-exclusion, and criminal trespass ordinances. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98 (1998) (holding that, where "a merits issue [is] dispositively resolved in a companion case," that merits ruling could be applied to the other companion case without the need for a remand to resolve a potential jurisdictional issue).

III

I therefore turn to whether the district court properly certified the class under Rule 23 of the Federal Rules of Civil Procedure. In my view, the district court relied on erroneous legal premises in certifying the class, and it therefore abused its discretion in doing so. *B.K.*, 922 F.3d at 965.

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ordinances, based on its erroneous conclusion that they established standing to challenge those ordinances. *See supra* at 69–72 & n.7.

A

"To obtain certification of a plaintiff class under Federal Rule of Civil Procedure 23, a plaintiff must satisfy both the four requirements of Rule 23(a)—'numerosity, commonality, typicality, and adequate representation'—and 'one of the three requirements listed in Rule 23(b).'" *A.B. v. Hawaii State Dep't of Educ.*, 30 F.4th 828, 834 (9th Cir. 2022) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345, 349 (2011)). Commonality, which is contested here, requires a showing that the class members' claims "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. In finding that commonality was satisfied with respect to the Eighth Amendment claims, the district court relied solely on the premise that whether the City's conduct "violates the Eighth Amendment" was a common question that could be resolved on a classwide basis. And in finding that Rule 23(b) was satisfied here, the district court relied solely on Rule 23(b)(2), which provides that a "class action may be maintained" if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). That requirement was satisfied, the district court concluded, because (for reasons similar to those that underlay its commonality analysis) the City's challenged enforcement of the ordinances "applies equally to all class members." The district court's commonality and Rule 23(b)(2) analyses are both flawed because they are based on an incorrect understanding of our decision in *Martin*.

As the earlier discussion of *Martin* makes clear, the Eighth Amendment theory adopted in that case requires an individualized inquiry in order to assess whether any individuals to whom the challenged ordinances are being applied "*do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it." 920 F.3d at 617 n.8. *See supra* at 61–63. Only when persons "do not have a *single place* where they can lawfully be," can it be said that an ordinance against sleeping or camping in public, "*as applied to them*, effectively punish[es] them for something for which they may not be convicted under the Eighth Amendment." *Id*. at 617 (simplified) (emphasis added).

Of course, such an individualized inquiry is not required—and no Eighth Amendment violation occurs under *Martin*—when the defendant can show that there is adequate shelter space to house all homeless persons in the jurisdiction. *Id*. But the converse is not true—the mere fact that a city's shelters are full does *not* by itself establish, without more, that any particular person who is sleeping in public does "not have a single place where [he or she] can lawfully be." *Id*. The logic of *Martin*, and of the opinions in *Powell* on which it is based, requires an assessment of a person's individual situation before it can be said that the Eighth Amendment would be violated by applying a particular provision against that person. Indeed, the opinions in *Powell* on which *Martin* relied—Justice White's concurring opinion and the opinion of the dissenting Justices—all agreed that, at most, the Eighth Amendment provided a case-specific affirmative defense that would require the defendant to provide a "satisfactor[y] showing that it was not feasible for him to have made arrangements"

to avoid the conduct at issue. *Powell*, 392 U.S. at 552 (White, J., concurring); *id*. at 568 n.31 (Fortas, J., dissenting) (agreeing with Justice White that the issue is whether the defendant "on the occasion in question" had shown that avoiding the conduct was "impossible"); *see also supra* at 59–60.[9]

In light of this understanding of *Martin*, the district court clearly erred in finding that the requirement of commonality was met here. "What matters to class certification is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

[9] The majority incorrectly contends that the dissenters in *Powell* did not endorse Justice White's conclusion that the *defendant* bears the burden to establish that his or her conduct was involuntary. *See* Opin. at 48–51. On the contrary, the *Powell* dissenters' entire argument rested on the affirmative "constitutional defense" presented at the trial in that case and on the findings made by the trial court in connection with that defense. *See* 392 U.S. at 558 (Fortas, J., dissenting). The majority's suggestion that I have taken that explicit reference to Powell's defense "out of context," *see* Opin. at 49 n.29, is demonstrably wrong—the context of the case was precisely the extensive affirmative defense that Powell presented at trial, including the testimony of an expert. *See* 392 U.S. at 517–26 (plurality) (summarizing the testimony). And, of course, in *Martin*, the issue was raised in the context of a § 1983 action in which the plaintiffs challenging the laws bore the burden to prove the involuntariness of their relevant conduct. The majority points to nothing that would plausibly support the view that *Powell* and *Martin* might require the *government* to carry the burden to establish *voluntariness*. *See* Opin. at 50 n.31 (leaving this issue open). The majority claims that it can sidestep this issue here, but that is also wrong: the burden issue is critical both to the class-certification analysis and to the issue of summary judgment on the merits. *See infra* at 78–89.

Wal-Mart, 564 U.S. at 350 (simplified). Under *Martin*, the answer to the question whether the City's enforcement of each of the anti-camping ordinances violates the Eighth Amendment turns on the individual circumstances of each person to whom the ordinance is being applied on a given occasion. That question is simply not one that can be resolved, on a common basis, "in one stroke." *Id*. That requires decertification.

For similar reasons, the district court also erred in concluding that the requirements of Rule 23(b)(2) were met. By its terms, Rule 23(b)(2) is satisfied only if (1) the defendant has acted (or refused to act) on grounds that are generally applicable to the class as whole and (2) as a result, final classwide or injunctive relief is appropriate. As the Supreme Court has observed, "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart*, 564 U.S. at 360. It follows that, when the *wrongfulness* of the challenged conduct with respect to any particular class member depends critically upon the individual circumstances of that class member, a class action under Rule 23(b)(2) is not appropriate. In such a case, in which (for example) the challenged enforcement of a particular law may be lawful as to some persons and not as to others, depending upon their individual circumstances, the all-or-nothing determination of wrongfulness that is the foundation of a (b)(2) class is absent: in such a case, it is simply not true that the defendant's "conduct is such that it can be enjoined or declared unlawful *only* as to *all* of the class members or as to *none* of them.'" *Id*. (emphasis added).

Because *Martin* requires an assessment of each person's individual circumstances in order to determine whether application of the challenged ordinances violates the Eighth Amendment, these standards for the application of Rule 23(b)(2) were plainly not met in this case. That is, because the applicable law governing Plaintiffs' claims would entail "a process through which highly individualized determinations of liability and remedy are made," certification of a class under Rule 23(b)(2) is improper. *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 499 (7th Cir. 2012). Moreover, the mere fact that the district court's final judgment imposes sweeping across-the-board injunctive relief that disregards individual differences in determining the defendant's liability does *not* mean that Rule 23(b)(2) has been satisfied. The rule requires that any such classwide relief be rooted in a determination of *classwide liability*—the defendant must have acted, or be acting, unlawfully "on grounds that apply generally to the class, *so that* final injunctive or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2) (emphasis added). That requirement was not established here, and the class must be decertified. [10]

[10] The majority wrongly concludes that the City has forfeited any argument concerning Rule 23(b)(2) because it did not specifically mention that subdivision of the rule in its opening brief. Opin. at 41. This "Simon Says" approach to reading briefs is wrong. The *substance* of the argument is contained in the opening brief, in which the City explicitly contended that *Martin* requires "a more individualized analysis" than the district court applied and that, as a result, "neither FED. R. CIV. P. 23 nor *Martin* provide plaintiffs the ability to establish the type of sweeping class-wide claims advanced in this case." Indeed, Plaintiffs themselves responded to this argument, in their answering brief, by

B

The majority provides two responses to this analysis, but both of them are wrong.

First, the majority contends that *Martin* established a bright-line rule that the government cannot prosecute "involuntarily homeless persons for sleeping in public"—or, presumably, for camping—"if there are no other public areas or appropriate shelters where those individuals can sleep." *See* Opin. at 19. As the majority makes clear, that latter inquiry into available shelter space turns on whether "the number of homeless persons outnumber the available shelter beds," except that, "[w]hen assessing the number of shelter spaces," shelters that have a "mandatory religious focus" are not to be counted. *See* Opin. at 13, 19 (citation omitted). Moreover, although the majority's phrasing pays lip service to the fact that the persons at issue must be "involuntarily homeless," the majority also explicitly rejects the City's contention that "the holding of *Martin* can only be applied after an individualized inquiry of each alleged involuntarily homeless person's access to shelter." *See* Opin. at 35. The net result, for class certification purposes, is that any issue of individualized involuntariness is set aside and *Martin* is thereby reduced to a simplistic formula—to be resolved on a classwide basis—into whether the number of homeless persons in the jurisdiction exceeds the number of available shelter beds. *See* Opin. at 34–35, 38.

The majority's analysis fails, because *Martin* does *not* allow the individualized inquiry into involuntariness to be set aside in this way. *Martin* states that, if there are

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explaining why they believe that the requirements of Rule 23(b)(2) were met.

insufficient available beds at shelters, then a jurisdiction "cannot prosecute homeless individuals for '*involuntarily* sitting, lying, and sleeping in public.'" 920 F.3d at 617 (emphasis added). The lack of adequate shelter beds thus merely eliminates a *safe-harbor* that might otherwise have allowed a jurisdiction to prosecute violations of such ordinances *without* regard to individual circumstances, with the result that the jurisdiction's enforcement power will instead depend upon whether the conduct of the individual on a particular occasion was "involuntar[y]." *Id*. *Martin* confirms that the resulting inquiry turns on whether the persons in question have access to "a *single place* where they can lawfully be," *id*. at 617 (emphasis added) (citation omitted), and not just on whether they have access to "appropriate shelters" or "other public areas." And the majority's misreading of *Martin* completely disregards the *Powell* opinions on which *Martin* relied, which make unmistakably clear that an individualized showing of involuntariness is required.

Second, and relatedly, the majority states that, to the extent that *Martin* requires such an individualized showing to establish an Eighth Amendment violation, any such individualized issue here has been eliminated by the fact that "[p]ursuant to the *class definition*, the class includes only *involuntarily* homeless persons." *See* Opin. at 38–40 (first emphasis added). As the majority acknowledges, "[p]ersons are involuntarily homeless" under *Martin* only "if they do not 'have access to adequate temporary shelter,'" such as, for example, when they lack "'the means to pay for it'" and it is otherwise not "'realistically available to them for free.'" Opin. at 14 n.2 (quoting *Martin*, 920 F.3d at 617 n.8). Because that individualized issue has been shifted into the class definition, the majority holds, the City's enforcement

of the challenged ordinances against *that* class can in that sense be understood to present a "common question" that can be resolved in one stroke. According to the majority, because the class definition requires that, at the time the ordinances are applied against them, the class members must be "involuntarily homeless" in the sense that *Martin* requires, there is a common question as to whether "the City's enforcement of the anti-camping ordinances against all involuntarily homeless individuals violates the Eighth Amendment." *See* Opin. at 38–39 & n.22.

The majority cites no authority for this audacious bootstrap argument. If a person's individual circumstances are such that he or she has *no* "access to adequate temporary shelter"—which necessarily subsumes (among other things) the determination that there are no shelter beds available—then the *entire* (highly individualized) question of the City's liability to that person under *Martin*'s standards has been shifted into the class definition. That is wholly improper. *See Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651, 670 n.14 (9th Cir. 2022) (en banc) ("A court may not . . . create a 'fail safe' class that is defined to include only those individuals who were injured by the allegedly unlawful conduct."); *see also Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016) (stating that it would be improper to define a class in such a way "as to preclude membership unless the liability of the defendant is established" (simplified)).

The majority nonetheless insists that "[m]embership in [the] class" here "has no connection to the success of the underlying claims." *See* Opin. at 39 n.23. That is obviously false. As I have explained, *Martin*'s understanding of when a person "involuntarily" lacks "access to adequate temporary shelter" or to "a single place where [he or she] can lawfully

be," *see* 920 F.3d at 617 & n.8 (citations omitted), requires an individualized inquiry into a given person's circumstances at a particular moment. By insisting that a common question exists here *because Martin*'s involuntariness standard has been folded into the class definition, the majority is unavoidably relying on a fail-safe class definition that improperly subsumes this crucial individualized merits issue into the class definition. The majority's artifice renders the limitations of Rule 23 largely illusory.[11]

To the extent that the majority instead suggests that the class definition requires only an involuntary lack of access to regular or permanent shelter to qualify as "involuntarily homeless," its argument collapses for a different reason. Because *Martin*'s Eighth Amendment holding applies only to those who involuntarily lack "access to adequate temporary shelter" on a given occasion, *see* 920 F.3d at 617 n.8, such an understanding of the class definition would *not*

[11] The majority contends that, despite the presence of a liability-determining individualized issue in the class definition, there is no fail-safe class here because one or more of the claims might still conceivably fail on the merits for *other* reasons. *See* Opin. at 39 n.23. But the majority does not identify any such other reasons and, of course, under the majority's view of the substantive law, there are none. But more importantly, the majority is simply wrong in positing that the *only* type of class that would qualify as an impermissible fail-safe class is one in which *every* conceivable merits issue in the litigation has been folded into the class definition. What matters is whether the class definition folds within it *any* bootstrapping merits issue (such as the "injur[y]" issue mentioned in *Olean*) as to which "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Olean*, 31 F.4th at 670 n.14 (citation omitted). To the extent that the central individualized merits issue in this case has been folded into the class definition, that defect is present here.

be sufficient to eliminate the highly individualized inquiry into whether a particular person lacked such access at a given moment, and the class would then have to be decertified for the reasons I have discussed earlier. *See supra* at 75–80. Put simply, the majority cannot have it both ways: either the class definition is co-extensive with *Martin*'s involuntariness concept (in which case the class is an improper fail-safe class) or the class definition differs from the *Martin* standard (in which case *Martin*'s individualized inquiry requires decertification).

IV

Given these conclusions as to standing and class certification, all that remains are the individual claims of Johnson for prospective relief against enforcement of the two anti-camping ordinances. In my view, these claims fail as a matter of law.

Johnson's sole basis for challenging these ordinances is that they prohibit her from sleeping in her van within the City. In her declaration in support of class certification, however, Johnson specifically stated that she has "often" been able to sleep in her van by parking *outside* the City limits. In a supplemental declaration in support of summary judgment, she affirmed that these facts "remain true," but she added that there had also been occasions in which, outside the City limits, county officers had told her to "move on" when she "was parked on county roads" and that, when she parked "on BLM land"—*i.e.*, land managed by the federal Bureau of Land Management—she was told that she "could only stay on BLM for a few days."

As an initial matter, Johnson's declaration provides no non-conclusory basis for finding that she lacks *any* option other than sleeping in her van. Although her declaration

notes that she worked as a nurse "for decades" and that she now collects social security benefits, the declaration simply states, without saying anything further about her present economic situation, that she "cannot afford housing." Her declaration also says nothing about where she lived before she began living "on the street" a few years ago, and it says nothing about whether she has any friends or family, in Grants Pass or elsewhere, who might be able to provide assistance.[12] And even assuming that this factual showing would be sufficient to permit a trier of fact to find that Johnson lacks any realistic option other than sleeping in her van, we cannot affirm the district court's summary judgment in Johnson's favor without holding that her showing was so overwhelming that she should prevail as a matter of law. Because a reasonable trier of fact could find, in light of these evidentiary gaps, that Johnson failed to carry her burden of proof on this preliminary point, summary judgment in her favor was improper.[13]

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[12] The majority dismisses these questions about the sufficiency of Johnson's evidentiary showing as "artificial limitations" on claims under *Martin*, *see* Opin. at 51, but the standard for establishing an Eighth Amendment violation under *Martin* and the *Powell* opinions on which it relies is a demanding and individualized one, and we are obligated to follow it. Indeed, in upholding Powell's conviction for public drunkenness, the controlling opinion of Justice White probed the details of the record as to whether, in light of the fact that Powell "had a home and wife," he could have "made plans while sober to prevent ending up in a public place," and whether, despite his chronic alcoholism, he "retained the power to stay off or leave the streets, and simply preferred to be there rather than elsewhere." 392 U.S. at 553.

[13] The majority errs by instead counting all gaps in the evidentiary record against the City, faulting it for what the majority thinks the City has failed to "demonstrate[]," *See* Opin. at 52 & n.32. That is contrary to well-settled law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)

But even assuming that Johnson had established that she truly has no option other than sleeping in her van, her showing is still insufficient to establish an Eighth Amendment violation. As noted, Johnson's *sole* complaint in this case is that, by enforcing the anti-camping ordinances, the City will not let her sleep in her van. But the sparse facts she has presented fail to establish that she lacks any alternative place where she could park her van and sleep in it. On the contrary, her factual showing establishes that the BLM will let her do so on BLM land for a "few days" at a time and that she also has "often" been able to do so on county land. Given that Johnson has failed to present sufficient evidence to show that she lacks alternatives that would allow her to avoid violating the City's anti-camping ordinances, she has not established that the conduct for which the City would punish her is involuntary such that, under *Martin* and the *Powell* opinions on which *Martin* relies, it would violate the Eighth Amendment to enforce that prohibition against her.

In nonetheless finding that the anti-camping ordinances' prohibition on sleeping in vehicles violates the Eighth Amendment, the majority apparently relies on the premise that the question of whether an individual has options for avoiding violations of the challenged law must be limited to alternatives that are *within the City limits*. Under this view, if a large homeless shelter with 1,000 vacant beds were

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(holding that a movant's summary judgment motion should be granted "against a [nonmovant] who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). The majority's analysis also belies its implausible claim that it has not shifted the burden to the City to establish the *voluntariness* of the behavior targeted by the ordinances. *See supra* at 78 n.9.

opened a block outside the City's limits, the City would *still* be required by the Eighth Amendment to allow hundreds of people to sleep in their vans in the City and, presumably, in the City's public parks as well. Nothing in law or logic supports such a conclusion. *Martin* says that anti-sleeping ordinances may be enforced, consistent with the Eighth Amendment, so long as there is a "*single place* where [the person] can lawfully be," 920 F.2d at 617 (emphasis added) (citation omitted), and Justice White's concurrence in *Powell* confirms that the Eighth Amendment does not bar enforcement of a law when the defendant has failed to show that avoiding the violative conduct is "*impossible*," 392 U.S. at 551 (emphasis added).[14] Nothing in the rationale of this Eighth Amendment theory suggests that the inquiry into whether it is "impossible" for the defendant to avoid violating the law must be artificially constrained to only those particular options that suit the defendant's geographic or other preferences. To be sure, Johnson states that having to drive outside the City limits costs her money for gas, but that does not provide any basis for concluding that the option is infeasible or that she has thereby suffered "cruel and unusual punishment."

Finally, because the district court's reliance on the Excessive Fines Clause was predicated on the comparable view that the challenged ordinances punish "status and not conduct" in violation of *Robinson*, that ruling was flawed for the same reasons. And because Johnson provides no other

[14] The majority complains that this standard is too high, *see* Opin. at 52, but it is the standard applied in *Martin* and in the *Powell* opinions on which *Martin* relied.

basis for finding an Excessive Fines violation here, her claims under that clause also fail as a matter of law.

V

Accordingly, I would remand this case with instructions (1) to dismiss as moot the claims of Debra Blake as well as Plaintiffs' claims with respect to GPMC § 6.46.355; (2) to dismiss the claims of John Logan for lack of Article III standing; (3) to dismiss the remaining claims of Gloria Johnson for lack of Article III standing, except to the extent that she challenges the two anti-camping ordinances (GPMC §§ 5.61.030, 6.46.090); (4) to decertify the class; and (5) to grant summary judgment to the City, and against Johnson, with respect to her challenges to the City's anti-camping ordinances under the Eighth Amendment's Cruel and Unusual Punishments Clause and Excessive Fines Clause. That disposes of all claims at issue, and I therefore need not reach any of the many additional issues discussed and decided by the majority's opinion or raised by the parties.[15]

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[15] Two of the majority's expansions of *Martin* nonetheless warrant special mention. First, the majority's decision goes well beyond *Martin* by holding that the Eighth Amendment precludes enforcement of anti-camping ordinances against those who involuntarily lack access to temporary shelter, if those ordinances deny such persons the use of whatever materials they need "to keep themselves warm and dry." *See* Opin. at 46. It seems unavoidable that this newly declared right to the necessary "materials to keep warm and dry" while sleeping in public parks must include the right to use (at least) a tent; it is hard to see how else one would keep "warm and dry" in a downpour. And the majority also raises, and leaves open, the possibility that the City's prohibition on the use of other "items necessary to facilitate sleeping outdoors"—such as "stoves," "fires," and makeshift "structures"—"may or may not be permissible." *See* Opin. at 45–46, 53–54. Second, the majority indirectly extends *Martin*'s holding from the strictly criminal context at issue in that case to civil citations and fines. *See* Opin. at 41–45. As the

VI

Up to this point, I have faithfully adhered to *Martin* and its understanding of *Powell*, as I am obligated to do. *See Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). But given the importance of the issues at stake, and the gravity of *Martin*'s errors, I think it appropriate to conclude by noting my general agreement with many of the points made by my colleagues who dissented from our failure to rehear *Martin* en banc.

In particular, I agree that, by combining *dicta* in a concurring opinion with a *dissent*, the panel in *Martin* plainly misapplied *Marks*' rule that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken *by those Members who concurred in the judgments* on the narrowest grounds.'" 430 U.S. at 193 (emphasis added) (citation omitted). Under a correct application of *Marks*, the holding of *Powell* is that there is no constitutional obstacle to punishing conduct that has *not* been shown to be involuntary, and the converse question of what rule applies when the

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district court noted below, the parties vigorously debated the extent to which a "violation" qualifies as a crime under Oregon law. The majority, however, sidesteps that issue by instead treating it as irrelevant. The majority's theory is that, even assuming *arguendo* that violations of the anti-camping ordinances are only civil in nature, they are covered by *Martin* because such violations *later* could lead (after more conduct by the defendant) to criminal fines, *see* Opin. at 44–45. But the majority does not follow the logic of its own theory, because it has not limited its holding or remedy to the enforcement of the ultimate criminal provisions; on the contrary, the majority has enjoined *any* relevant enforcement of the underlying ordinances that contravenes the majority's understanding of *Martin*. *See* Opin. at 55.

conduct *has* been shown to be involuntary was left open. *See Martin*, 920 F.3d at 590–93 (M. Smith, J., dissenting from denial of rehearing en banc) (explaining that, under a proper application of *Marks*, "'there is definitely no Supreme Court holding' prohibiting the criminalization of involuntary conduct" (citation omitted)).

Moreover, the correct answer to the question left open in *Powell* was the one provided in Justice Marshall's plurality opinion in that case: there is no federal "constitutional doctrine of criminal responsibility." 392 U.S. at 534. In light of the "centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds," including the "doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress," the "process of adjustment" of "the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man" is a matter that the Constitution leaves within "the province of the States" or of Congress. *Id*. at 535–36. "There is simply no indication in the history of the Eighth Amendment that the Cruel and Unusual Punishments Clause was intended to reach the substantive authority of Congress to criminalize acts or status, and certainly not before conviction," and the later incorporation of that clause's protections vis-à-vis the States in the Fourteenth Amendment "worked no change in its meaning." *Martin*, 920 F.3d at 602 (Bennett, J., dissenting from denial of rehearing en banc); *see also id*. at 599 (explaining that *Martin*'s novel holding was inconsistent with the "text, tradition, and original public meaning[] [of] the Cruel and Unusual Punishments Clause of the Eighth Amendment"). Consequently, so long as "the accused has committed some

act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*," the Eighth Amendment principles applied in *Robinson* have been satisfied. *Powell*, 392 U.S. at 533 (plurality). The Eighth Amendment does not preclude punishing such an act merely "because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'" *Id*.; *see also Martin*, 920 F.3d at 592 n.3 (M. Smith, J., dissenting from denial of rehearing en banc) ("*Powell* does not prohibit the criminalization of involuntary conduct.").

Further, it is hard to deny that *Martin* has "generate[d] dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein." *Id*. at 594 (M. Smith, J., dissenting from denial of rehearing en banc). Those harms, of course, will be greatly magnified by the egregiously flawed reconceptualization and extension of *Martin*'s holding in today's decision, and by the majority's equally troubling reworking of settled class-action principles. With no sense of irony, the majority declares that no such harms are demonstrated by the record in this case, even as the majority largely endorses an injunction effectively requiring Grants Pass to allow the use of its public parks as homeless encampments. Other cities in this circuit can be expected to suffer a similar fate.

In view of all of the foregoing, both *Martin* and today's decision should be overturned or overruled at the earliest opportunity, either by this court sitting en banc or by the U.S. Supreme Court.

* * *

I respectfully but emphatically dissent.

Silver, District Judge, and Gould, Circuit Judge, joint statement regarding denial of rehearing:

The differences of opinion in this case are hard and there is basis for good-faith disagreements which are reflected in the filings from a variety of judges. The robust defense of the panel majority opinion we offer here should not be read as any comment on the sincerity of our colleagues' quarrels with our position.

The statement regarding the denial of rehearing from Judge O'Scannlain and the dissent from Judge M. Smith significantly exaggerate the holding in *Johnson v. Grants Pass*, 50 F.4th 787 (9th Cir. 2022). *Grants Pass*, relying on *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), holds only that governments cannot criminalize the act of sleeping with the use of rudimentary protections, such as bedding, from the elements in some public places when a person has nowhere else to sleep. It does not establish an unrestrained right for involuntarily homeless persons to sleep anywhere they choose. Nor does it require jurisdictions to cede all public spaces to involuntarily homeless persons. The argued notion that *Martin* and *Grants Pass* work together to guarantee a "federal constitutional 'right' . . . to camp or to sleep on sidewalks and in parks, playgrounds, and other public places" is completely absent from the opinion. The denial of en banc rehearing should not be criticized based on rhetorical exaggerations.

Beyond misdescribing the holding of *Grants Pass*, Judge O'Scannlain extrapolates and proposes that the Ninth Circuit ignore 65 years of Supreme Court precedent in favor of his preferred approach of looking exclusively to what he declares is the "text, history, and tradition" of the Eighth Amendment. But inferior courts are not free to embark on

such freewheeling adventures when the Supreme Court has provided the applicable guidance. Judge M. Smith does not join the portion of Judge O'Scannlain's statement discussing this point, but Judge M. Smith engages in a puzzling error by attributing in part the homelessness problem throughout the Ninth Circuit to *Martin* and now *Grants Pass*. The homelessness problem predates *Martin*, and cities outside the Ninth Circuit, and outside the United States, are experiencing crisis-levels of homelessness. It is implausible to argue the crisis would abate if jurisdictions in the Ninth Circuit regained the authority to punish involuntarily homeless persons for sleeping in public with blankets.

I. Limited Holding of *Grants Pass*

Judge O'Scannlain and Judge M. Smith aim most of their fire at the portion of *Grants Pass* addressing the two overlapping "anti-camping" ordinances. *Grants Pass* holds the anti-camping ordinances enacted by the City of Grants Pass violate the Eighth Amendment but only to the extent they criminalize sleeping with rudimentary forms of protection from the elements (*i.e.*, bedding or sleeping bags) by those persons without access to any other shelter (*i.e.*, persons who are "involuntarily homeless"). *Grants Pass* does not expressly preface every reference to "homeless persons" with the adjective "involuntarily." However, in clear reliance on *Martin*, the opinion is strictly limited to enforcement of the ordinances against "involuntarily" homeless persons. Like *Martin*, *Grants Pass* holds only that "it is 'unconstitutional to [punish] simply sleeping *somewhere* in public if one has nowhere else to do so.'" *Id.* (quoting *Martin*, 920 F.3d at 590 (Berzon, J., concurring in denial of rehearing en banc)).

The holding in *Grants Pass* is *not* that involuntarily

homeless persons in the City of Grants Pass and elsewhere in the Ninth Circuit are allowed to sleep wherever and whenever they wish. When there is space available in shelters, jurisdictions are free to enforce prohibitions on sleeping *anywhere* in public. And emphatically, when an involuntarily homeless person refuses a specific offer of shelter elsewhere, that individual may be punished for sleeping in public. When there is no shelter space, jurisdictions may still enforce limitations on sleeping at certain locations. The assertion that jurisdictions must now allow involuntarily homeless persons to camp or sleep on every sidewalk and in every playground is plainly wrong. Jurisdictions remain free to address the complex policy issues regarding homelessness in the way those jurisdictions deem fit, subject to the single restriction that involuntarily homeless persons must have "*somewhere*" to sleep and take rudimentary precautions (bedding) against the elements. *Id.* (quoting *Martin*, 920 F.3d at 590 (Berzon, J., concurring in denial of rehearing en banc)).

Judge M. Smith misinterpreted a statement in the original majority opinion that he believed mandated "a crude *jurisdiction-wide* inquiry" dictating a local "government cannot prosecute homeless people for sleeping in public if there is a greater number of homeless individuals in a jurisdiction than the number of available shelter spaces." Judge M. Smith's understanding of the original statement was incorrect. To avoid any possibility of confusion, the majority has now removed the statement Judge M. Smith found confounding. But Judge M. Smith is still not satisfied. He complains the change did not result in any "downstream changes" to the majority's analysis. But Judge M. Smith fails to acknowledge the undisputed facts established that in the City of Grants Pass, there were zero shelter beds

available on almost every night of the year. Given that, there was no need to change the remaining analysis.

As clearly explained in the majority opinion, the only secular shelter beds in the City of Grants Pass (other than beds for intoxicated adults) were located at a "warming center" that operated on especially cold nights. The warming center could hold 40 individuals and was open 16 nights during the winter of 2020 and zero nights during the winter of 2021. Thus, on 95% of the nights in 2020 and 100% of the nights in 2021, the City of Grants Pass had zero secular shelter beds for non-intoxicated adults. Given that reality, there was no need to make "downstream changes" to the analysis based on the availability of shelter beds in the City of Grants Pass. When a jurisdiction has zero shelter beds even theoretically available, it does not require significant analysis to conclude the jurisdiction is barred from prosecuting the involuntarily homeless persons in that jurisdiction.

Judge M. Smith's refusal to acknowledge the lack of shelter space in the City of Grants Pass reveals his actual complaint in this area is the perceived failure to strictly police who will qualify as involuntarily homeless. According to Judge M. Smith, it was inappropriate to find that zero shelter beds, combined with "conclusory allegations of involuntariness," were enough to conclude there were involuntarily homeless persons in the jurisdiction. The "conclusory allegations" Judge M. Smith faults are expressly found in a declaration submitted by Gloria Johnson where she stated, in relevant part, "I have no choice but to live outside and have no place else to go," and "I continue to live without shelter in Grants Pass." It bears repeating this case was resolved on summary judgment. The City of Grants Pass did not present any evidence to the

district court, nor did it argue on appeal, that Gloria Johnson's declaration was inaccurate. In fact, it is undisputed there are at least fifty involuntarily homeless persons in the City of Grants Pass, as stated in the testimony of a City of Grants Pass police officer. Describing unequivocal and undisputed statements submitted at the summary judgment stage as mere "conclusory allegations" is incorrect.

Judge M. Smith worries the amended opinion might still prohibit any enforcement actions against individuals with access to shelter. But the opinion repeatedly notes it only addresses enforcement attempts against "involuntarily homeless persons." *Grants Pass* goes to great lengths to make this clear. *Grants Pass* states individuals qualify as "involuntarily homeless" only if they "do not have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free." *Id.* at 793 n.2 (internal quotation marks and citation omitted). To remove any doubt, *Grants Pass* stresses "[i]ndividuals who have shelter or the means to acquire their own shelter simply are never class members," meaning such individuals are not "involuntarily homeless." *Id.* at 805. And to further illuminate the point, *Grants Pass* states "To be clear: A person with access to temporary shelter is not involuntarily homeless unless and until they no longer have access to shelter." *Id.* at 805 n.24. Judge M. Smith's assertion that *Grants Pass* might prohibit enforcement against persons "no matter their personal situations" is wrong.

When an individual has access to a shelter, such as through a "city's offer of temporary housing," that person is not "involuntarily homeless" and anti-camping ordinances may be enforced against that person. Similarly, if a

jurisdiction always has shelter beds or other locations available, that jurisdiction is free to enforce its anti-camping ordinances on all other public areas.

Judge M. Smith also claims that after *Grants Pass* local authorities are "powerless to cite" individuals "even for public defecation."[1] Neither *Martin* nor *Grants Pass* involved particular ordinances precluding public urination and defecation and the assertion that *Martin* and *Grants Pass* resolved the constitutionality of ordinances addressing public urination and defecation is mistaken.[2]

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[1] Judge M. Smith's sole support for this interpretation is an unpublished decision by the Eastern District of California. *Mahoney v. City of Sacramento*, No. 2:20-cv-00258-KJM, 2020 WL 616302 (E.D. Cal. Feb. 10, 2020). That case involved the removal of portable toilets from public property that had been placed there by private citizens for homeless individuals to use. The plaintiffs alleged many different constitutional claims, including that the removal of the toilets would violate their Eighth Amendment rights. On that point, the City of Sacramento stated "neither the benefactors of the toilets nor the users of the toilets have, or will be, criminally prosecuted." In denying a request for a temporary restraining order, the court stated "Extending *Martin* to these facts, the City may not prosecute or otherwise penalize the plaintiffs . . . for eliminating in public if there is no alternative to doing so." *Id.* The court continued, arguably based on the city's representations regarding non-prosecution, that "no irreparable injury to plaintiffs' Eighth Amendment rights is likely." *Id.* Because the plaintiffs voluntarily dismissed their claim nine days after the court's order, the court did not provide a more complete Eighth Amendment analysis based on *Martin*. A brief statement made in the context of resolving an emergency motion is not a solid foundation for Judge M. Smith's assertion that after *Grants Pass* local authorities are now "powerless to cite" individuals for public defecation.

[2] The focus of *Martin* and *Grants Pass* was sleep. Sleep is not a voluntary act but an "identifiable human need[]." *Rico v. Ducart*, 980 F.3d 1292, 1298 (9th Cir. 2020). "[S]leep is critical to human existence."

As another panel recently noted, it is unwise "to adjudicate slippery-slope hypotheticals." *Mayes v. Biden*, No. 22-15518, 2023 WL 2997037, at *17 (9th Cir. Apr. 19, 2023). And Judge O'Scannlain noted almost twenty years ago, "[i]n our system of government, courts base decisions not on dramatic Hollywood fantasies . . . but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record." *United States v. Kincade*, 379 F.3d 813, 838 (9th Cir. 2004) (en banc). Because there was no challenge to any public urination or defecation ordinances in *Grants Pass*, the parties did not develop a record regarding those issues such that neither the district court nor Ninth Circuit had a basis to address them. Judge M. Smith's assertion that *Grants Pass* prohibits citations "even for public defecation" is wrong.

II. Class Certification was Proper

Connected to the purported "jurisdiction-wide analysis," Judge M. Smith argues, as did the dissent by Judge Collins, that *Grants Pass* erred in affirming certification of the class.

Walker v. Schult, 717 F.3d 119, 126 (2d Cir. 2013). *See also* Wilkins Kaplan & Sadock's Comprehensive Textbook of Psychiatry, 10th Ed. CH23 ("Sleep is a process required for proper brain function. Failure to sleep impairs thought processes, mood regulation, and a host of normal physiological functions."). The lack of sleep may play a role in the development of dementia. *See* Nedergaard and Goldman, *Glymphatic failure as a final common pathway to dementia*, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8186542/. And long-term sleep deprivation has been shown to be lethal in some animals. *See Why Severe Sleep Deprivation Can be Lethal*, *available at* https://brain.harvard.edu/hbi_news/why-severe-sleep-deprivation-can-be-lethal/#:~:text=We%20found%20high%20levels%20of,can%20eventually%20trigger%20cell%20death.

According to Judge M. Smith, the opinion "wholly collaps[es] the merits into the class definition" which resulted in an "impermissible fail safe class." The *Grants Pass* opinion explains why that conclusion is wrong. 50 F.4th at 805 n.23. In brief, the population of the class of "involuntarily homeless" individuals does not change based on whether the class wins or loses. There has never been a possibility that a "class member either wins or, by virtue of losing, is defined out of the class." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (quotation marks and citation omitted).

Judge M. Smith, as did Judge Collins, also believes the class should not have been certified due to a "lack of commonality." Judge M. Smith's view is that "commonality" was lacking because determining class membership requires an individualized assessment of each potential class member's access to shelter. This is an incorrect understanding of Federal Rule of Civil Procedure 23's "commonality" requirement.

To satisfy Rule 23's "commonality" requirement there must be a "common contention" such "that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). In *Grants Pass*, the "common contention" was the assertion that the City's anti-camping ordinances violated the Eighth Amendment as applied to the class. That contention could be resolved in "one stroke," meaning the "commonality" requirement was met. *Dukes*, 564 U.S. at 350.

While not entirely clear, Judge M. Smith might be arguing "commonality" does not exist when a court is unable

to immediately and easily identify each and every class member. But there has never been such a requirement. *See In re Google Inc. St. View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1115 (9th Cir. 2021) (affirming class settlement despite it being "not feasible" to identify class members). Alternatively, Judge M. Smith might be arguing "commonality" does not exist when some effort will be required to identify class members. But it is entirely routine for class actions to require individualized determinations to identify class members.

For example, a recent Ninth Circuit opinion involved a class defined as "All individuals who have worked as California-based flight attendants of Virgin America, Inc. while residing in California at any time during the Class Period." *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1134 (9th Cir. 2021). Identifying members of that class necessarily required individualized determinations to identify whether an individual had worked as a flight attendant for Virgin America and where the individual had lived throughout the multi-year class period. Judge M. Smith's view that "commonality" is not present whenever class members can only be identified after an individualized inquiry would preclude certification of most classes.

III. Eighth Amendment Doctrine

Judge O'Scannlain laments "*Grants Pass* never meaningfully engaged the text, history, and tradition of the Constitution." For the most part, that criticism is misplaced as the *Grants Pass* majority was bound to follow *Martin*. More importantly, however, the present record does not contain sufficient facts to conduct the analysis Judge O'Scannlain wishes to perform, presumably because the parties were aware Judge O'Scannlain's preferred method of

analysis is foreclosed by long established precedent.

The historical inquiry regarding the meaning of constitutional terms may require looking as far back as the 13th Century. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2249 (2022) (discussing cases from 13th century). The parties in *Grants Pass* did not gather and present evidence regarding centuries of history to illuminate the complete "text, history, and tradition" of the Eighth Amendment. If, as Judge O'Scannlain believes, courts must assess the Eighth Amendment exclusively under a "text, history, and tradition" approach, the parties must be given the opportunity to present relevant historical evidence. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (noting courts should follow "party presentation principle"). That may require the parties retain experts. *See, e.g., Miller v. Smith*, No. 22-1482, 2023 WL 334788, at *1 (7th Cir. Jan. 20, 2023) (remanding for district court to solicit additional expert reports regarding "text, history, and tradition framework" in Second Amendment case).

Notably, Judge O'Scannlain is not arguing *Grants Pass* should be remanded for a proper inquiry under his proposed "text, history, and tradition" test. Rather, he professes he has conducted the relevant inquiry on his own and definitively established the correct interpretation of centuries of history. Our adversarial system takes a dim view of appellate courts embarking on their own fact-finding missions. *Alpha Distrib. Co. of California v. Jack Daniel Distillery*, 454 F.2d 442, 453 (9th Cir. 1972) ("The appellate court is not the trier of facts and does not ordinarily make findings of fact."). And that is especially true when the inquiry has not been briefed by the parties. *Sineneng-Smith*, 140 S. Ct. at 1579 (2020). Ultimately, however, Judge O'Scannlain's favored constitutional analysis is beside the point. The Supreme

Court has made clear "text, history, and tradition" is not the correct method when assessing Eighth Amendment claims.

According to the Supreme Court, the proper interpretation of the Eighth Amendment does not turn exclusively on standards from hundreds of years ago. In a plurality opinion in 1958, the Supreme Court explained the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). More recently, the Supreme Court stated a proper Eighth Amendment analysis "is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (citation omitted). And "courts must look beyond historical conceptions" when assessing Eighth Amendment challenges. *Graham v. Florida.*, 560 U.S. 48, 58 (2010).

Given this guidance, lamenting *Grants Pass* did not delve into the Eighth Amendment's "text, history, and tradition" is a complaint that the majority in *Grants Pass* followed the Supreme Court's settled guidance. Contrary to Judge O'Scannlain, the majority in *Grants Pass* was not free to ignore the Supreme Court, embark on its own fact-finding mission, and conclude the correct interpretation of the Eighth Amendment is the one Judge O'Scannlain likes. Instead, the majority chose the more modest approach of applying existing Supreme Court and Ninth Circuit authority to the record presented by the parties.[3]

[3] Judge Graber agrees with the "underlying legal premise" that the Eighth Amendment prohibits criminal prosecution of involuntarily homeless persons. But she believes *Grants Pass* "unjustifiably expands the reach of the Eighth Amendment" by prohibiting "civil remedies that could, in

IV. Application of *Marks* Doctrine

Both Judge O'Scannlain and Judge M. Smith take issue with the *Marks v. United States*, 430 U.S. 188 (1977), analysis in *Martin* and *Grants Pass*. According to them, the proper application of the *Marks* doctrine is obvious and should have prevented the result in *Martin* and *Grants Pass*. It is not clear if the *Marks* analyses conducted by Judge O'Scannlain and Judge M. Smith reach the same conclusion.[4] Moreover, neither Judge O'Scannlain nor Judge M. Smith cite the en banc majority opinion from the Fourth Circuit that conducts the *Marks* analysis on the relevant Supreme Court authorities and reaches the "same conclusion" as that reached in *Martin*. *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 283 n.17 (4th Cir. 2019) (en banc). Thus, Judge O'Scannlain and Judge M. Smith show overconfidence that their application of the *Marks* doctrine is correct. In the end, however, an exhaustive

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theory, lead to [criminal] prosecution." But all parties in *Grants Pass* agreed the civil violations were used as the first step in the eventual pursuit of criminal charges. This is not a case where the jurisdiction has disavowed pursuing criminal charges.

[4] Judge O'Scannlain describes Justice White's concurrence in *Powell v. Texas*, 392 U.S. 514 (1968), as "the dispositive fifth vote." But Judge O'Scannlain also relies heavily, without explanation, on statements made by the non-binding plurality in *Powell*. As for Judge M. Smith, he argues *Powell* produced "no single rationale and only its specific result is binding." But Judge M. Smith then faults the *Martin* and *Grants Pass* majorities for not addressing arguments made by the non-binding plurality in *Powell*. Judge M. Smith seems to believe proper application of the *Marks* doctrine means only the result in *Powell* is binding, but lower courts have an affirmative obligation to address points made by the *Powell* plurality. Judge M. Smith does not cite any authority for his idiosyncratic view of how the *Marks* doctrine operates.

Marks analysis is not necessary.

Everyone agrees *Robinson v. California*, 370 U.S. 660 (1962) is the binding Supreme Court precedent. It is vital that every justice in *Powell v. State of Texas*, 392 U.S. 514 (1968), fully embraced the holding in *Robinson* that a status cannot be prosecuted. In *Robinson*, the Supreme Court concluded it violated the Eighth Amendment for California to criminalize the status of being "addicted to the use of narcotics." In doing so, the Supreme Court also noted it would violate the Eighth Amendment for a state to make it a criminal offense to be "mentally ill, or a leper, or to be afflicted with a venereal disease." *Robinson*, 370 U.S. at 666. And "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667. Judge O'Scannlain and Judge M. Smith interpret *Robinson* as establishing a conclusive line between constitutionally barred "status crimes" and constitutionally permitted "conduct crimes." But such a definitive line requires *Robinson* be read rigidly, such that a jurisdiction could avoid *Robinson* by tying "statuses" to inescapable human activities.

For example, under a strict "status-conduct" distinction, the California statute at issue in *Robinson* could have been cured by tying the addiction status to sleeping. Under such logic, it would have been constitutional for California to make it a criminal offense for a person "addicted to the use of narcotics" to fall asleep. *Id.* at 660. Similarly, it now would be constitutional for a jurisdiction to criminalize falling asleep while being "mentally ill, or a leper, or [] afflicted with a venereal disease." *Id.* at 666. Reading

Robinson as allowing such simple evasion is absurd.[5]

Regardless of the *Marks* analysis, *Robinson* limits the reach of criminal law. Or, as the Supreme Court declared fifteen years after *Robinson*, the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). *Martin* and *Grants Pass* recognize those substantive limits reach the exceptionally narrow situation of prohibiting punishment when involuntarily homeless persons engage in the life-sustaining act of sleeping in public. Criminalizing the act of sleeping in public when an individual has nowhere else to sleep is, in effect, criminalizing the underlying status of being homeless.

V. Non-Existent Circuit Split

Judge O'Scannlain greatly overstates the extent to which *Martin* and *Grants Pass* fall on one side of an existing circuit split. According to Judge O'Scannlain, no "federal circuit or state supreme court . . . has ever embraced *Grants Pass*'s sweeping holding" regarding the Eighth Amendment. Judge O'Scannlain then cites opinions from the Eleventh and Fifth Circuits, but neither of those opinions hold what Judge O'Scannlain claims. In fact, no circuit court has reached the merits of a challenge to public camping or sleeping

[5] Even the dissent in the Fourth Circuit opinion Judge O'Scannlain cites with approval understood the logic of *Robinson* points away from a rigid interpretation. *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 290 (4th Cir. 2019) (Wilkinson, J., dissenting). That dissent noted "[i]n the rare case where the Eighth Amendment was found to invalidate a criminal law, the law in question sought to punish persons merely for their need to eat or sleep, which are essential bodily functions. This is simply a variation of *Robinson*'s command that the state identify conduct in crafting its laws, rather than punish a person's mere existence." *Id.*

restrictions when no shelter space was available and concluded such restrictions were lawful. Judge O'Scannlain also points to a state supreme court opinion but that opinion explicitly does not decide the question presented in *Martin* and *Grants Pass*.

First, in *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), the Eleventh Circuit addressed a challenge to an anti-camping ordinance. The entire Eighth Amendment analysis in that case was premised on the fact the City of Orlando "presented unrefuted evidence that . . . a large homeless shelter . . . never reached its maximum capacity and that no individual has been turned away because there was no space available or for failure to pay the one dollar nightly fee." *Id.* at 1362. Thus, the Eleventh Circuit concluded the anti-sleeping ordinance did "not criminalize involuntary behavior" because the plaintiff could "comply with the [anti-sleeping] ordinance" by sleeping in the shelter. *Id.* There is no suggestion the result would have been the same if there were no shelter space available.

Judge O'Scannlain claims the availability of shelter space is not a "compelling response" in terms of distinguishing the result in *Joel* from that in *Martin* and *Grants Pass*. But the central holding in *Martin* and *Grants Pass* is that the Eighth Amendment analysis turns on whether there are shelter beds or other locations where an involuntarily homeless person can lawfully sleep. It would be hard to imagine a more "compelling" way to distinguish *Joel* than pointing out *Joel* did not involve involuntary conduct because shelter space was always available.

Judge O'Scannlain also cites *Johnson v. City of Dallas, Tex.*, 61 F.3d 442 (5th Cir. 1995), where the Fifth Circuit concluded the plaintiffs lacked standing to challenge an anti-

sleeping ordinance because they had not been prosecuted. The district court had conducted an extensive overview of the Supreme Court cases and concluded the challenged anti-sleeping ordinance impermissibly "punishe[d] the homeless for their status as homeless." *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994). Instead of rejecting or even addressing such reasoning, the Fifth Circuit concluded no individual had standing to seek pre-enforcement review of a criminal statute. It is not clear whether Judge O'Scannlain agrees with this standing analysis and there is significant reason to doubt it is correct. *See, e.g.*, *Holder v. Humanitarian L. Project*, 561 U.S. 1, 15 (2010) (allowing "preenforcement review of a criminal statute"). But at the very least, it is misleading to describe the Fifth Circuit's rejection based on standing as establishing any position on the merits of the Eighth Amendment issue.[6]

[6] Judge O'Scannlain also professes to find conflicting decisions from the First and Seventh Circuits. In the First Circuit case, the defendant argued "because his drug addiction is a disease, sentencing him to a term of imprisonment for manifesting a condition of his disease constitutes cruel and unusual punishment in violation of the Eighth Amendment." *United States v. Sirois*, 898 F.3d 134, 135 (1st Cir. 2018). The First Circuit rejected this argument, primarily because the standard of review was "clear error" based on the defendant's failure to raise the argument in the district court. Thus, the First Circuit held only that existing caselaw did not make it "clear or obvious" that "the Eighth Amendment proscribes criminal punishment for conduct that results from narcotic addiction." *Id.* at 138. Concluding existing caselaw did not make the issue "clear or obvious" is not the same as reaching the merits of the issue. As for the Seventh Circuit opinion, it is unpublished and is based on an obvious error. The opinion discusses a defendant who, allegedly due to his alcoholism, "failed to attend treatment programs, used cocaine, and abused alcohol so excessively that it led to his arrest for public intoxication." *United States v. Stenson*, 475 Fed. App'x 630, 631 (7th Cir. 2012). The Seventh Circuit concluded the defendant could be

Judge O'Scannlain also cites *Tobe v. City of Santa Ana*, 892 P.2d 1145 (1995) from the California Supreme Court. That case involved a facial challenge to an anti-camping ordinance. *Id.* at 1154. The California Supreme Court explicitly noted, however, it was not resolving whether an "involuntarily homeless person who involuntarily camps on public property may be convicted or punished under the ordinance." *Id.* at 1166 n.19. Claiming *Tobe* is contrary to *Grants Pass* requires ignoring the language of *Tobe*.

Finally, Judge O'Scannlain does not disclose that reaching his preferred result would create a circuit split with the Fourth Circuit. In *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 268 (4th Cir. 2019) (en banc), the en banc Fourth Circuit addressed Virginia's statutory scheme that made it a criminal offense for individuals identified as "habitual drunkards" to possess or attempt to possess alcohol. The Fourth Circuit concluded this scheme might violate the Eighth Amendment's Cruel and Unusual Punishments clause because it targeted "conduct that is both *compelled by [the plaintiffs'] illness* and is *otherwise lawful* for all those of legal drinking age." *Id.* at 281. In reaching that conclusion, the Fourth Circuit unequivocally adopted the same view of the Supreme Court cases regarding status crimes as that adopted in *Martin*. 930 F.3d at 282 n.17.

Judge O'Scannlain acknowledges that *Manning* holds "involuntary conduct may be exempt" from prosecution.

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punished for those acts because he was not being "punished for his status as an alcoholic but for his conduct." *Id.* However, as noted by the Fourth Circuit, the Seventh Circuit "erroneously treated the plurality opinion in *Powell* as the holding of the Court." *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 283 n.17 (4th Cir. 2019). Therefore, *Stenson* is of little value.

But he argues *Manning* "limited its holding to laws that singled individuals out for special punishment for otherwise lawful conduct that is compelled by their illness." Judge O'Scannlain apparently believes the ordinances addressed in *Grants Pass* do not "single out" individuals in a similar manner. Judge O'Scannlain is wrong. The ordinances addressed in *Grants Pass* target the involuntarily homeless the same way the scheme in *Manning* targeted alcoholics.

Under the ordinances addressed in *Grants Pass*, it would be lawful for an individual with access to shelter to wrap himself in a blanket in a public park because the individual was not using the blanket "for the purpose of maintaining a temporary place to live." 50 F.4th at 793. However, the same conduct could lead to criminal prosecution of an involuntarily homeless person because, with no other place to live, the person would be using the blanket for purposes of maintaining a place to live. In brief, blanket use in a public park is criminal if you are homeless and "lawful conduct" if you are not. As with the ordinances in *Manning* regarding alcoholics, the ordinances addressed in *Grants Pass* single out the involuntarily homeless for criminalization of otherwise lawful conduct.

Judge O'Scannlain's purported "deep and varied intercircuit split over how to read the Eighth Amendment" is an illusion. The Ninth Circuit is the sole circuit to have addressed, on the merits, a challenge to the criminalization of sleeping in public by involuntarily homeless persons. The Ninth Circuit's current approach is faithful to Supreme Court precedent and consistent with the Fourth Circuit's approach to a similar issue. Thus, Judge O'Scannlain's desire to hear *Grants Pass* en banc is so that a circuit split with the Fourth Circuit can be created, not that an existing circuit split can be resolved.

VI. Evidence Not in the Record

Judge M. Smith cites a wide variety of extra-record evidence establishing homelessness is a serious issue "caused by a complex mix of economic, mental-health, and substance-abuse factors." Everyone agrees. Judge M. Smith then states, "local governments have taken a variety of steps intended to ameliorate the crisis . . . but most of these attempts to mitigate the challenging issues of homelessness have been wholly or partially frustrated by an alleged constitutional right conjured by a panel of our court." This appears to say that, but for *Martin* and now *Grants Pass*, local governments would be able to pursue policies that would reduce the homeless population. In other words, Judge M. Smith believes *Martin* and *Grants Pass* are somewhat responsible for the size of the homeless population. That is not sensible.

Judge M. Smith points out the City of Los Angeles has roughly 70,000 homeless persons. Judge M. Smith seems to believe at least some of those 70,000 persons, and more throughout the Ninth Circuit, remain homeless because of the very limited protection offered by *Martin*. Thus, it follows that if *Martin* were overruled and criminal penalties were again possible, at least some of those 70,000 persons in Los Angeles would obtain housing. Judge M. Smith does not cite any authority that shows the possibility of criminal penalties would have this effect. Available evidence points away from such a conclusion. *See, e.g.*, Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 Geo. J. on Poverty L. & Pol'y 545, 559 (2006) ("[C]riminalization laws make it much more difficult for the homeless to gain social and economic mobility, and thus the laws have the result of extending the period of time that one is homeless.").

Judge M. Smith's extra-record evidence is carefully limited to support his causal theory. But if extra-record evidence should be considered, other jurisdictions show *Martin* is not the problem. New York City is experiencing a crisis in the increase of the involuntarily homeless population. As of February 2023, New York City had more than 77,000 homeless persons, "by far the most ever recorded and an increase of over 70 percent since May." Emma G. Fitzsimmons and Andy Newman, *New York City Commissioner Of Social Services Resigns*, The New York Times (Feb. 8, 2023). New York City is not in the Ninth Circuit and it seems unlikely the holding in *Martin* is causing a surge in the homeless population across the country. Thus, *Martin* is not, as alleged, the driver of the homelessness problem.

VII. Conclusion

The Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). Those substantive limits are implicated only in rare circumstances. One such circumstance is when a jurisdiction attempts to punish as a criminal offense the life-sustaining act of sleeping in public with bedding when a person has nowhere else to go. Because *Grants Pass* and *Martin* provide exceptionally limited protection, and are consistent with Supreme Court precedent, the decision not to rehear *Grants Pass* en banc is correct.[7]

[7] The city ordinances addressed in *Grants Pass* will be superseded, to some extent, on July 1, 2023, when a new Oregon state law takes effect. The new state law requires "[a]ny city or county law that regulates the acts of sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to the public must be objectively reasonable

O'SCANNLAIN, Circuit Judge,[1] with whom Judges WALLACE, CALLAHAN, BEA, IKUTA, BENNETT, R. NELSON, BADE, COLLINS, LEE, BRESS, FORREST, BUMATAY, and VANDYKE join, and with whom Judge M. SMITH joins as to all parts except Part II-A, respecting the denial of rehearing en banc:

With this decision, our Circuit's jurisprudence now effectively guarantees a personal federal constitutional 'right' for individuals to camp or to sleep on sidewalks and in parks, playgrounds, and other public places in defiance of traditional health, safety, and welfare laws—a dubious holding premised on a fanciful interpretation of the Eighth Amendment. We are the first and only federal circuit to have divined such a strange and sweeping mandate from the Cruel and Unusual Punishments Clause. Our jurisprudence in this case is egregiously flawed and deeply damaging—at war with constitutional text, history, and tradition, and Supreme Court precedent. And it conflicts with other circuits on a question of exceptional importance—paralyzing local

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as to time, place and manner with regards to persons experiencing homelessness." Or. Rev. Stat. Ann. § 195.530(2). The statute specifies that "[k]eeping warm and dry means using measures necessary for an individual to survive outdoors given the environmental conditions" but it "does not include any measure that involves fire or flame." Or. Rev. Stat. Ann. § 195.530(1)(b)(B). This change in state law is yet another reason why it was wise to not rehear *Grants Pass*.

[1] As a judge of this court in senior status, I no longer have the power to vote on calls for rehearing cases en banc or formally to join a dissent from failure to rehear en banc. *See* 28 U.S.C. § 46(c); Fed. R. App. P. 35(a). Following our court's general orders, however, I may participate in discussions of en banc proceedings. *See* Ninth Circuit General Order 5.5(a).

communities from addressing the pressing issue of homelessness, and seizing policymaking authority that our federal system of government leaves to the democratic process. We should have reheard this case en banc to reconsider our unfortunate constitutional mistake.

I

Instead of respecting constitutional "text, history, and precedent," *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2271 (2022), our Eighth Amendment jurisprudence here has disrupted the "paramount role of the States in setting 'standards of criminal responsibility,'" *Kahler v. Kansas*, 140 S. Ct. 1021, 1028 (2020) (quoting *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality)). In my view, our cases do not inspire confidence that we have faithfully followed the Cruel and Unusual Punishments Clause—and it is worth explaining how we got here before considering why we should have reheard *Grants Pass* en banc to fix our constitutional mistakes. *See Martin v. City of Boise*, 920 F.3d 584, 603 (9th Cir. 2019) (inventing the doctrine); *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022) (expanding the doctrine).

A

Our untenable jurisprudence here started in *Boise*—where a three-judge panel first invented a federal constitutional 'right' (rooted in the Eighth Amendment, of all places!) to sleep on public property. In *Boise*, six homeless individuals alleged that the City of Boise, Idaho, had violated their constitutional rights by enforcing municipal ordinances that prohibited unauthorized sleeping on sidewalks and in parks, plazas, and other public places. Even though the Eighth Amendment, on its own terms, only prohibits "cruel and unusual punishments," U.S. Const.

amend. VIII, the *Boise* panel went where no federal circuit had gone before—holding that the Eighth Amendment prohibited a local government from "prosecuting people criminally" for the "involuntary act" of "sleeping outside on public property [including sidewalks] when those people have no home or other shelter to go to." *Boise*, 920 F.3d at 603, 613, 616 (cleaned up).

In doing so, the *Boise* panel made no effort to ground its decision in the text, history, or tradition of the Eighth Amendment. Instead—after failing to identify a single Supreme Court precedent blessing its approach—the *Boise* panel attempted to fashion its preferred constitutional rule by stitching together *dicta* in a lone concurrence with a *dissent*. *Id.* at 616 (holding that these separate, unprevailing writings in *Powell* "compel[led]" *Boise*'s result). While we declined to rehear *Boise* en banc, *see id.* at 590-99 (M. Smith, J., dissental) (explaining *Boise*'s misconstruction of Supreme Court precedent); *id.* at 599-603 (Bennett, J., dissental) (articulating *Boise*'s inconsistency with the Eighth Amendment), our mistake in *Boise* has (fortunately) not been replicated in other circuits—and, as I have already stated, we remain the only federal court of appeals to have recognized an individual constitutional 'right' to sleep or to camp on sidewalks and other public property.

B

Unfortunately, the problems created by *Boise* have now been visited upon the City of Grants Pass by the panel majority here, which has expanded *Boise*'s faulty holding to affirm an injunction effectively requiring the City to resign all but one of its public parks to be used as homeless

encampments. *See Grants Pass*, 50 F.4th at 792-93, 813.[2] In this case, several individuals sought to represent a putative class of all involuntarily homeless people living in Grants Pass, seeking a permanent injunction barring the enforcement of municipal ordinances that prohibited unauthorized sleeping or camping in public spaces. *Id.* at 792-94 (explaining that violating the challenged public-sleeping, public-camping, and park-exclusion ordinances could result in civil citations and fines, that repeat violators could be excluded from specified City property, and that violating an exclusion order could subject a violator to criminal trespass prosecution). The district court sided with the challengers—and it certified a class consisting of "[a]ll involuntarily homeless individuals living in Grants Pass," and held that the City's enforcement of the public-sleeping and public-camping ordinances violated the Eighth Amendment. *Id.* at 795-97.

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A divided panel of our Court affirmed in all "material

[2] The cities of Boise and Grants Pass are, regrettably, not the only victims of our Eighth Amendment jurisprudence here—a point that is not to be celebrated. *See, e.g.*, *Fund for Empowerment v. City of Phoenix*, No. CV-22-02041-PHX-GMS, 2022 WL 18213522 (D. Ariz. Dec. 16, 2022) (applying *Boise*); *Coal. on Homelessness v. City & Cnty. of San Francisco*, No. 22-CV-05502-DMR, 2022 WL 17905114 (N.D. Cal. Dec. 23, 2022) (applying *Grants Pass*). While our mistaken jurisprudence in this area has some limits, *see Grants Pass*, 50 F.4th at 812 n.33, we should not pretend that the jurisprudential experiment started by *Boise* and expanded by *Grants Pass*—which "effectively strikes down the anti-camping and anti-sleeping [o]rdinances … of countless, if not all, cities within our jurisdiction," *Boise*, 920 F.3d at 599 (M. Smith, J., dissental)—is "narrow," *contra id.* at 617 (majority opinion); *Grants Pass*, 50 F.4th at 813.

aspects of this case." *Id.* at 793. After concluding that class certification was proper, the panel majority held, following *Boise*, that the City could not enforce the public-camping and park-exclusion ordinances against "involuntarily homeless persons" for the "mere act of sleeping" or camping in public spaces when "there is no other place in the City for them to go." *Id.* at 798 & n.12, 813 (remanding, *inter alia*, on the public-sleeping ordinance because the relevant plaintiff had died). It also expanded *Boise* by holding that the City could not deprive persons of whatever materials they needed "to keep … warm and dry," and by extending *Boise* from the purely criminal arena to civil fines and citations. *Id.* at 806-09. In doing so, the panel majority—content to rest on *Boise*'s tortured reading of Supreme Court precedent, *see id.* at 808-11—declined to devote any serious attention to the text, history, or tradition of the Eighth Amendment.

2

Judge Collins dissented. *Id.* at 814-31. He explained, *inter alia*, that the case should be reheard en banc because the panel majority decision combined a "gross misreading of [*Boise*] with a flagrant disregard of settled class-certification principles," and because "the foundation on which [the panel majority decision] is built is deeply flawed: [*Boise*] seriously misconstrued the Eighth Amendment and the Supreme Court's caselaw construing it." *Id.* at 814, n.1. In his view, *Boise* has "'generate[d] dire practical consequences for the hundreds of local governments within our jurisdiction,'" and those harms will be "greatly magnified by the egregiously flawed reconceptualization and extension of [*Boise*'s] holding." *Id.* at 831 (quoting *Boise*, 920 F.3d at 594 (M. Smith, J., dissental)).

II

There is a simple reason why we should have reheard *Grants Pass* en banc: it entrenches a deeply damaging and egregiously wrong construction of the Eighth Amendment in our Circuit's precedent. An "erroneous interpretation" of the Constitution is "always important." *Dobbs*, 142 S. Ct. at 2265. But some judicial mistakes are "more damaging" than others—and "more than just wrong." *Id.* at 2265-66. The novel and expansive jurisprudence entrenched by *Grants Pass*—which thumbs its nose at the "standard grounds for constitutional decisionmaking[:] text, history, and precedent"—stands on "exceptionally weak grounds" and "should be overruled." *Id.* at 2264, 2266, 2271.

A

The first flaw in *Grants Pass*'s jurisprudence is that it conflicts with the text, history, and tradition of the Eighth Amendment—which demonstrate that the Cruel and Unusual Punishments Clause does not establish a federal constitutional "doctrine[] of criminal responsibility." *Kahler*, 140 S. Ct. at 1028 (cleaned up). Constitutional text, history, and tradition make plain that the Clause was directed to *modes of punishment*—and that it was never intended to arrogate the substantive authority of legislatures to prohibit "acts" like those at issue here, and "certainly not before conviction." *Boise*, 920 F.3d at 602 (Bennett, J., dissental). Indeed, one might question whether the Cruel and Unusual Punishments Clause has anything to do with the jurisprudence embraced by *Grants Pass*—which authorizes a plaintiff who has never been assigned a "punishment," let alone one that is "cruel and unusual," to challenge traditional anti-vagrancy regulations under the Clause. It is regrettable that *Grants Pass* never meaningfully engaged the text,

history, and tradition of the Constitution—which are the "standard grounds for constitutional decisionmaking." *Dobbs*, 142 S. Ct. at 2271 ("text, history, and precedent"); *see, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) ("history" and precedent); *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) ("text, history, meaning, and purpose"); *see also, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) ("historical practices and understandings" (cleaned up)); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2128-29 (2022) ("text and history"); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("history and tradition" (cleaned up)).

1

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments inflicted*." U.S. Const. amend. VIII (emphasis added). The Amendment's bar on excessive "bail," excessive "fines," and the infliction of cruel and unusual "punishments" indicates the Amendment's punitive focus. And the text of the Cruel and Unusual Punishments Clause itself provides no substantive limit on what conduct may be punished. Instead, it only prohibits "punishments" (i.e., pain or suffering inflicted for a crime or offense) that are "cruel" (i.e., marked by savagery and barbarity) and "unusual" (i.e., not in common use), reflecting a constitutional prohibition originally and traditionally understood to forbid the government from "authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed." *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (opinion of Scalia, J.); *id.* at 979 ("[b]reaking on the wheel," "flaying alive," and "maiming, mutilating, and scourging to death" (cleaned up)).

Constitutional text, history, and tradition make clear—contrary to *Grants Pass*'s holding—that the Clause was not originally understood to displace the authority of legislatures to prohibit historically proscribable acts (and certainly not before any punishment was imposed), *see Boise*, 920 F.3d at 599-603 (Bennett, J., dissental), and that the Clause was not traditionally taken to enshrine a constitutional "doctrine[] of criminal responsibility," *Kahler*, 140 S. Ct. at 1028 (cleaned up).

2

Ultimately, the text, history, and tradition of the Eighth Amendment teach a simple truth: the Cruel and Unusual Punishments Clause—a constitutional prohibition fundamentally centered on *modes of punishment*—is not a boundless remedy for all social and policy ills, including homelessness. It does not empower us to displace state and local decisionmakers with our own enlightened view of how to address a public crisis over which we can claim neither expertise nor authority, and it certainly does not authorize us to dictate municipal policy here. Given the "centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds," including the "doctrines of actus reus, mens rea, insanity, mistake, justification, and duress," the "process of adjustment" of the "tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man" has primarily "been thought to be the province of the States." *Powell*, 392 U.S. at 535-36 (plurality). So long as "the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*," the Eighth

Amendment does not prohibit punishing such an act merely "because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'" *Id.* at 533. It is troubling that our Circuit—in inventing a new individual 'right' unmoored from text, history, or tradition—has twisted the Eighth Amendment to displace the substantive authority of local officials to prohibit a species of antisocial conduct that was neither originally nor traditionally thought to warrant the protection of the Constitution, let alone immunity under the Cruel and Unusual Punishments Clause.

B

The second flaw in *Grants Pass*'s jurisprudence is that it lacks any foundation in the Eighth Amendment doctrine handed down to us by the Supreme Court—which, to be clear, has *never* accepted *Grants Pass*'s theory that the Cruel and Unusual Punishments Clause establishes a federal constitutional prohibition on the criminalization of purportedly nonvolitional conduct. While *Grants Pass* purports faithfully to follow the Supreme Court's decisions in *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968), it actually rests on a plain misreading of the Supreme Court's instructions because it does little more than combine dicta in a solo concurrence with a dissent. In doing so, *Grants Pass* has clearly erred—embracing a startling misapplication of the *Marks* doctrine to venture far astray from Supreme Court precedent, *see Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (cleaned up)).

1

The Supreme Court has never blessed our Circuit's sweeping approach to the Eighth Amendment here—and neither *Robinson* nor *Powell* provide any support for *Grants Pass*'s adventurous holding. In *Robinson*, the Supreme Court first articulated the status-act distinction that should have made this a simple case—holding only that the Eighth Amendment prohibited states from making it a crime "to be addicted to the use of narcotics." *Robinson*, 370 U.S. at 662 (cleaned up). Unlike laws "punish[ing] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration," the California law invalidated by *Robinson* punished the mere "status" of narcotics addiction, unmoored from any particular conduct. *Id.* at 662, 666. The holding of *Robinson* is simple: the criminal law cannot punish status (e.g., "be[ing] addicted to the use of narcotics"); it can only punish conduct (e.g., "the use of narcotics"). *Id.* at 662-67 (cleaned up); *see Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 288 (4th Cir. 2019) (en banc) (Wilkinson, J., dissenting).

The Supreme Court has not wavered from the status-act distinction articulated by *Robinson*—and *Powell* is certainly no exception. In *Powell*, decided soon after *Robinson*, a fractured Supreme Court upheld a Texas law prohibiting public drunkenness against an Eighth Amendment challenge alleging that the alcoholic's status compelled him to drink in public. *Powell*, 392 U.S. 514. No controlling majority rejected the status-act line drawn by *Robinson*: (1) Justice Marshall's four-justice plurality upheld the statute based on *Robinson*'s status-act distinction, *id.* at 516-37 (plurality); (2) Justice White's lone concurrence (the dispositive fifth vote) upheld the statute because it involved a volitional act,

and he declined to determine whether a non-volitional act could be criminalized, *id.* at 548-54 (White, J., concurring); and (3) Justice Fortas's four-justice dissent rejected *Robinson*'s status-act distinction and deemed the statute's enforcement unconstitutional, *id.* at 554-70 (Fortas, J., dissenting). Because Justice White did not "reach[] the broader question of compulsion, the judgment in *Powell* neither extended [n]or contracted *Robinson*, which was left undisturbed." *Manning*, 930 F.3d at 289 (Wilkinson, J., dissenting). And the Supreme Court has certainly never understood *Powell* to have such broad effect: it has neither "walked away from *Robinson*" nor "embraced [*Boise*'s] whole notion of nonvolitional conduct." *Id.*

2

Nevertheless, *Grants Pass*—turning to *Powell*'s fractured decision, *see Grants Pass*, 50 F.4th at 809-11 (contorting *Powell* and *Marks*)—attempts to "tease [its] preferred reading from the dicta of a single justice," *Manning*, 930 F.3d at 290 (Wilkinson, J., dissenting). *Grants Pass*'s distortion of *Powell* clearly violates *Marks*—which, as explained, instructs that the Court's holding is "that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks*, 430 U.S. at 193 (cleaned up). Because no victorious majority in *Powell* disrupted *Robinson*'s "status-act" distinction or blessed *Grants Pass*'s "involuntary conduct" theory, we are left with nothing more than *Grants Pass*'s attempt to craft its preferred rule by combining dicta in a concurrence with a dissent—which means that *Grants Pass* is ultimately predicated on a plain *Marks* violation. Such a fundamental mistake, which directly implicates the limits on an inferior court's authority to circumvent the limits of such controlling precedents, should not remain the law of our Circuit.

III

The fundamental flaws in *Grants Pass* are sufficient reason to reject its deeply damaging and egregiously wrong interpretation of the Eighth Amendment. But even apart from the constitutional errors entrenched by *Grants Pass*, there are additional, compelling reasons why this case warranted rehearing en banc. Perhaps most importantly, our expansive interpretation of the Cruel and Unusual Punishments Clause diverges from other courts on an issue of exceptional importance—and it is telling that we remain the only circuit bold enough to embrace an Eighth Amendment doctrine that effectively requires local communities to surrender their sidewalks and other public places to homeless encampments.

A

The Eighth Amendment jurisprudence undergirding *Grants Pass* squarely conflicts with decisions from other circuits and other courts. We should not pretend that our Circuit's divination of a personal constitutional 'right' to encamp on public property (including sidewalks) is anything but the inventive, judge-made novelty that we all know it to be.

1

The first set of conflicts—which centers on *Grants Pass*'s result—is plain. No federal circuit or state supreme court (not one!) has ever embraced *Grants Pass*'s sweeping holding that the Eighth Amendment prohibits the enforcement of public-camping restrictions (including before any punishment is imposed). Other circuits to consider the issue have uniformly upheld such laws against Eighth Amendment challenges. *See Joel v. City of Orlando*,

232 F.3d 1353, 1356, 1361-62 (11th Cir. 2000) (upholding public-camping proscription because "[a] distinction exists between applying criminal laws to punish conduct, which is constitutionally permissible, and applying them to punish status, which is not"); *see also Johnson v. City of Dallas*, 61 F.3d 442, 443-45, n.5 (5th Cir. 1995) (rejecting challenge to public-camping proscription because the prohibition on cruel and unusual punishments is applicable only after prosecution and conviction, and none of the challengers had been "*convicted* of violating the sleeping in public ordinance" (relying on *Ingraham*, 430 U.S. at 664)). And no state supreme court has reached the same result as our aberrant decision here. *See Tobe v. City of Santa Ana*, 892 P.2d 1145, 1166 (Cal. 1995) (upholding public-camping regulation because the "ordinance permits punishment for proscribed conduct, not punishment for status"); *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 60 (2015) (upholding public-camping bar because "the Eighth Amendment does not prohibit the punishment of acts," and the "ordinance punishes the act[] of [illegal] camping, … not homelessness"). No defender of *Grants Pass*'s jurisprudence has provided a compelling response to these decisions, *see Boise*, 920 F.3d at 617 n.9 (attempting to reconcile *Boise* with *Joel*'s alternative rationale, but declining to do much else); *Grants Pass*, 50 F.4th 787 (not even attempting this much)—let alone a federal appellate or state supreme court case that has ever reached *Grants Pass*'s result. While *Grants Pass* has not been replicated elsewhere, aside from a smattering of trial-level dispositions, a decision that stands so far out of step with so many other courts is one that cries out for correction.

2

The second set of conflicts—which relates to *Grants*

Pass's rationale—is similarly troublesome. Our approach to the Eighth Amendment in this area conflicts with decisions from the First Circuit, Fourth Circuit, and Seventh Circuit, which embrace several competing tests for determining whether the Eighth Amendment immunizes involuntary conduct. At least two other circuits—the First Circuit and the Seventh Circuit—have flatly rejected the *Grants Pass* principle that purportedly "involuntary" conduct is exempt from criminal liability under the Eighth Amendment, or that Justice White's lone concurrence in *Powell* provides the binding opinion that compels such exemptions. *See, e.g.*, *United States v. Sirois*, 898 F.3d 134, 137-38 (1st Cir. 2018); *United States v. Stenson*, 475 F. App'x 630, 631 (7th Cir. 2012) (citing *United States v. Black*, 116 F.3d 198, 200-01 (7th Cir. 1997)); *see also supra* (collecting cases rejecting *Grants Pass*'s reading of *Robinson*, *Powell*, and *Ingraham*). And the Fourth Circuit—the only circuit that embraces anything like *Grants Pass*'s approach—provides, at best, only mixed support because even though it held that involuntary conduct may be exempt based on dicta in Justice White's lone concurrence, it limited its holding to laws that "singled" individuals "out for special punishment for otherwise lawful conduct that is compelled by their illness." *Manning*, 930 F.3d at 281 n.14. Our Circuit is, therefore, locked in a deep and varied intercircuit split over how to read the Eighth Amendment in light of *Robinson* and *Powell*—and, as explained, we are the only federal court of appeals to have discovered a personal constitutional 'right' for individuals to encamp on public property (including sidewalks) in violation of traditional health, safety, and welfare laws, a result that no other federal circuit or state supreme court in the country has been bold enough to replicate.

B

Grants Pass also presents a question of exceptional practical and institutional importance. The immodest approach to the Eighth Amendment that it embraces is both troubling and dangerous. It undermines the power of state and local governments to address the homelessness crisis. And it arrogates to federal judges authority that the Constitution reserves elsewhere. We should have granted rehearing en banc to stop the damage already being worked by *Boise* and to stave off the mischiefs that *Grants Pass* is sure to worsen. It is regrettable that our Circuit has declined to grapple with the consequences of our mistakes.

1

The practical consequences should have been reason enough to reconsider our jurisprudential experiment before it did any more harm to our communities—and before its dangers were exacerbated by *Grants Pass*. No one reasonably doubts that our existing precedent in *Boise* has created grave and troubling consequences for the state and local communities within our jurisdiction. And no one meaningfully contests that these harms will be greatly worsened by the doctrinal innovations introduced by *Grants Pass*. One need only walk through our neighborhoods—through the Tenderloin (San Francisco) or Skid Row (Los Angeles)—to know that our communities are fast coming undone. Tents crowding out sidewalks, needles flooding parks, and rubbish (and worse) marring public squares reflect a threat to the public welfare that should not be taken lightly. Nor do such troubling blights mark an area where we should be eager to throw caution to the wind and to embrace judicial adventurism so far removed from the guardrails set by the Constitution's text and the Supreme

Court's precedents.

Unfortunately, the "Hobson's choice" imposed by our Circuit effectively requires state and local officials to "abandon enforcement of a host of laws regulating public health and safety," *Boise*, 920 F.3d at 594 (M. Smith, J., dissental)—and, if today's decision is any guide, our precedents will readily be wielded effectively to require jurisdictions throughout our Circuit to surrender the use of many of their public spaces (including sidewalks) to homeless encampments. It is easy enough for us, behind marble walls and sealed doors, to dismiss the consequences of our decisions. But for those who call these communities home—who must live by the criminal violence, narcotics activity, and dangerous diseases that plague the homeless encampments buttressed by our decisions—the consequences of our judicial arrogation are harder to accept.

2

In addition to the practical harms that our jurisprudence creates for our communities, we also should have ended the jurisprudential mistake embraced by *Grants Pass* as quickly as possible because it "visit[s] structural and institutional damage in so many respects." *Manning*, 930 F.3d at 305 (Wilkinson, J., dissenting). In particular, the doctrine embraced by *Grants Pass* puts "judges in policymaking roles reserved largely for legislatures and states." *Id.* at 297. It erodes "the states' role as separate sovereigns entrusted to define the criminal law within their own borders," and "pushes the Eighth Amendment as a catch-all corrective" for social ills identified by inexpert and unelected judicial officers. *Id.* Under our federal system, state and local leaders—not distant federal judges—are primarily entrusted with the power and duty to protect the common welfare of

our towns, cities, and neighborhoods, and to ensure that our streets, squares, and sidewalks remain clean and safe. *See United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995). The reason for such "legislative responsibility over criminal law is fundamental: the criminal law exists to protect the safety of citizens, and ensuring the safety of the people is one of those things that popular government exists to do." *Manning*, 930 F.3d at 297 (Wilkinson, J., dissenting). Unfortunately, this has not swayed our Court—with consequences that will sweep well past the troubles visited upon the City of Boise and the City of Grants Pass.

IV

Grants Pass is a regrettable mistake that entrenches and expands upon previous deeply damaging jurisprudence. While I do not doubt the good faith of my colleagues, it is hard to imagine a jurisprudence that combines so little regard for the sacred words of the Constitution, with so much disregard for the state and local authorities that our constitutional system entrusts as the primary protectors of the health, safety, and welfare of our communities. Our jurisprudence here is flawed—in conflict with the text, history, and tradition of the Eighth Amendment, and the precedents of the Supreme Court. And it splits from other circuits on a question of exceptional importance, working great violence to our constitutional structure and threatening dire consequences for communities within our jurisdiction. It is most regrettable that our Court has failed to rehear this case en banc.

GRABER, Senior Circuit Judge, respecting the denial of rehearing en banc:

The constitutional limits on a municipality's ability to address the issue of homelessness present an exceptionally important and complex topic. I appreciate the many thoughtful views expressed by my colleagues. I write separately to offer a middle ground.

Whether or not the result is dictated by Powell v. Texas, 392 U.S. 514 (1968), the Eighth Amendment almost certainly prohibits criminal punishment of persons who engage in truly involuntary actions such as sleeping. I thus agree with the underlying legal premise of the decisions in Johnson v. City of Grants Pass, 50 F.4th 787 (9th Cir. 2022), and Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019). Eighth Amendment protection also extends to individualized injunctive relief, such as precluding a municipality from enforcing a particular criminal provision against a specific person, if past actions by the municipality warrant such equitable relief. Our opinion in Martin, though controversial, reached a reasonable result, particularly because Martin emphasized the "narrow" nature of its holding. 920 F.3d at 617. I did not join, and did not agree with, the dissents from denial of rehearing en banc in Martin.

In my view, though, the extension of Martin to classwide relief, enjoining civil statutes that may eventually lead to criminal violations but have never resulted in criminal convictions for any named plaintiff, is a step too far from the individualized inquiries inherent both in the Eighth Amendment context and in the context of injunctive relief. A key part of Johnson's reasoning begins with the observation that civil citations could lead to a civil park-exclusion order which, in turn, could lead to a prosecution

for criminal trespass (but which never has for the named plaintiffs).[1] Johnson, 50 F.4th at 807–08. The opinion then concludes that, because the Eighth Amendment would prohibit that ultimate prosecution, it also must prohibit the civil citations. Id. I disagree with that double leap in logic. Even assuming that classwide injunctive relief were available against a prosecution for criminal trespass, the Eighth Amendment does not prohibit all civil remedies that could, in theory, lead to such a prosecution. In this way, Johnson unjustifiably expands the reach of the Eighth Amendment.

The challenges faced by individuals experiencing homelessness are severe. And the challenges that face municipalities are daunting. When called upon, we have an obligation to ensure that a municipality's efforts to provide for the common health and safety do not violate the Constitution. I agree with the basic legal premise that the Eighth Amendment protects against criminal prosecution of the involuntary act of sleeping, but the injunctive relief in this case goes too far. Moreover, given the widespread nature of the homelessness crisis in our jurisdiction, it is

[1] The amended opinion refers to Debra Blake as "a named plaintiff," and the amended opinion states that she was convicted of "Criminal Trespass on City Property." Amended Op. at 28 n.13. Blake unfortunately died. As the opinion elsewhere recognizes, Johnson, 50 F.4th at 800–02, she is no longer a named plaintiff. Moreover, Blake's "conviction" is doubly inapt here. First, despite the name of the citation, the conviction was for a violation, not a crime. Second, Blake was cited for being in a closed park, not for violating any of the civil statutes challenged here. The crux of the opinion's analysis is that a civil citation could lead to a criminal misdemeanor conviction under Oregon Revised Statute section 164.245. Johnson, 50 F.4th at 807. No evidence in the record suggests that the civil statutes relevant here have caused Blake or any named plaintiff to be convicted of that crime.

crucial that we get it right. Our court should have reheard this case en banc.

M. SMITH, Circuit Judge, with whom Judges BENNETT, BUMATAY, and VANDYKE join, and with whom Judges IKUTA, R. NELSON, BADE, COLLINS, and BRESS join as to Parts I and II, dissenting from the denial of rehearing en banc:

Homelessness is presently the defining public health and safety crisis in the western United States. California, for example, is home to half of the individuals in the entire country who are without shelter on a given night.[1] In the City of Los Angeles alone, there are roughly 70,000 homeless persons.[2] There are stretches of the city where one cannot help but think the government has shirked its most basic responsibilities under the social contract: providing public safety and ensuring that public spaces remain open to all. One-time public spaces like parks—many of which provide scarce outdoor space in dense, working-class neighborhoods—are filled with thousands of tents and makeshift structures, and are no longer welcoming to the

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[1] HUD, *The 2022 Annual Homelessness Assessment Report (AHAR) to Congress* 16 2022), https://www.huduser.gov/portal/sites/default/files/pdf/2022-AHAR-Part-1.pdf.

[2] Doug Smith, *Rand Survey Finds Homelessness Up 18% in L.A. Hot Spots Where the Official Count Recorded Decreases*, L.A. Times (Jan. 26, 2023), https://www.latimes.com/california/story/2023-01-26/rand-survey-finds-homelessness-up-18-in-l-a-hot-spots-where-the-official-count-recorded-decreases.

broader community.[3]

It is a status quo that fails both those in the homeless encampments and those near them. The homeless disproportionately risk being the victims of violence, sexual assault, and drug-related death,[4] and encampments' unsanitary conditions have caused resurgences of plagues such as typhus, tuberculosis, and hepatitis-A.[5] For those who live, work, and attend school near these encampments, they have become a source of fear and frustration. A plurality of California residents rate homelessness and the closely related issue of a lack of affordable housing as the

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[3] *See generally* Luis Sinco, *Photos: An Unflinching Look at Homelessness During the Pandemic* (Mar. 8, 2021), https://www.latimes.com/california/story/2021-03-08/homelessness-and-the-pandemic (depicting homeless encampments); L.A. Homeless Servs. Auth., *Car, Van, RV/Camper, Tent, and Makeshift Shelter (CVRTM)* (2022), https://www.lahsa.org/documents?id=6533-cvrtm-summary-by-geography (estimating the total number of tents and makeshift structures across the City of Los Angeles).

[4] *See* Gale Holland, *Attacked, Abused and Often Forgotten: Women Now Make Up 1 in 3 Homeless People in L.A. County*, L.A. Times (Oct. 28, 2016), https://www.latimes.com/projects/la-me-homeless-women/; Christian Martinez & Rong-Gong Lin II, *L.A. County Homeless Deaths Surged 56% in Pandemic's First Year. Overdoses Are Largely to Blame*, L.A. Times (Apr. 22, 2022), https://www.latimes.com/california/story/2022-04-22/la-county-homeless-deaths-surge-pandemic-overdoses.

[5] Soumya Karlamangla, *L.A. Typhus Outbreak Adds Fuel to Debates Over Homelessness and Housing*, L.A. Times (Oct. 11, 2018), https://www.latimes.com/local/california/la-me-ln-typhus-outbreak-20181011-story.html; Anna Gorman & Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless*, Atlantic, https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/ (last updated Mar. 11, 2019).

state's two most pressing issues.[6] In the City of Los Angeles, a startling 95% of residents view homelessness as a serious or very serious problem, while roughly 40% of residents report that pervasive homelessness makes them no longer feel safe in their own neighborhoods.[7]

Homelessness is caused by a complex mix of economic, mental-health, and substance-abuse factors, and appears to resist any easy solution. In recent years, state and local governments have taken a variety of steps intended to ameliorate the crisis: adopting zoning reforms to increase the supply of housing, declaring public emergencies to bypass red tape and more quickly build new public housing, increasing spending on mental-health services, and contracting with hotels and motels to offer temporary housing to those living on the street. Some local governments have also reasonably chosen to couple these longer-term measures with attempts to enforce public-camping bans and other public health measures—but most of these attempts to mitigate the challenging issues of homelessness have been wholly or partially frustrated by an

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[6] Mark Murray, California Poll: *Homelessness Is Most Urgent Issue in the State*, NBC News (Mar. 1, 2023), https://www.nbcnews.com/meet-the-press/meetthepressblog/california-poll-homelessness-urgent-issue-state-rcna72972.

[7] Benjamin Oreskes, Doug Smith & David Lauter, *95% of Voters Say Homelessness is L.A.'s Biggest Problem, Times Poll finds. 'You Can't Escape It.'*, L.A. Times (Nov. 14, 2019), https://www.latimes.com/california/story/2019-11-14/homeless-housing-poll-opinion; Benjamin Oreskes & David Lauter, *L.A. Voters Angry, Frustrated Over Homeless Crisis, Demand Faster Action, Poll Finds*, L.A. Times (Dec. 1, 2021), https://www.latimes.com/homeless-housing/story/2021-12-01/la-voters-are-frustrated-impatient-over-persistent-homelessness-crisis.

alleged constitutional right conjured by a panel of our court that finds no support in United States Supreme Court jurisprudence.

Assume, for example, that you are a police officer and you encounter a homeless person in some public space—say, San Francisco's Civic Center near the James R. Browning Building where our court sits. Assume further that the person has set up a tent and "engage[d] in other life-sustaining activities" like defecation and urination on the sidewalk nearby. *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (citation omitted). You also know that, pursuant to the city's good-faith efforts to comply with the dictates of *Martin*, government workers have conducted outreach and offered temporary housing to the homeless persons in this area. Nonetheless, under the majority's reasoning, you are powerless to cite this person even for public defecation because San Francisco has fewer shelter beds than total homeless persons. It is irrelevant that the city already offered this specific person shelter because "the number of homeless persons outnumber the available shelter beds." *Johnson v. City of Grants Pass*, 50 F.4th 787, 792 (9th Cir. 2022) (cleaned up).[8] In a democracy, voters and government officials should be able to debate the efficacy and desirability of these types of enforcement actions. Regrettably, our court has short-circuited the political process and declared a reasonable policy response to be off-limits and flatly unconstitutional.

Contrary to Judges Gould and Silver's assertion, neither

[8] This hypothetical is based on two district-court applications of *Martin* and *Grants Pass*. *See infra* section III (San Francisco and Sacramento examples).

my description of the West's homelessness crisis nor my offering of the above hypothetical is meant to "argue the crisis would abate" if *Martin* and *Grants Pass* were overruled. Though these decisions certainly add obstacles to local governments' already difficult path to solving the homelessness crisis, I have never and do not here contend that our precedent is an on/off-switch entirely responsible for the crisis.

I describe the scope of the West's homelessness crisis to instead make a point about our proper role, as well as our institutional competence and accountability. Unlike the officials tasked with addressing homelessness, the members of our court are neither elected nor policy experts. Of course, the political process must yield to the fundamental rights protected by the Constitution, and some of federal courts' finest moments have come in enforcing the rights of politically marginal groups against the majority. But when asked to inject ourselves into a vexing and politically charged crisis, we should tread carefully and take pains to ensure that any rule we impose is truly required by the Constitution—not just what our unelected members think is good public policy. Unfortunately, the careful constitutional analysis that the West's homelessness crisis calls for is absent from both *Martin*, 920 F.3d 584, and the majority opinion here, *Grants Pass*, 50 F.4th 787.

Martin misread Supreme Court precedent, yet we failed to give that case the en banc reconsideration it deserved. *Grants Pass* now doubles down on *Martin*—crystallizing *Martin* into a crude population-level inquiry, greenlighting what should be (at most) an individualized inquiry for class-wide litigation, and leaving local governments without a clue of how to regulate homeless encampments without risking legal liability. *Martin* handcuffed local jurisdictions as they

tried to respond to the homelessness crisis; *Grants Pass* now places them in a straitjacket. If this case does not "involve[] a question of exceptional importance," I cannot imagine one that does. Fed. R. App. P. 35(a)(2). We should have taken this second chance to revisit our flawed precedent en banc, and I respectfully dissent from our decision not to do so.

I.

As Judge O'Scannlain explains in his Statement, *Martin* cannot be squared with the Supreme Court's Eighth Amendment precedent. What is more, as Judge O'Scannlain also explains, *Martin* violates Supreme Court precedent regarding what constitutes binding precedent. The *Marks* rule instructs in no uncertain terms that, "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who *concurred in the judgments* on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (cleaned up) (emphasis added). Yet *Martin* counted to five votes for its understanding of the Eighth Amendment by including the four votes of the *Powell* dissenters. *Martin*, 920 F.3d at 616 ("The four dissenting Justices adopted a position consistent with that taken by Justice White [in his concurrence] . . . ."). When the *Marks* rule is properly applied to *Powell v. Texas*, 392 U.S. 514 (1968), it produces the holding that Powell's "conviction was constitutional because it involved the commission of an act. Nothing more, nothing less." *Martin*, 920 F.3d at 591 (M. Smith, J., dissenting from denial of rehearing en banc); *see also Grants Pass*, 50 F.4th at 830 (Collins, J., dissenting) ("Under a correct application of *Marks*, the holding of *Powell* is that there is no constitutional obstacle to punishing conduct that has *not* been shown to be

involuntary, and the converse question of what rule applies when the conduct has been shown to be involuntary was left open."). Put differently: When the *Marks* rule is properly applied, *Martin* cannot hide behind *Powell* and insist that Supreme Court precedent "compels the conclusion" it reached. *Martin*, 920 F.3d at 616.

Martin therefore had the burden to affirmatively justify its rule—that a "state may not criminalize conduct that is an unavoidable consequence" of a person's status—as consistent with the Eighth Amendment. *Id.* at 617 (cleaned up). But neither *Martin* nor the majority in this case even attempts to make that showing, including rebutting the number of reasons Justice Thurgood Marshall and the other Justices in the *Powell* plurality thought an unavoidable-consequence-of-status rule would be both improper and unworkable. We are left completely in the dark as to why, for example, the *Martin* panel and *Grants Pass* majority apparently thought:

- The *Powell* plurality was wrong to interpret *Robinson v. California*, 370 U.S. 660 (1962) as a ban on "punish[ing] a mere status" and nothing more. *Powell*, 392 U.S. at 532 (plurality) (Marshall, J.).
- The *Powell* plurality was wrong to be concerned that an unavoidable-consequence-of-status rule would lack "any limiting principle." *Id.* at 533.
- The *Powell* plurality was wrong to think that a constitutionalized unavoidable-consequence rule would improperly override the ability of states to develop "[t]he doctrines of actus reus, mens rea, insanity, mistake, justification, and duress" to resolve as they think best "the tension between the evolving

aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man." *Id.* at 535–36.

- The *Powell* plurality incorrectly characterized an unavoidable-consequence rule as conferring upon unelected federal judges the impossible task of being "the ultimate arbiter[s] of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country." *Id.* at 533.
- The punishment flowing from a public-camping prosecution (or even just a civil citation) constitutes the "exceedingly rare" instance—outside the context of capital punishment and juvenile life without parole—where a particular sentence may violate the Eighth Amendment. *Rummel v. Estelle*, 445 U.S. 263, 272 (1980); *see Miller v. Alabama*, 567 U.S. 460, 469–70 (2012) (summarizing proportionality case law).

Judges Gould and Silver are correct to note that the *Powell* plurality is, after all, just a plurality. But these questions, and others, still warranted a response—one would hope that a lower court, when fashioning a novel constitutional rule, would at least grapple with the reasons four Supreme Court Justices expressly chose to reject the very same rule. The district courts tasked with applying *Martin*/*Grants Pass*, the local governments placed in a straitjacket by these decisions, and the residents of our circuit who now must live with the consequences all deserved better than the half-reasoned decisions they received from our court.

II.

Moreover, even if one assumes *arguendo* that the Eighth

Amendment supports an unavoidable-consequence-of-status principle, *Grants Pass*'s homelessness-specific analysis has nothing to do with that principle. One would reasonably assume that *Grants Pass* implemented *Martin*'s general Eighth Amendment principle by mandating that courts conduct an *individualized* inquiry: whether public camping by the individual plaintiffs before the court is an "unavoidable consequence" of their status as homeless persons—inquiring, for example, into whether the plaintiffs declined offers of temporary housing.[9] But one would be mistaken in that assumption. Instead of calling for an individualized inquiry, the original *Grants Pass* majority opinion candidly set forth a crude *jurisdiction-wide* inquiry: "The formula established in *Martin* is that the government cannot prosecute homeless people for sleeping in public if there is a greater number of homeless individuals in a jurisdiction than the number of available shelter spaces." *Grants Pass*, 50 F.4th at 795 (cleaned up); *see id.* at. 823–28 (Collins, J., dissenting) (arguing that *Martin* provides at most a "case-specific," as-applied claim). The original

[9] One short-term housing site in Los Angeles sits nearly empty despite proximity to a large homeless camp, and one of the new Los Angeles mayor's marquee offers of short-term housing had a below-50% acceptance rate. *See* Helen Li, *The Times Podcast: Why Hotel Rooms for L.A.'s Homeless Sit Empty* (Feb. 15, 2023), https://www.latimes.com/podcasts/story/2023-02-15/the-times-podcast-cecil-hotel-los-angeles; Benjamin Oreskes, *Bass Wants to Bring Homeless People Indoors. Can She Secure Enough Beds?*, L.A. Times (Dec. 22, 2022), https://www.latimes.com/california/story/2022-12-22/karen-bass-homelessness-directive-inside-safe; *see also* David Zahniser, *In Downtown L.A., Bass' Plan to Clear Encampments Faces Crime, Addiction and Resistance* (May 30, 2023), L.A. Times, https://www.latimes.com/california/story/2023-05-30/la-me-mayor-bass-homeless-encampment-resistance.

majority opinion made clear that the beds-versus-population "formula" is all that matters: Because the plaintiffs in this case established a shelter-beds deficit, they are deemed—no matter their personal situations—involuntarily homeless, and the city effectively cannot enforce its ordinances against *any* homeless person.

The majority has now amended its opinion to remove this "formula" language, and the opinion's body now quotes *Martin*'s statement that individuals are outside the purview of its holding if they "have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but [they] choose not to use it." *Martin*, 920 F.3d at 617 n.8. But I fear that this amendment, in reality, does little to change the substance of *Grants Pass* and instead simply obscures what *Grants Pass* holds.

Notably, the amendment is not accompanied by any downstream changes to the majority's application of its rule to the facts or its ultimate conclusion. So, the "formula" language may be gone, but the approach that language forthrightly described remains embedded in the opinion. *Grants Pass* still holds that "[t]here, of course, exists no law or rule requiring a homeless person" to "provide the court an accounting of her finances and employment history" before being deemed "involuntarily homeless." 50 F.4th at 811. It still equates a shelter-beds deficit with jurisdiction-wide involuntariness: "[T]he number of homeless persons outnumber the available beds. In other words, homeless persons have nowhere to shelter and sleep in the City . . . ." *Id.* at 792; *see also id.* at 797 (describing the district court decision, which it largely affirms, as holding "that, based on the unavailability of shelter beds, the City's enforcement of its anti-camping and anti-sleeping ordinances violated the

Cruel and Unusual Punishment Clause"). And it still treats a shelter-beds deficit, when combined with conclusory allegations of involuntariness, as sufficient for an individual to show that he or she is involuntarily homeless: "Gloria Johnson has adequately demonstrated that there is no available shelter in Grants Pass and that she is involuntarily homeless." *Id.* at 811.

The amendment thus places district courts in an impossible position. They will not be able to reconcile *Grants Pass*'s disparate strands—because they cannot be reconciled. District courts will have to choose between following what *Grants Pass* now says in one place (there must be a meaningful voluntariness inquiry) and what *Grants Pass* says and does in another place (a shelter-beds deficit and conclusory allegations are all one needs).

Indeed, *Grants Pass*'s class-certification analysis confirms that its nod to the *unavoidable*-consequence or *involuntarily*-homeless limitation is just window dressing—and that the amendment to the opinion is one of form, not substance. As Judge Collins explained, if *Martin*'s public-camping ban is truly limited to those who are involuntarily homeless, then *Martin*-type cases cannot possibly be litigated on a class-wide basis. *Grants Pass*, 50 F.4th at 823–28 (Collins, J., dissenting). To be certified, a putative class must satisfy Federal Rule of Civil Procedure 23's commonality requirement, among others. "What matters" for purposes of that requirement "is not the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (cleaned up). A court must be able to "resolve an issue that is central to the validity of each one of the [class members']

claims in one stroke." *Id.* Whether a public-camping ban is unconstitutional as applied to a homeless plaintiff depends (it would seem) on whether that plaintiff is "involuntarily homeless," which in turn depends on a host of individualized factors: Did they decline the city's offer of temporary housing? Do they otherwise "have the means to pay" for temporary housing? Were there areas of the city where they could publicly camp without citation in light of the city's enforcement policies? It blinks reality to say that the district court could, "in one stroke," resolve the constitutionality of the public-camping ban as applied to each of the "at least around 50" class members here. *Grants Pass*, 50 F.4th at 811.

The majority, for what it is worth, tries to backdoor involuntariness into its Rule 23 analysis. But its argument is one that Philosophy 101 professors should consider using as their go-to example of circular reasoning: The class satisfies Rule 23's commonality requirement because the class members' claims all present the question of whether enforcement of public-camping ordinances against "involuntarily homeless individuals violates the Eighth Amendment." *Id.* at 804–05 n.22. Answering that question resolves the claims of each class member "in one stroke" because "[p]ursuant to the class definition, the class includes only involuntarily homeless persons." *Id.* at 804–05 (citation omitted). The basis for that premise? "[T]he record establishes" it. *Id.* at 804–05 n.22. As Judge Collins explained, there is "no authority for this audacious bootstrap argument." *Id.* at 827 (Collins, J., dissenting). By wholly collapsing the merits into the class definition, the majority opinion certified an impermissible "fail safe" class. *Id.* (quoting *Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651, 670 n.14 (9th Cir. 2022) (en banc)).

In response to this criticism, Judges Gould and Silver suggest that *Grants Pass*'s class-certification analysis is run of the mill—analogizing it to our court's recent approval of a district court's certification of a class of California residents who worked for a certain employer. *See Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1134 (9th Cir. 2021). It is telling that Judges Gould and Silver think involuntary homelessness is as easily determined as residency and employment history—another piece of evidence that *Martin*'s involuntariness component has faded away or been collapsed into the shelter-beds inquiry. More fundamentally, their analogy overlooks that the *Bernstein* class definition did not swallow the merits inquiry in the manner that the class definition does here. Separate from class membership (based on residency and employment), the *Bernstein* plaintiffs still had to make a merits showing that the defendant violated California labor laws by, among other things, failing to pay a minimum wage and to pay for all hours worked. *See id.* at 1133. Here, by contrast, the game is essentially over as soon as the class is certified. The class (purportedly) consists only of involuntarily homeless people, and application of the challenged ordinances to the class members is unconstitutional (under our flawed precedent) *because* the class members are involuntarily homeless.

Viewing the majority's class-certification analysis, there are only two possible conclusions: *Either* (1) the majority erred in certifying the class despite a lack of commonality; *or* (2) the majority read "involuntarily" out of *Martin*'s purported involuntarily-homeless rule. Either conclusion points to profound error that we should have used the en banc process to correct.

III.

Judges Gould and Silver insist that *Martin* and *Grants Pass* apply only in "exceptionally narrow situation[s]" and that critics of these decisions have resorted to "rhetorical exaggerations." But whose word should one take: that of a panel majority defending its own work or that of several district court judges who have no dog in this fight and are simply trying to understand and apply the law as we have handed it down to them? Several district court decisions have understood *Martin* and now *Grants Pass* to run roughshod over normal procedural rules and past any substantive limiting principles. As a result, local governments are hard-pressed to find any way to regulate the adverse health and safety effects of homeless encampments without running afoul of our court's case law—or, at a minimum, being saddled with litigation costs. If one picks up a map of the western United States and points to a city that appears on it, there is a good chance that city has already faced a lawsuit in the few short years since our court initiated its *Martin* experiment. Without expressing any view on how other district courts or panels of our court should decide these or similar cases pursuant to our existing precedent, I offer a few examples of the judicial adventurism our case law has already produced:

1. ***San Francisco*** responded conscientiously to *Martin*. The police department promulgated an enforcement bulletin intended to comply with that case's dictates while retaining flexibility to clear some of the city's worst encampments. *See Coal. on Homelessness v. City & Cnty. of San Francisco*, No. 22-cv-05502-DMR, 2022 WL 17905114, at *3–7 (N.D. Cal. Dec. 23, 2022). Pursuant to the bulletin, an officer cannot arrest a homeless person for a set of enumerated offenses unless SFPD first "secure[s] appropriate shelter."

Id. at *4 (emphasis omitted). SFPD policy requires officers to work with other city agencies to implement a multi-step process: The city posts a notice that an encampment clearing will occur on a particular date; city workers perform outreach at the encampment the weekend before the clearing; and city workers follow up at the encampment 24 to 72 hours before the clearing. *Id.* at *5–7. Only then can an encampment clearing take place. To be sure, the record on SFPD's compliance with this policy was mixed. The defendants asserted that they *always* comply with the policy—"conduct[ing] regular training[s]" on it, setting aside beds based on an estimated acceptance rate, and providing officers with the means to check shelter-bed availabilities. *Id.* at *13–15, *23. Some plaintiffs asserted that they *never* received advance notice of encampment clearings or offers of housing. *Id.* at *8–9. Other plaintiffs asserted that SFPD *sometimes* complied with the policy and "acknowledge[d] receiving and/or accepting shelter offers at . . . encampment closures." *Id.* at *22; *see also id.* at *10–12. The plaintiffs' expert opined that San Francisco had a shelter-beds deficit but conceded that a "clear way to access shelter is via an encampment [closure] while under threat from law enforcement." *Id.* at *14.

Nonetheless, the court found the mixed record before it sufficient to issue a sweeping preliminary injunction. The district court repeatedly returned not to the facts of specific plaintiffs in specific encampment clearings but to the consideration at the center of *Grants Pass*: whether there is a shelter-beds deficit. *See id.* at *21 ("insufficient stock of shelter beds"); *id.* *22 ("long-standing shelter bed shortfalls"); *id.* at *23 ("there are thousands more homeless individuals . . . than there are available shelter beds"); *id.* at *27 ("shortfall of shelter beds"). The court determined that

it "need not decide" how offers of housing, when actually made, would impact the constitutionality of arrests or alter the scope of an injunction. *See id.* at *23–24. The court instead issued a broad, if ambiguous, injunction that appears to effectively prevent SFPD from enforcing five separate prohibitions against homeless persons in San Francisco "as long as there are more homeless individuals . . . than there are shelter beds available." *Id.* at *28.

2. ***Phoenix*** suffered a similar fate. Like San Francisco, it adopted a policy that police "officers must make individualized assessments" before issuing citations against homeless persons for certain offenses. *Fund for Empowerment v. City of Phoenix*, No. CV-22-02041-PHX-GMS, 2022 WL 18213522, at *3 (D. Ariz. Dec. 16, 2022). Unlike the San Francisco case, the district court cited no evidence in the record showing that Phoenix breached its policy. Still, the district court issued a sweeping injunction after conducting a merits inquiry that focused almost exclusively on the *Grants Pass* beds-versus-population inquiry. The district court noted that it was "not contested that there are more unsheltered individuals than shelter beds in Phoenix" and then concluded that Phoenix's policy "present[s] likely unconstitutional applications especially when the unsheltered in the city outnumber the available bed spaces." *Id.* The city's enforcement policy—as a mere "statement of administrative policy"—was insufficient to "forestall the Plaintiffs' ultimate likelihood of success on the merits." *Id.* (quoting *Martin*, 920 F.3d at 607).

3. ***Santa Barbara*** adopted a half-measure: a geographically- and time-limited ban against public sleeping that applied only in the city's downtown area. *Boring v. Murillo*, No. CV-21-07305, 2022 WL 14740244, at *1 (C.D. Cal. Aug. 11, 2022). Despite the ordinance's modest scope,

the district court still held that the plaintiffs stated a plausible claim to relief pursuant to *Martin* and denied the city's motion to dismiss. *See id.* at *5–6.

4. ***Sacramento*** found itself subject to a lawsuit after taking the innocuous step of removing a portable toilet from city-owned property. *Mahoney v. City of Sacramento*, No. 2:20-cv-00258-KJM, 2020 WL 616302, at *1 (E.D. Cal. Feb. 10, 2020). Though the court ultimately declined to issue a temporary restraining order because the plaintiffs' claims failed on factual grounds, it still interpreted *Martin* to cover public urination and defecation prosecutions and stated that "the City may not prosecute or otherwise penalize the plaintiffs . . . for eliminating in public if there is no alternative to doing so." *Id.* at *3.

Judges Gould and Silver argue this "brief statement made in the context of resolving an emergency motion is not a solid foundation" on which to suggest that the enforcement of public defecation and urination laws may well be suspect pursuant to our court's precedent. In their view, that is because *Martin* and *Grants Pass* did not involve a "challenge to any public urination or defecation ordinances." But our decisions are not good-for-one-ride-only tickets forever bound to their specific facts; they serve as precedent to which parties analogize in related situations. *Martin* attempted to limit its reach by explaining that sleep is a "life-sustaining activit[y]." *Martin*, 920 F.3d at 617. In their concurrence, Judges Gould and Silver offer a slightly different version of that limiting principle—that sleep is an "identifiable human need[]." But "[w]hat else is [an identifiable human need]? Surely bodily functions." *Martin*, 920 F.3d at 596 (M. Smith, J., dissenting from denial of rehearing en banc). It is not a slippery-slope fallacy to note a realistic consequence that flows directly from *Martin*

and *Grants Pass*'s reasoning. Moreover, Judges Gould and Silver fail to recognize that something is fundamentally amiss with our precedent if a city, even if it ultimately prevails, must first go to court before it can remove a toilet from property it owns.

5. ***Chico*** "constructed an outdoor temporary shelter facility at the Chico Municipal Airport that accommodate[d] all 571 of the City's homeless persons." *Warren v. City of Chico*, No. 2:21-CV-00640-MCE, 2021 WL 2894648, at *3 (E.D. Cal. July 8, 2021). But the district court cited stray lines in *Martin* in addition to *Merriam-Webster*'s definition of "shelter," conducted a single paragraph of analysis, concluded that the airport shelter was not *Martin*-type shelter, and subsequently enjoined Chico from enforcing its anti-camping laws against "homeless persons in violation." *Id.* at *3–4.

As the district court itself recognized, this decision (as well as the others above) shows that, while the *Martin* analysis may be "straight-forward . . . [as] to the facts of [a] case," the "practical ramifications for the community are much more complex" and the "concerns raised in the dissent from the denial of rehearing en banc appear to have come to fruition." *Id.* at *4 n.4 (citation omitted). As I feared, our case law has "prohibit[ed] local governments from fulfilling their duty to enforce an array of public health and safety laws," and the "[h]alting [of] enforcement of such laws" has "wreak[ed] havoc on our communities." *Martin*, 920 F.3d at 594 (M. Smith, J., dissenting from denial of rehearing en banc).

* * *

I respect the good intentions of my colleagues on the *Martin* panel and in the *Grants Pass* majority. But *Martin*,

particularly now that it has been supercharged by *Grants Pass*, has proven to be a runaway train that has derailed and done substantial collateral damage to the governmental units in which it has been applied and those living therein. These cases use a misreading of Supreme Court precedent to require unelected federal judges—often on the basis of sloppy, mixed preliminary-injunction records—to act more like homelessness policy czars than as Article III judges applying a discernible rule of law. I respectfully dissent from our court's decision not to rehear *Grants Pass* en banc.

COLLINS, Circuit Judge, dissenting from the denial of rehearing en banc:

In my dissent as a member of the panel in this case, I explained that:

- *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), is a "deeply flawed" decision that "seriously misconstrued the Eighth Amendment and the Supreme Court's caselaw construing it";
- Even if *Martin* were correct in its Eighth Amendment holding, the panel majority's decision in *Johnson* "greatly expands *Martin*'s holding" in a way that is "egregiously wrong"; and
- The panel majority's decision "make[s] things worse" by "combin[ing] its gross misreading of

> *Martin* with a flagrant disregard of settled class-certification principles."

See Johnson v. City of Grants Pass, 50 F.4th 787, 814 & n.1 (9th Cir. 2022) (Collins, J., dissenting). In its "joint statement regarding denial of rehearing," the panel majority today recycles many of the flawed arguments in its opinion. I have already explained in my dissent why those arguments are wrong. *See id*. at 823–31. The statement of Judge O'Scannlain respecting the denial of rehearing en banc and Parts I and II of Judge M. Smith's dissent from the denial of rehearing en banc—which I join—further cogently explain the multiple serious errors in the panel majority's opinion. I will not repeat all of what has already been said, but I think that two points are worth underscoring in response to the panel majority's statement regarding the denial of rehearing.

First, the panel majority's statement confirms and illustrates the layers of self-contradiction that underlie its opinion in this case.

The panel majority continues implausibly to insist that its opinion is "strictly limited to enforcement of the ordinances against 'involuntarily' homeless persons," which would suggest—as *Martin* itself suggested—an individualized case-specific inquiry. *See* Panel Majority Statement at 94. But the panel majority also continues to insist that the class was properly certified *because* any individualized issues concerning involuntariness were moved into the class definition. *See* Panel Majority Statement at 99–101. As I have explained, that "artifice" ignores the requirements of Federal Rule of Civil Procedure 23, because it "rel[ies] on a fail-safe class definition that improperly subsumes this crucial individualized merits issue into the class definition." 50 F.4th at 827 (Collins, J.,

dissenting). The panel majority tries to wave away the problem as merely one of "individualized determinations to *identify* class members," arguing that what it did in this case is no different than asking whether, for example, a given class member resides in a particular State or performs a given job for a company. *See* Panel Majority Statement at 101 (emphasis added). But in sharp contrast to the simple factual inquiries in the panel majority's examples, its standard for "identifying" class members here—*i.e.*, whether a given plaintiff's homelessness is involuntary under all of the circumstances—is the *central merits issue* in the case under a correct reading of *Martin*. Thus, under the faulty class action upheld by the panel majority, if a particular person's individual circumstances confirm that his homelessness is not "involuntary" in the sense that *Martin* requires, then his Eighth Amendment claim under *Martin* fails on the merits—and he is then defined out of the class. But if his homelessness is involuntary under *Martin*'s standards, then (under that decision's reading of the Eighth Amendment) his *Martin* claim is a winner—and he remains in the class. The result is a classic fail-safe class: each "class member either wins or, by virtue of losing, is defined out of the class." *Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651, 669–70 n.14 (9th Cir. 2022) (en banc) (citation omitted).

Underlying all of this is a fundamental inconsistency between the various propositions endorsed by the panel majority's opinion. As I stated in my panel dissent, "the majority cannot have it both ways: either the class definition is co-extensive with *Martin*'s involuntariness concept (in which case the class is an improper fail-safe class) or the class definition differs from the *Martin* standard (in which case *Martin*'s individualized inquiry requires

decertification)." 50 F.4th at 827–28 (Collins, J., dissenting). Nothing in the panel majority's statement resolves these internal contradictions, which plague its deeply flawed opinion.

Second, I cannot let pass without comment the panel majority's contention that a newly enacted Oregon statute regulating the application of local ordinances to homeless individuals provides "yet another reason why it was wise to not rehear" this case en banc. *See* Panel Majority Statement at 112–13 n.7. Even assuming that this statute will require that city laws such as those challenged here must be "objectively reasonable as to time, place and manner with regards to persons experiencing homelessness," under "the totality of the circumstances," *see* Or. Rev. Stat. § 195.530(2), (5), the removal of the objectively *un*reasonable constitutional straitjacket wrongly imposed by *Martin* and *Johnson* would continue to alter the outcome of this case and would also greatly improve the cogency, coherence, and correctness of Eighth Amendment jurisprudence in this circuit. The panel majority is quite wrong in suggesting that this statute provides any grounds for looking the other way and allowing *Martin*'s cancer on our jurisprudence to continue to metastasize.

I reiterate what I said in the conclusion of my panel dissent, which is that both *Martin* and *Johnson* "should be overturned or overruled at the earliest opportunity, either by this court sitting en banc or by the U.S. Supreme Court." 50 F.4th at 831 (Collins, J., dissenting). By denying rehearing en banc today, we have regrettably failed to overrule *Martin* and *Johnson*. I again emphatically dissent.

BRESS, Circuit Judge, joined by CALLAHAN, M. SMITH, IKUTA, BENNETT, R. NELSON, MILLER, BADE, LEE, FORREST, BUMATAY, and VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

Looking out the windows of the Ninth Circuit's courthouse in San Francisco, one sees the most difficult problems plaguing big-city America on display. Homelessness, drug addiction, barely concealed narcotics dealing, severe mental health impairment, the post-COVID hollowing out of our business districts. These problems of disrespect for the law, human suffering, and urban decline would seem connected, the result of a complex interaction of forces that defies any easy solution.

But on top of everything that our localities must now contend with, our court has injected itself into the mix by deploying the Eighth Amendment to impose sharp limits on what local governments can do about the pressing problem of homelessness—a problem now so often related to every other in our great cities. With no mooring in the text of the Constitution, our history and traditions, or the precedent of the Supreme Court, we have taken our national founding document and used it to enact judge-made rules governing who can sit and sleep where, rules whose ill effects are felt not merely by the States, and not merely by our cities, but block by block, building by building, doorway by doorway.

The antecedent question we must always ask when interpreting the Constitution is whether a matter has been entrusted, in the first instance, to the courts or to the people. The answer to that question here is clear: we must allow local leaders—and the people who elect them—the latitude to address on the ground the distinctly local features of the present crisis of homelessness and lack of affordable

housing. And we must preserve for our localities the ability to make tough policy choices unobstructed by court-created mandates that lack any sound basis in law. The expanding constitutional common law our court is fashioning in this area adds enormous and unjustified complication to an already extremely complicated set of circumstances.

Not every challenge we face is constitutional in character. Not every problem in our country has a legal answer that judges can provide. This is one of those situations. The decision in *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022), and our decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), on which *Johnson* is premised, are clearly wrong and should have been overruled. I respectfully dissent from the denial of rehearing en banc.

ORS 195.500
Policy for removal of homeless individuals camping on public property

All municipalities and counties shall:

(1) Develop a policy that recognizes the social nature of the problem of homeless individuals camping on public property.

(2) Implement the policy as developed, to ensure the most humane treatment for removal of homeless individuals from camping sites on public property. [Formerly 203.077]

Note: 195.500 (Policy for removal of homeless individuals camping on public property) to 195.510 (Sites not subject to ORS 195.500 to 195.510) were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 195 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

ORS 195.505
Elements of camp removal policies

(1) A policy developed pursuant to ORS 195.500 (Policy for removal of homeless individuals camping on public property) shall conform, but is not limited, to the following provisions.

(2) As used in this section, "personal property" means any item that can reasonably be identified as belonging to an individual and that has apparent value or utility.

(3) Except as provided in subsection (9) of this section, at least 72 hours before removing homeless individuals from an established camping site, law enforcement officials shall post a written notice, in English and Spanish, at all entrances to the camping site to the extent that the entrances can reasonably be identified.

(4) Intentionally left blank —Ed.

(a) When a 72-hour notice is posted, law enforcement officials shall inform the local agency that delivers social services to homeless individuals as to where the notice has been posted.

(b) The local agency may arrange for outreach workers to visit the camping site that is subject to the notice to assess the need for social service assistance in arranging shelter and other assistance.

(5) Intentionally left blank —Ed.

(a) All personal property at the camping site that remains unclaimed after removal shall be given to a law enforcement official, a local agency that delivers social services to homeless individuals, an outreach worker, a local agency official or a person authorized to issue a citation described in subsection (10) of this section, whether notice is required under subsection (3) of this section or not.

(b) The unclaimed personal property must be stored:

(A) For property removed from camping sites in counties other than Multnomah County, in a facility located in the same community as the camping site from which it was removed.

(B) For property removed from camping sites in Multnomah County, in a facility located within six blocks of a public transit station.

(c) Items that have no apparent value or utility or are in an insanitary condition may be immediately discarded upon removal of the homeless individuals from the camping site.

(d) Weapons, controlled substances other than prescription medication and items that appear to be either stolen or evidence of a crime shall be given to or retained by law enforcement officials.

(6) The written notice required under subsection (3) of this section must state, at a minimum:

(a) Where unclaimed personal property will be stored;

(b) A phone number that individuals may call to find out where the property will be stored; **or**

(c) If a permanent storage location has not yet been determined, the address and phone number of an agency that will have the information when available.

(7) Intentionally left blank —Ed.

(a) The unclaimed personal property shall be stored in an orderly fashion, keeping items that belong to an individual together to the extent that ownership can reasonably be determined.

(b) The property shall be stored for a minimum of 30 days during which it shall be reasonably available to any individual claiming ownership. Any personal property that remains unclaimed after 30 days may be disposed of or donated to a corporation described in section 501(c)(3) of the Internal Revenue Code as amended and in effect on December 31, 2020.

(8) Following the removal of homeless individuals from a camping site on public property, the law enforcement officials, local agency officials and outreach workers may meet to assess the notice and removal policy, to discuss whether the removals are occurring in a humane and just manner and to determine if any changes are needed in the policy.

(9) Intentionally left blank —Ed.

(a) The 72-hour notice requirement under subsection (3) of this section does not apply:

(A) When there are grounds for law enforcement officials to believe that illegal activities other than camping are occurring at an established camping site.

(B) In the event of an exceptional emergency at an established camping site, including, but not limited to, possible site contamination by hazardous materials, a public health emergency or other immediate danger to human life or safety.

(b) If a funeral service is scheduled with less than 72 hours' notice at a cemetery at which there is a camping site, or a camping site is established at the cemetery less than 72 hours before the scheduled service, the written notice required under subsection (3) of this section may be posted at least 24 hours before removing homeless individuals from the camping site.

(10) A person authorized to issue a citation for unlawful camping under state law, administrative rule or city or county ordinance may not issue the citation if the citation would be issued within 200 feet of a notice required under subsection (3) of this section and within two hours before or after the notice was posted.

(11) Any law or policy of a city or county that is more specific or offers greater protections to homeless individuals subject to removal from an established camping site preempts contrary provisions of this section. [Formerly 203.079]

ORS 131.705

As used in ORS 131.705 (Definitions for ORS 131.705 to 131.735) to 131.735 (Review of exclusion order), unless the context requires otherwise:
***

(3) "Public property" means public lands, premises and buildings, including but not limited to any building used in connection with the transaction of public business or any lands, premises or buildings owned or leased by this state or any political subdivision therein. [Formerly 145.610]

ORDINANCE NO. 2060

AN ORDINANCE RELATING TO THE USE OF PARK AREAS: PROVIDING FOR PENALTIES FOR VIOLATION THEREOF; REPEALING ORDINANCE 1918 AND DECLARING AN EMERGENCY.

THE CITY OF WOODBURN ORDAINS AS FOLLOWS:

Section 1. Policy. The City of Woodburn may develop, construct, improve, operate and maintain park and recreation facilities in a manner which will best afford the public with necessary conveniences and accommodations. In order to protect the health, safety and well-being of the public, and insure the greatest use and benefits from such areas, it is necessary to make regulations and provisions the City Council deems necessary.

Section 2. Definitions

(1) Board. The Woodburn Recreation and Parks Board.

(2) Council. The Woodburn City Council.

(3) Director. The person hired by the City of Woodburn who is in charge of the Community Services Department of the City of Woodburn or his designee.

[Section 2 (3) as amended by Ordinance 2412, passed November 13, 2006.]

(4) Park Area. A City Park, wayside area, community rest areas, scenic or historical areas, public park open spaces and greenbelt areas.

(5) Park Employee. Any employee of the City of Woodburn Community Services Department.

[Section 2 (5) as amended by Ordinance 2412, passed November 13, 2006.]

(6) Person. A natural person, firm, partnership, association, or corporation.

Section 3. General Rules and Regulations. The general rules and regulations for City of Woodburn Parks shall be as follows:

(1) Fires in park areas:

No person shall build a fire in any park area unless said fire is confined to:

(a) Park camp stoves or fireplaces.

(b) Portions of parks designated as permitting fires.

(c) Portable stoves in established picnic areas and designated where fires are permitted.

(d) No fire shall be left unattended, and every fire shall be extinguished before its user leaves the park area.

(2) No person in a park area shall hunt, pursue, trap, kill, injure or molest any birds or animals or disturb their habitat. [Section 3(2) as amended by Ordinance 2083, passed May 26, 1992.]

(3) No person shall pick, cut, mutilate or remove from any park area flowers, shrubs, foliage, trees, plant life, barkdust, or products of any type without the written permission of the Director or his authorized agent.

(4) No person shall, except in areas designated by City Council, erect signs, markers, or inscriptions of any type within a park area without permission from the Director.

(5) No person in a park area shall sell, peddle or offer for sale any food liquids, edibles for human consumptions, or any goods, wares, service or merchandise within the park area except under permit by the Director, and then only subject to such laws and regulations as may now or hereafter exist.

(6) No person shall, except duly authorized peace officers in the course of their duties, drive, lead or keep a horse or other farm animal in any park area, except on such roads, trails or other areas designated for that purpose. No horse or such animal shall be hitched to any tree or shrub in such manner that may cause damage to such tree or shrub. The only exception to this rule would be during a parade line-up or a special event, and only after obtaining written permission from The Director.

(7) No person shall wash any clothing, or materials or other substances, or clean any fish in a park area or in a lake, stream or river, or in a park area. Park sinks, faucets and hydrants within the confines of parks or park restrooms shall not to be used for washing clothes of any type.

(8) No person shall use park sinks, other than those provided in public restrooms, for personal hygiene. Faucets, drinking fountains, hose outlets and hydrants shall not be used for this purpose.

(9) No person shall clog picnic shelter sinks in a park area with food, debris, grease or any other substances

(10) No person shall camp in a park area except by written approval of the Director.

(11) The Director may restrict to designated zone areas certain activities, including but not limited to, swimming, picnicking, group picnicking, boating, water skiing, fishing, camping, group camping, hiking and horseback riding.

(12) No person shall enter or remain in a park area anytime between the hours of 10:00 p.m. and 7:00 a.m. the following morning during April 1 through September 30 of the calendar year, or between the hours of 7:00 p.m. and 7:00 a.m. the following morning during October 1 through March 31 of the calendar year. This section shall not apply to:

(a) Persons attending an event for which a permit has been issued.

b) Participants or spectators of athletic events in park areas lighted for these events; or

(c) Persons attending events sponsored by the City.

[Section 3(12) as amended by Ordinance 2083, passed May 26, 1992.]

(13) No person shall have in their possession, any alcoholic beverages or intoxicating liquor, or consume such liquor while in a park area except that the use of alcoholic beverages may be permitted in Centennial Park in compliance with a Special Event Park Use Permit where the city has issued the permit and the premises have been licensed for the service of alcoholic beverages by the Oregon Liquor Control Commission.

[Section 3(13) as amended by Ordinance 2083, passed May 26, 1992 and by Ordinance 2321, passed July 8, 2002.]

(14) Nothing in this ordinance shall in any manner restrict the authority of the City of Woodburn to enforce all State statutes and City Ordinances relating to the use and control of alcoholic beverages.

(15) The Director, any Park employee, Code Enforcement officer, or member of the Woodburn Police Department is authorized to issue a civil infraction citation for a violation of this ordinance.

(16) The Council, City Administrator or The Director shall have the authority to close a park area or a portion of a park area to the public at any time and without notice for any reasonable and necessary circumstance including, but not limited to, construction and maintenance in the park area and for the existence of a hazardous condition.

Section 4. Fees. Fees may be charged for certain services and privileges, and for the use of designated areas, buildings or facilities. No person shall enter or use such areas, buildings, services or facilities or to be granted those privileges unless the appropriate fee or fees have been paid.

Section 5. Rules of Conduct. The Community Services Department may adopt administrative rules for the conduct of persons participating in City Programs in the park areas, the Aquatic Center, or the Community Center. All persons participating in City Programs shall be registered. The Rules of Conduct shall be administered by the Director, or a park employee.

[Section 5 as amended by Ordinance 2412, passed November 13, 2006.]

Section 6. Animals.

(1) Persons owning, keeping or harboring a dog within a park area are responsible for the dog's behavior and shall comply with the following regulations:

(a) A dog shall be on a leash not more than (8) feet in length, or confined in a vehicle at all times, except dogs in off-leash dog areas designated by the City Administrator or the City Administrator's designee.

(b) Any dog found by the Municipal Judge to be a dangerous dog pursuant to Ordinance 2434 (the Animal Control Ordinance) shall not be permitted.

(c) A dog may not deposit solid waste matter on any improved park property unless the person owning, keeping, or harboring the dog immediately removes the solid waste.

(2) The Director or a park employee may require a person in charge of any animal to undertake any measure, including the removal of an animal from the park area to prevent interference by the animal with the safety, comfort or well being of park area visitors or resources.

(3) No farm animal, including, but not limited to, horses, cattle, sheep and goats is allowed in a park area except by permission of the Director.

[Section 6 as amended by Ordinance 2472, passed September 27, 2010.]

Section 7. Glass Beverage Containers. Except by written authorization from the Director or designated park employee, no person shall possess a beverage container made of glass in any park area.

Section 8. Additional Prohibited Activities. In addition to any other prohibitions in this ordinance, no person in a park area shall:

(1) Set or use a public address system without the written permission of the Director.

(2) Operate or use any noise producing device in a manner that disturbs other park visitors.

(3) Use a metal detector without the written permission of the Director.

(4) Play sports or engage in other recreational activities in areas designated by the Director as unavailable for those activities.

(5) Over crowd persons or vehicles so that necessary access to emergency vehicles is unavailable. Vehicles improperly parked will be towed at owners expense.

Section 9. Penalty. Any violation of this Ordinance constitutes a class 4 civil infraction and shall be dealt with according to the procedures established by Ordinance 1998.

Section 9A. Enhanced Penalty for Violation of Special Park Use Permit. Notwithstanding Section 9 of this Ordinance, which provides that a violation of the park rules established by this Ordinance constitutes a class 4 civil infraction, any violation of the terms and conditions of a Special Event Park Use Permit by the permittee shall constitute a class 1 civil infraction and shall be dealt with according to the procedures established by Ordinance 1998, the civil infraction ordinance.
(Section 9A added by Ordinance 2321, passed July 8, 2002.)

Section 9B. In addition to other measures provided for violation of this Ordinance, or any of the laws of the State of Oregon, any peace officer, as defined by ORS 133.005(3), as amended, or any City of Woodburn park or parks maintenance official or employee designated by the City Administrator, may exclude any person who violates any provision of this Ordinance, any City ordinance, any of the laws of the State of Oregon, or any rule or regulation duly made and issued by the Community Services Department or the City Council from any City park for a period of not more than 30 days.

[Section 9B as amended by Ordinance 2412, passed November 13, 2006.]

(1) No person shall enter or remain in a City park at any time that a Notice of Exclusion issued under this Ordinance excluding that person from that City park is in effect

(2) An exclusion issued under the provisions of this Ordinance shall be for thirty (30) days. If the person to be excluded has been excluded from any park at any time, within two years before the date of the present exclusion, the exclusion shall be for ninety (90) days. If the person to be excluded has been excluded from one or more parks on two or more occasions within two years before the date of the present exclusion, the exclusion shall be for one-hundred eighty (180) days.

(3) Before issuing a Notice of Exclusion under this Ordinance the issuing officer shall first give the person a warning and a reasonable opportunity to desist from the violation. A Notice of Exclusion shall not be issued if the person promptly complies with the warning and desists from the violation. No warning shall be required if the person is to be excluded for committing any act punishable as a felony, or involving controlled substances or alcoholic beverages, or which has resulted in injury to any person or damage to any property. Further, no warning shall be required if the person to be excluded has been warned or excluded from the park previously for engaging in the same unlawful conduct.

(4) A Notice of Exclusion under this Ordinance shall specify the date the exclusion is to commence, the term of the exclusion, the City park that the person is to be excluded from, the provision of law that the person violated, and a brief description of the offending conduct. It shall be signed by the issuing party. The Notice of Exclusion shall provide information concerning the right to appeal the notice and to apply for a temporary waiver from the effects of the notice warning of consequences for failure to comply shall be prominently displayed on the notice.

(5) Notices of Exclusion shall take effect immediately except that if a timely appeal is filed under this Ordinance, the effectiveness of the exclusion shall be stayed pending the outcome of the appeal. If the exclusion is affirmed, the remaining period of the exclusion shall become effective immediately upon issuance of the Woodburn Municipal Court decision, unless the Court sets a later effective date.

(6) A person receiving a Notice of Exclusion may appeal to the Woodburn Municipal Court to have the notice rescinded or the exclusion period shortened. In order to be timely, an appeal must be filed within five (5) days of receipt of the Notice of Exclusion.

(a) The appeal need not be in any particular form, but should substantially comply with the following requirements:

(i) Be in writing
(ii) Identify the date, time, and place of the exclusion
(iii) Identify the name and address of the appealing party
(iv) Identify the official who issued the exclusion
(v) Contain a concise statement as to why the Notice of Exclusion was issued in error

(b) A copy of the appeal shall be served on the City Attorney.

(c) An appeal hearing shall be conducted by the Woodburn Municipal Court and a decision on the appeal shall be made by the Court within ten (10) days after the appeal is filed.

(d) At the appeal hearing the City and any interested parties shall have the right to present evidence and witnesses and be heard. After due consideration of pertinent information and testimony the Court shall issue a written decision. The decision of the Court shall be final.

(7) At any time within the exclusion period, a person receiving a Notice of Exclusion may apply in writing to the City Administrator for a temporary waiver from the effects of the notice for good cause shown. In exercising discretion under this section, the City Administrator shall consider the seriousness of the violation for which the person has been excluded, the particular need of the person to be in the park during some or all of the period of exclusion, such as for work or to attend or participate in a particular event (without regard to the content of any speech associated with that event), and any other criterion the City Administrator determines to be relevant to the determination of whether or not to grant a waiver. The decision of the City Administrator to grant or deny, in whole or in part, a waiver under this section is committed to the discretion of the City Administrator, and is not subject to appeal or review.

(Section 9B added by Ordinance 2342, passed July 28, 2003; amended by Ordinance 2377, passed November 8, 2004.)

Section 10. Severability. Each portion of this Ordinance shall be deemed severable from any other portion. The unconstitutionality or invalidity of any portion of this Ordinance shall not invalidate the remainder of the Ordinance.

Section 11. Repeal and Saving Clause.

(1) Ordinance No. 1918 is hereby repealed.

(2) Notwithstanding Subsection (1) of this Section, Ordinance No. 1918 shall remain valid and in force for the purpose of authorizing arrest, prosecution, conviction and punishment of a person who violated Ordinance No. 1918 prior to the effective date of this Ordinance.

Section 12. [Emergency clause.]

Passed by the Council April 22, 1991 and approved by the Mayor April 23, 1991.

ORDINANCE NO. 2577

AN ORDINANCE PROHIBITING CAMPING IN PUBLIC RIGHTS-OF-WAY; PROVIDING FOR ENFORCEMENT; AND DECLARING AN EMERGENCY

THE CITY OF WOODBURN ORDAINS AS FOLLOWS:

Section 1. **Purpose.** This Ordinance is adopted pursuant to the City's police powers as set forth in the Oregon Constitution and the Woodburn Charter for the following purposes:

A. To protect public health and safety.

B. To maintain and safeguard the use of Public Rights-of-Way, which the City holds in trust for the public

C. To protect the constitutional rights of all individuals.

D. To avoid the creation of public nuisances.

Section 2. **Findings.** The City makes the following findings:

A. Camping on Public Rights-of-Way threatens the safety and welfare of all pedestrians, with the greatest impact on those pedestrians who are elderly or young children or who have physical and mental disabilities.

B. Camping on Public Rights-of-Way is dangerous to the individuals who are camping and constitutes a public safety hazard.

C. Camping on Public Rights-of-Way can be dangerous to drivers and constitutes a public safety hazard.

D. Camping on Public Rights-of-Way can obstruct and delay public safety personnel responding to emergencies.

E. The accumulation of trash, uncontained food and human waste related to camping in Public Rights-of-Way, is detrimental to safety and public health.

Section 3. **Camping on Public Property and Rights-of-Way.** It shall be unlawful for any person or persons to camp on Public Rights-of-Way within the City.

Section 4. **Definitions.**

A. "To Camp" means to set up, or remain in or at, a Campsite for the purpose of establishing or maintaining a temporary place to live.

B. "Campsite" means any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire is placed, established, or maintained, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure or any vehicle or part thereof. A Campsite includes any place where there is a tent, or any structure or assembly of materials consisting of a top or roof or any other upper covering and enclosed on one or more sides, that is of sufficient size for a person to fit underneath or inside.

C. "Public Rights-of-Way" means and includes, but is not limited to, the space in, upon, above, along, across, over or under the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, bridges, trails, paths, sidewalks, bicycle lanes, public utility easements, and all other public ways or areas, including the subsurface under and air space over these areas, but does not include parks, parkland or other City property not generally open to the public for travel.

Section 5. **Enforcement.**

A. A violation of this Ordinance is declared a public nuisance under Ordinance 2338 (the Nuisance Ordinance). Due to the public health and safety concerns stated in the Ordinance Findings, the City Council directs the summary abatement of Campsites in Public Rights-of-Way, subject to applicable state statutes.

B. This Ordinance is cumulative to other City Ordinances and regulations and should be construed consistent with these other enactments.

Section 6. [Emergency clause.]

Passed by the Council and approved by the Mayor January 27, 2020.

ORDINANCE NO. 2578

AN ORDINANCE, ENACTED IN COMPLIANCE WITH ORS 203.077, TO DEVELOP A POLICY FOR REMOVAL OF CAMPING SITES ON PUBLIC PROPERTY AND DECLARING AN EMERGENCY

THE CITY OF WOODBURN ORDAINS AS FOLLOWS:

Section 1. Unlawful Camping on Public Property. It is unlawful for any person to camp in or upon public property for more than seventy-two (72) hours after having been given a notice of unlawful camping as provided by this Ordinance. Any person found to be camping unlawfully on public property may be removed from the unlawful Camping Site pursuant to City ordinance and consistent with Oregon law.

[Section 1 as amended by Ordinance No. 2600, passed March 28, 2022.]

Section 2. Definitions.

A. "To Camp" means to set up, or remain in or at, a Camping Site for the purpose of establishing or maintaining a temporary place to live.

B. "Camping Site" means any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire is placed, established, or maintained, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure or any vehicle or part thereof. A Camping Site includes any place where there is a tent, or any structure or assembly of materials consisting of a top or roof or any other upper covering and enclosed on one or more sides, that is of sufficient size for a person to fit underneath or inside.

Section 3. Removal of Individuals, their Property and Camping Sites on Public Property.

A. Prior to the removal of any individual and/or their Personal Property from an established Camping Site on public property, law enforcement officials shall post a Camping Site Removal Notice, written in English and Spanish, seventy-two (72) hours in advance of removal.

1. At the time the notice is posted, law enforcement officials shall inform a local agency that delivers social services to homeless individuals where the notice has been posted.

2. This local agency may arrange for outreach workers to visit the Camping Site where a notice has been posted to assess the need for social service assistance in arranging shelter and other assistance.

3. All unclaimed Personal Property shall be given to law enforcement officials whether seventy-two (72) hour notice is required or not. The City shall develop a protocol for the custody, removal, storage, and destruction of the unclaimed Personal Property.

4. An Unclaimed Personal Property Notice shall be posted, written in English and Spanish, providing a phone number to call during the business hours of 8:00 AM to 4:00 PM, Monday through Friday, to arrange an appointment to pick up the unclaimed Personal

Property. This notice shall be posted at all entrances to the Camping Site and made to be weather resistant. The unclaimed Personal Property shall be stored for 30 days from the removal date in a facility located within the corporate boundary of the City of Woodburn and will be reasonably available to any individual claiming ownership. Personal property that remains unclaimed for 30 days will be disposed of and the notice removed.

5. "Personal Property" means any item that is reasonably recognizable as belonging to a person and has apparent utility. Items that have no apparent utility or are in an unsanitary condition will be immediately discarded upon removal of the Camping Site.

6. City officials shall photograph the Camping Site prior to the removal of property and provide a general description of items disposed of due to their lack of apparent utility or unsanitary condition.

7. Weapons, drug paraphernalia and items that appear to be either stolen or evidence of a crime shall be turned over to the appropriate law enforcement officials.

B. Following the removal of homeless individuals from a Camping Site on public property, the law enforcement officials, local agency officials and outreach workers may meet to assess the notice and removal policy, to discuss whether removals are occurring in a humane and just manner and to determine if any changes are needed in the policy.

C. The seventy-two (72) hour Camping Site Removal Notice shall not apply:

1. When there are grounds for law enforcement officials to believe that illegal activities other than camping are occurring.

2. In the event of an exceptional emergency such as possible site contamination by hazardous materials or when there is immediate danger to human life or safety.

D. A person authorized to issue a citation for Unlawful Camping on Public Property may not issue the citation if the citation would be issued within 200 feet of the notice described in this section and within two hours before or after the notice was posted.

[Section 3 as amended by Ordinance No. 2600, passed March 28, 2022.]

Section 4. <u>Enforcement.</u>

A. Unlawful Camping on Public Property in violation of this Ordinance constitutes a Class 3 Civil Infraction subject to forfeiture not to exceed $250.

B. Recognizing the need for humane treatment of homeless individuals Unlawfully Camping on Public Property, the City Council, as an alternative to a Civil Infraction citation under section 4A, authorizes summary abatement of the unlawful Camping Sites pursuant to the procedures provided in this Ordinance.

C. This Ordinance is cumulative to other City Ordinances and regulations and should be construed consistent with these other enactments.

Section 5. [Emergency clause.]

Passed by the Council and approved by the Mayor January 27, 2020.

City	City Council Public Process	Duration of Public process	Was an Ordinance Adopted	What does the Ordinance do	Location of Established Camping Site	Authorized Camping Site services and regulations
Portland (963,5067)		1 month: May 31 - June 7, 2023	Yes	**TIME:** allows involuntarily homeless persons to camp between the hours of 8 pm and 8 am. After 8 am, the person must dismantle the campsite and all removal personal property until 8 pm. **PLACE:** The proposed code changes specify several places where camping would be always prohibited. Restrictions includethe pedestrian use zone, 250 feet from a school or childcare center, in the public right-of-way along the High Crash Corridor, and City Parks. **MANNER:** Prohibits the use of gas heaters in and around campsite, obstructing access to private properties or business adjacent to the public right-of-way, alterations to the ground or infrastructure; environmental damage; accumulation or leaving garbage, debris, unsanitary hazardous material, sewage, or drug paraphernalia. **ENFORCEMENT:** If at any time, place, or manner restrictions are violated, the proposed code changes give the Portland Police Bureau the ability to issue citations, which they do not issue currently. First or second violation of time, place, and manner restrictions, the person will receive a written warning. Third or subsequent violations have a criminal penalty of a fine of no more than $100 or imprisonment for a period not to exceed 30 days.	Clinton Triangle in Southeast Portland (1490 SE Gideon St).	Site Services: • Individual pods designed with ADA accessibility in mind (doorway ramps added as needed). Pods can also shelter two individuals who seek to be together. • Some sites may be set up for RV residency • A small number of tent platforms for individuals who may not want to move into a pod right away • Meals: Average of one meal per day, plus snack (our experience reveals one meal is enough since not everyone eats the meal; there is typically enough food for those who seek 2 or 3 meals per day) • Restrooms and showers, with some ADA-accessible restrooms Laundry access • Community space for building connections and meeting with social workers • Decompression areas • Pet areas • Storage space for personal goods • Access to public transit/transportation • Electricity (i.e., for phone charging) • Wi-fi • Designated parking areas • Perimeter fencing • Regular trash collection and hazardous waste removal • Livability enhancements like planter boxes, artwork, etc. Service Provider: Urban Alchemy To support the extensive services at each site, Urban Alchemy (as of July 14) has hired more than 100 people locally. 85 are already active practitioners and 30 are being onboarded to staff the three Portland sites. At each location, Urban Alchemy and the City will provide: • 24/7 operations with 1 guest services staff for every 15 guests. • Single point of entry and exit for guests at the site with 24/7 check in/out procedures. • Daily access to care coordination managers who will help guest navigate the bureaucracy of social services (1 care coordination manager to every 20 guests). •Access to medical professionals. • Close coordination Multnomah County to use a Built For Zero client-centered public health approach to guide clients through the continuum of care. • Referral-based entry system through the City of Portland. Walk-ins will not be allowed. •Stay for an indefinite period of time. Though the intention is for an individual to use these sites temporarily before transitioning to other housing or care, there will be no specific time limit regarding length of stay. Key site rules: • Alcohol and drugs cannot be consumed in common areas/public spaces. • No cooking or fires are allowed. •No cooking or fires are allowed. • Each guest must agree to community guidelines that emphasize respect for their neighbor. Security: •No guns or illegal weapons; any other potential weapon (e.g. pocket knives) will be securely stored before a guest can access the site. •If an individual needs to be excluded from a site because a person is a clear / present danger to themselves or others, removal options will include the PPB Behavioral Health Unit and Portland Street Response. Perimeter Area: •24/7 hotline staffed by service provider for complaints or questions about the site or perimeter issues. • On-site service provider will monitor an area of approximately 1,000 ft. surrounding the site to engage and communicate with neighbors, engage immediately to new unsanctioned campsites, and report incidents of illegal activities (drug dealing, etc). •Light trash cleanup in the 1,000 ft. area and immediate reporting of large amounts of trash to the City's Impact Reduction Team or Metro RID. •Service provider will engage regularly with surrounding residents, clients, businesses, neighborhood associations, and Enhanced Service Districts. Parking: •Sites will be chosen with availability of public transit in mind. •Sites may include RV / car options. •Parking availability and rules will be aligned to reduce impact on the surrounding community.

City	City Council Public Process	Duration of Public process	Was an Ordinance Adopted	What does the Ordinance do	Location of Established Camping Site	Authorized Camping Site services and regulations
Eugene (177,923)	Work Session April 24, 2023 Ordinance 20689 Adopted May 24, 2023	1 month: April 24 - May 24, 2023	Yes Ordinance 20689	**TIME:** Permitted overnight sleeping Dusk to Dawn Program between the hours of 4:30 pm and 7:30 am. In determining the hors that the City Manager permits persons to sleep overnight at designated sites, the City Manager shall consider, among other things, the seasonal sunset. **PLACE:** City Manager shall recommend to the City Council proposed sites for the Dustk to Dawn program. Proposed site may not be located in a residential area or close to a school, and must be owned or leased by the City of Eugene, another governmental agency, a religious institution, a non-profit organization, or a business if the business is located on property zoned commercial or industrial. The City Council must approve the site by motion and the City Manager must adopt an administrative rule governing use of the site. If, as an addition to the permitted overnight sleeping program athorized by this subsection (11), daytime support services are available at or near the site, the Dusk to Dawn site may be referred as a Dawn to Dawn site. No person shall camp in or upon the following publicly owned property: (a) Property that is primarily intended for and used by motor vehicles, including but not limited to, the portion of the street between the curbs; (b) Publicly owned parking lots and on-street parking spaces; (c) Property that is intended to provide a buffer between lanes of vehicular traffic or between vehicular traffic and pedestrians, including but not limited to traffic islands and parking strips, if there is not a minimum of 60 inches (5 feet) between the campsite and vehicular traffic; (d) Sidewalks, accessways, and shared-use paths when the minimum width established by the Americans with Disabilities Act (ADA) or the Federal Highway Administration (FHWA) cannot be maintained. For purposes of this section, sidewalks must have a minimum clear width of 48 inches (4 feet), and accessways and shared-use paths must have a minimum clear width of 120 inches (10 feet); (e) Property adjacent to a building if the campsite blocks access to the building's entrance, exit, access ramp, or stairs; (f) For the Willamette River and all other open waterways, property located within 100 feet of top of high bank; and property within 5 feet of ditches, wetlands, and vegetative stormwater quality facilities. For purposes of this section, "top of high bank" means the highest point at which the bank meets the grade of the surrounding topography, characterized by an abrupt or noticeable change from a steeper grade to a less steep grade, and "open waterway" means a natural or human-made creek, stream, pond, or open channel; and, (g) Property within 1000 feet of an educational facility. For purposes of this section, "educational facility" means a public library or a building owned, leased or under the control of a public or private school system, college, university, or licensed daycare or preschool. **MANNER:** Unless otherwise authorized in the code or by revocable permit, no person shall: (a) Cut or split wood on a street or sidewalk. (b) Carryl, hau, deposit, or discard any rubbish, garbage, debris, human waste, or other refuse upon any street, sidewalk, accessway, or shared-use path exposed so as to be offensive to pedestrians. (c) Give a show, exhibition or performance on a street or sidewalk. (d) Set up or operate a vehicle, stand or place for the display or sale of merchandise, or selll, vend, or display for sale an article in the streets or on the sidewalks or in doorways or stairways of business houses, or in any other place where such activity causes congregation and congestion of people or vehicles on the streets or sidewalks. (e) Place or maintain gasoline pumps or similar devices for vending volatile oils on a street or alley except under a revocable permit from the city manager. (f) Place personal property on a sidewalk, accessway, or shared-use path if the minimum width established by the Americans with Disabilities Act (ADA) or the Federal Highway Administration (FHWA) is not maintained. For purposes of this section, sidewalks must have a minimum clear width of 48 inches (4 feet), and accessways and shared-use paths must have minimum clear width of 120 inches (10 feet). (g) Drain, or cause or permit to be drained, sewage, graywater, or the drainage from a cesspool, septic tank, recreational or camping vehicle waste holding tank or other contaminated source, upon any street, sidewalk, accessway, or shared-use path, the associated stormwater drainage system, or adjacent wetlands. A violation of this section is deemed an immediate risk to public health and safety and, in addition to the issuance of a citation for the violation, a recreational or camping vehicle is subject to immediate impoundment in accordance with EC 5.693-5.980 and the administrative rules adopted pursuant thereto.	**Dawn to Dawn** 171 Highway 99 **Managed by:** St. Vincent dePaul	**Dawn to Dawn:** Dawn to Dawn (formerly known as Dusk to Dawn) is a low-barrier, drop-in shelter program that provides space where people can stay, keep their belongings, and receive connections to services. Shelter is provided in heated, multi-person tents. Sign up begins at 2 p.m. every day at the Eugene Service Station at 450 Hwy 99N. The Service Station can be reached at (541) 461-8688. **Rules and Regulations:** Administrative Order 53-17-03F • Property provider/site manager shall be resposible forproviding supervision during site operating hours. • Site will be occupied no earlier than 4:30 p.m. and no later than 7:30 a.m. in a 24 hour period. • Personal property will be stored in compliance with criteria st by the property provider/site manager and must be taken with guests when they vacate the site each day. • One or more portable toilets with weekly cleaning,and weekly trash/recycling pick up. • Keep the site and sorrounding property free from accumulation of trash or items left beind by guests. • Site manager shall maintain a roster of individuals who are authorized to be at the property. • No exceeding of the number of people permitted by the City Manager's written authorization. • Site manager shall ensure that guests comply with all provisions of these rules, the site agreement, and provisions adopted by City Council. • All applicable provisions of federal, state, and local laws will be complied with, including the requirements of the fire code. **Dusk to Dawn - Guest Responsibilities:** The following activities/items are prohibited from the property: • Alcohol; illegal drugs • Weapons • Illegal activity • Open flames, unless approved by the Fire Marshal. • Loud music or other disruptive noise • Overnight visitors • Physical violence, intimidating or threatening behavior or language while on or in the vicinity of the property; damage or harm to the property or property in the surrounding area. • Behavior on or near the property that may negatively affect the peace and enjoyment of the property and surrounding property for other overnight sleepers or for neighbors. • Children • Guests shall be selected by the property provider/site manager and may stay on the property until the property provider/site manager revokes that permission. If permission to remain on the property is revoked, the guest(s) must immediately remove themselves and their property or risk citation for trespassing, having their vehicle towed, at the owner's expense, and their property disposed of. • Guests shall deposit all garbage in waste receptacles provided by the property provider/site manager or transport it off site and dispose of it lawfully, and shall keep the area where they are sleeping clean. • Guests shall use bathroom facilities provided by the property provider/site manager, or available to the public off-site. • Guests must comply with any additional rules or regulations not covered here but established by the property provider/site manager. **Dusk to Dawn - Closure of Site by the City Manager.** The City Manager may close a site at any time upon determining that allowing camping at a site would create or continue dangerous conditions or a threat to the public health, safety or welfare, or if the property provider/site manager fails to comply with these regulations or the provisions adopted by the City Council.

City	City Council Public Process	Duration of Public process	Was an Ordinance Adopted	What does the Ordinance do	Location of Established Camping Site	Authorized Camping Site services and regulations
Salem (177,487)	May 8: First Reading May 22: Second Reading	Less than a month	Yes Ordinance 9-23	**TIME:** **PLACE:** Camping Prohibited on Public Property. It is unlawful for any person to camp in or upon: (1) Any public property posted with a "No Camping" sign, (2) Any public right-of-way used for vehicular or bicycle transportation, (3) Within ten (10) feet of the intersection of a street and a driveway or a private pedestrian path, or within ten (10) feet of a building entry, (4) Any area designated as a park in the Salem Park System Master Plan, (5) The interior of any publicly owned building or structure, (6) Public property zoned single-family or multi-family residential or adjacent to those zones, (7) Within 600 feet of an authorized emergency shelter, day center, managed temporary village, or safe parking shelter location, (8) Within the area subject to a Permit of Entry issued by the City, The City Manager or designee, in the Manager's or designee's sole discretion, may designate a particular location on public property, or class of public property, where camping is prohibited, including: (1) High vehicular traffic areas, (2) Environmentally sensitive areas, (3) Any area that has become, or is at risk of becoming, a threat to public health or safety due to the chronic establishment of campsites, the proliferation of campsites within the area, or proximity to sensitive uses, such as pre-schools, K-12 and post-secondary schools, or social service providers. Areas or locations where a camping prohibition has been designated shall be posted with a "No Camping" sign. **MANNER:** Maintain a 36-inch pedestrian path within a public sidewalk, free of any obstruction.		
Gresham (111,621)	Part of City Council's Strategic Goal June 2023: Revised Clean-up of unauthorized campsites on public property.		Amended Policy 12-01	**TIME:** **PLACE:** (1) No person shall camp on public property or public rights-of-way, other than an area approved by the city for the permitted use and built for the purpose of campgrounds or overnight parks. **MANNER:** No person in charge of property shall permit camping on such property unless it is occupied and approved as a residential use and the property owner has given written permission to camp, and in no event for more than 72 hours in a 30-day period. Exceptions may be granted under emergency conditions as determined by the manager. **ENFORCEMENT:** "Persons experiencing homelessness" does not include a person camping on public property or on any public street or right-of-way who has been offered shelter in compliance with State law and City policy. The following provisions apply to persons experiencing homelessness: In accordance with ORS 195.500-530, the City Manager shall adopt an administrative rule developing a policy that recognizes the social nature of the problem of persons experiencing homelessness camping on public property and implement the policy as developed to ensure the most humane treatment for removal of persons experiencing homelessness from campsites on public property. The policy shall, among other things, comply with applicable federal and state law. The Manager shall review the policy annually to ensure compliance with applicable law and prominently post the policy on the City's website. A person experiencing homelessness shall not be subject to a fine or penalty as stated in section 7.10.165(4) unless that person has first been offered shelter in compliance with applicable law.		

City	City Council Public Process	Duration of Public process	Was an Ordinance Adopted	What does the Ordinance do	Location of Established Camping Site	Authorized Camping Site services and regulations
Hillsboro (107,299)	Advisory group met for three sessions: March 31, April 14, and May 26, 2023 Survey to engage Hillsboro community Ordinance updates presented at two City Council work sessions: May 2 and May 16, 2023	2.5 months: March 31 - June 20, 2023	Yes Ordinance 64-54	**TIME:** Between the hours of 7 pm to 7 am. **PLACE:** Persons without shelter are permitted to camp on public ROW within the city or upon other city properties that are outdoors and open to the public. City manager may adopt administrative rules that can limit the actual ROW or portion thereof as well as which city properties may be used for camping. Sanctioned campsites established for camping by individuals and has received written approval from the City manager. **MANNER:** Administrative rules may limit the manner in which camping may occur. Sanctioned campsites must comply with all applicable laws a regulations and any condition imposed on the operation of the campsite by the manager; must not create unreasonable risk to health or safety or constitute a threat to the public welfare; no direct damage to the environment; no dumping of gray water; no open flames, recreational fires, burning garbage and bonfires; no dumping of hazardous materials; no erecting permanent or temporary structure; no unauthorized connections or taps to electrical or other utilities; no camping within 10 feet from doorways to business entrances or driveways. Camping allowed in the ROW is subject to: camp materials may not obstruct any portion of any street, bike lane, or bike path intended for travel of vehicle, bicycle, pedestrian or other legal mode of travel; camp may not be in any ROW in any location that does not have a curb or other physical barrier separating the camp or camp materials from the area intended for vehicular use; camp may not obstruct portion of sidewalk, multi-use path, or pedestrian path in a manner that results in less than 36 inches of unobstructed area for passage or impairs any access required by the ADA; camp may not be attached to any public or private infrastructure; no caping on any portion of the ROW under or within a bridge. Camping within a vehicle must be parked in areas of the of the ROW where vehicles are permitted to be parked. No parking with or on a planter strip or other areas not intended for parking. No storing outside on the vehicle or the ROW; no obstruction of the sidewalk multi-use path, or pedestrian path in a manner that results in less than 36 inches of unobstructed area for passage or impairs any access required by the ADA; camp may not be attached to any public or private infrastructure; Vehicle camping must comply with all other applicable laws and regulations, including parking and storage restrictions found in the city code or administrative rules.	July 8-- The City of Hillsboro opened a temporary camping site at 699 SW Wood street near Downtown Hillsboro Managed by: Project Homeless connect https://www.hillsboro-oregon.gov/Home/Components/News/News/12729/1718	Sites must be operated by: The City of Hillsboro or other local government. OR An organization with at least two year's experience operating sanctioned campsites or emergency shelters. Must be a local housing authority, religious corporation, or public benefit corporation supporting homelessness. OR A nonprofit corporation partnering with local government or an experienced organization as listed above. Conditions There can be no charge for use. Must include sleeping areas, regular trash and recycling service, and restrooms. Must not create unreasonable risk to public health, safety, or welfare The City Manager may create reasonable rules for each campsite, such as: Length of use Hours of operation How many guests are permitted Number of restrooms, trash, and recycling areas **Wood Street Provisions:** Investments from the City and other partners will make the site capable of hosting a maximum of 30 campers, and the site will have the following facilities and services: • Portable restrooms • Hand washing station • Trash collection service • Security fencing • 30 designated tent sites • Sleeping bags • Sleeping pads • 24/7 supervision (from Project Homeless Connect) • Limited food and bottled water (from Project Homeless Connect)

City	City Council Public Process	Duration of Public process	Was an Ordinance Adopted	What does the Ordinance do	Location of Established Camping Site	Authorized Camping Site services and regulations
Bend (103,254)			Yes	**TIME:** Camping may only occur for 24 hours at a time in any one location, after 24 hours in on location, the camp and all associated camp materials mut be moved at least one block or 600 feet. **PLACE:** Camping is not allowed in any area zones Residential (RL, RS, RM, RH) on the City of Bend Zoning Map in effect at that time; within the Waterway Overlay Zone, as determined by the City of Bend Zoning Map and Bend Development Code; any place where camp or camping materials create a physical impediment to emergency or nonemergency ingress, egress, or access to property, private or public, or on public sidewalks or other public ROW; on any vehicle or bicycle lane or roundabout within any public ROW; within 1,000 feet from any safe parking site or shelter approved under the Bend Development Code/ and or applicable provision of State law; on any street or public ROW the City has closed for construction, heavy vehicle use, or other use of the roadway that is incompatible with camping in the ROW, the closure of the street does not have to be for vehicle traffic to close a street to camping. **MANNER:** Camping, when and where allowed, is subject to the following: Camp or camp materials may not obstruct sidewalk accessibility or passage, clear vision, fire hydrants, City or other utility infrastructure, or otherwise interfere with the use of the ROW for vehicular, pedestrian, bicycle, or other passage. A camp or camping must be limited within a spatial footprint of 12 feet by 12 feet, or 144 square feet. No more than three camps may be set up per block. Individuals may not accumulate, discard, or leave behind garbage, debris ,unsanitary or hazardous materials, or other items of no apparent utility in public ROW, on City property, or on ay adjacent public or private property. Open flames, recreational fires, burning of garbage, bonfires, or other fires, flames, or heating deemed unsafe by Bend Fire and Rescue are prohibited. Types of cooking stoves and there devices for keeping warm are permitted, as allowed by adopted City policies. Dumping of gray water is prohibited. Unauthorized connections or taps to electrical or other utilities, or violations of building, fire, or other relevant codes or standards, are prohibited. Obstruction or attachment of camp materials or personal property to fire hydrants, utility poles or other utility or public infrastructure, fences, trees, vegetation, vehicles, or buildings is prohibited. Individuals may not built or erect structures. storage of personal property other than what is related to camping, sleeping, or keeping warm and dry. Digging, excavation, terracing of soil, alteration of ground or infrastructure, or damage to vegetation or trees is prohibited. Use of emergency power generators that result in a violation of Bend Code 5.50.020(A) is prohibited. All animals must be leashed or crated at all times. Vehicle camping: Bend Code 6.20 governs where and for how long individuals may legally park vehicles on the public ROW, these standards are applicable to al individuals including those who use vehicles for shelter and/or sleeping on public ROW. Vehicle must be legally parked in compliance with the Bend City Code and any applicable policies. No building or erecting of any structures connecting or attaching to vehicles is permitted, including tents that are not designed and manufactured to be attached to a vehicle. Individuals may not accumulate, discard, or leave behind garbage, debris ,unsanitary or hazardous materials, or other items of no apparent utility in public ROW, on City property, or on ay adjacent public or private property. Open flames, recreational fires, burning of garbage, bonfires, or other fires, flames, or heating deemed unsafe by Bend Fire and Rescue are prohibited. Types of cooking stoves and there devices for keeping warm are permitted, as allowed by adopted City policies. Dumping of gray water is prohibited. Storage of material outside vehicle is prohibited, other than what is incidental to activities such as short-term loading and unloading a vehicle. Vehicle must be operational or ready to be towed if designed to be towed, may not be discarded or left inoperable in public ROW or on City property. Use of emergency power generators that result in a violation of Bend Code 5.50.020(A) is prohibited. All animals must be leashed or crated at all times. **ENFORCEMENT:** After a camp has been in one place for 24 hours or more, the City may post notice at the location that the camp, and all associated camp materials, must be removed no more than 72 hours later and all personal property remaining will be removed. Vehicle camping: Violations will be in accordance with applicable State law and City ordinances and policies, including laws, ordinances, and policies governing towing and impounding vehicles.	Currently no established site	

City	City Council Public Process	Duration of Public process	Was an Ordinance Adopted	What does the Ordinance do	Location of Established Camping Site	Authorized Camping Site services and regulations
Beaverton (97,053)	01/17/2023: Council work sessions; 03/07/2023: Council work session; 04/13 - 05/01/2023: Community Survey; 05/16/2023: 1st Public Hearing; 06/06/2023: 2nd Public Hearing	4.5 months: January 17 - June 6, 2023	yes Ordinance 4841	**TIME:** A person without alternative shelter may camp between the hours of 9:00 p.m. and 7:30 a.m. After 7:30 a.m. a person without alternative shelter must dismantle the campsite and remove all personal property from the campsite. VEHICLE CAMPING: A safe parking program guest may camp in a vehicle in a safe parking site for a continuous period as permitted by the regulations of the safe parking program. **PLACE:** A person without alternative shelter may camp in or upon the public right-of-way; provided, however, that a person without alternative shelter may not camp in the following places at any time: 1. On city property, except that a safe parking program guest may camp in a vehicle at a city safe parking site. 2. Within 500 feet from a safe parking site, a shelter or a property where homeless services are provided. 3. Within 500 feet from a lot or parcel containing an elementary school, secondary school or a certified child care center. 4. Within 500 feet from a freeway egress or ingress. 5. Within 50 feet of an intersection. 6. Within 10 feet of a fire hydrant. **MANNER:** 1. A person without alternative shelter may not obstruct pedestrian or vehicular traffic along a public right-of-way or into private property and businesses adjacent to a public right-of-way. For purposes of this subsection, a person without alternative shelter is presumed to obstruct pedestrian traffic if a person reduces the path of travel to less than 36 inches. 2. A person without alternative shelter may not (a) start or maintain any fire for the purpose of burning any combustible material in or around a campsite; or (b) use a gas heater in or around a campsite. 3. A person without alternative shelter may not accumulate, discard or leave behind in or around a campsite (a) any rubbish, trash, garbage, debris or other refuse; (b) any unsanitary or hazardous materials; or (c) any animal or human urine or feces. 4. A person without alternative shelter may not camp within 150 feet of another campsite. 5. A person without alternative shelter may not erect, install, place, leave, or set up any type of fixture or structure of any material or materials in or around a campsite. For purposes of this subsection, a “fixture or structure of any material or materials” does not include a tent, tarpaulin or other similar item used for shelter that is readily portable. 6. A person without alternative shelter may not dig, excavate, terrace soil, alter the ground or infrastructure, cause environmental damage, or damage vegetation or trees in or around a campsite.		
Tigard (55,762)	Since January 2023 the City engaged the Community Homelessness Assessment and Response Team (CHART) In February and May the Committee for Community Engagement (CCE) was briefed and consulted on the ordinance The Chief's Advisory Panel has been consulted and gave feedback to staff on the direction of the Time, Place, and Manner ordinance Staff held multiple 1-1 and group conversations with neighboring jurisdictions about the status of each community's ordinance and how it can align with their respective ordinances. All feedback has been incorporated into the proposed draft ordinance. May 9, 2023: Staff presented background information, considerations, and recommendations to Council. May 23, 2023 1st Legislative Public Hearing.	5 months: January thru May 23, 2023	Yes Ordinance 23-03	**TIME:** Camping is prohibited between 9 a.m. and 7 p.m. **PLACE:** Camping is prohibited in: • Sensitive lands, such as wetlands, significant habitat areas, and undeveloped park land • City parks • City parking lots • Along SW Burnham Street, SW Main Street, SW Commercial Street and SW Tigard Street between SW Main Street and SW Tiedeman Street • Within 500 ft. of houseless services, schools, and freeway entrances/exits • Within any vision clearance area around intersections, as indicated in grey in the images below **MANNER:** How campers may set up their campsites is regulated in several ways, including: • Campsite may not obstruct travel • Campsite must be 10 ft. from driveways, building entrances/exits, fire hydrants, and other utility infrastructure • Campers may not start or maintain a fire or use a gas heater • Campers may not dig, excavate, erect/install fixtures, or harm vegetation • Campers may not accumulate, discard, or leave behind trash, hazardous materials, or feces • Campsites are limited to 12x12 ft. and must be 20 ft. apart from one another		

City	City Council Public Process	Duration of Public process	Was an Ordinance Adopted	What does the Ordinance do	Location of Established Camping Site	Authorized Camping Site services and regulations
Lake Oswego (40,108)	None	None	NO	Resolution 16-24 A Resolution of the City Council of the City of Lake Oswego Amending the Park Rules (09/20/2016): 17. Overnight Camping. Camping overnight in any Park Property is prohibited, except at places designated for such purposes by the Director.		
Keizer (38,704)	June 6, 2023: 1st reading - ordinance did not pass unanimously and requires a second reading; July 3, 2023: 2nd reading	1 month	Amending Ordinance 2020-812	**TIME:** For those experiencing homelessness, in areas where camping is not prohibited, persons must relocate within 24 hours after arrival. **PLACE:** In express recognition of the need for those experiencing homelessness to19 sleep and rest and if they have nowhere else to go, camping is not prohibited in 20 public rights-of-way, except in the following right-of-way areas: (1) Vehicular and bicycle travel lanes and five (5) feet adjacent to such travel lanes. (2) Stormwater facilities. (3) Adjacent to any residential uses. (4) Within 100 feet of any school or daycare facility. (5) Within 100 feet of any church, except for on property that is accommodating camping or camping like activities under ORS 195.520. (6) Within ten (10) feet of the intersection of a street and driveway or a private pedestrian path, or within ten (10) feet of a building entry. (7) Within a five foot (5') clear pedestrian path on any public sidewalk. **MANNER:** Individuals may not build or erect structures, whether by using plywood, metal, wood materials, pallets, or other materials. Items such as tents and similar items used for shelter that are readily portable are not structures for purposes of this Section. The City Manager may adopt administrative rules or policies governing or guiding enforcement of this Ordinance, including but not limited to ensuring consistent and appropriate enforcement for various circumstances. Upon emergency declaration of the City Council, City Manager or Emergency Manager, other areas may be authorized for limited short-term camping. Upon finding it to be in the public interest, the City Manager or City Council may exempt a special event from compliance with this Section. The City Manager or City Council shall specify the period of time and location covered by the exemption, as well as other reasonable conditions. **ENFORCEMENT:** Violations of this Ordinance are infractions, and the violators may be cited under the Keizer Civil Infraction Ordinance. The minimum fine is $50. The presumptive fine is $100. The maximum fine is $150. In lieu of or in addition to a fine, the judge may impose other measures, consistent with ORS 153.008, that are reasonably calculated to aid the individual in not engaging in the conduct that led to the citation again in the future. Methods of enforcement for violations of this Ordinance are not exclusive and may consist of multiple enforcement mechanisms where legally authorized and appropriate. However, the intent of the city is to always resolve violations at the lowest possible level, and to engage to seek compliance and solve problems while maintaining the dignity of all involved. To that end, violations of this Ordinance should only result in citations when other means of achieving compliance have been unsuccessful, or are not practicable for the particular situation.		
McMinnville (34,530)	May 28, 2023 the Council voted to amend Ordinance 8.36		Yes Ordinance 5064	**TIME:** Camping allowed on most publicly owned property in McMinnville between the hours of 9:30 p.m. and 6:30 a.m. VEHICLE CAMPING: Sleeping in cars parked on most public property between the hours of 9:30 p.m. and 6:30 a.m. is allowed. **PLACE:** It is unlawful at all times for any person to establish or occupy a campsite on the following City property: 1. All park areas: 2. All public property located within the boundaries of the McMinnville Urban Renewal Area; 3. All publicly owned or maintained parkin lots; and 4. All public property located within an area zoned for Residential Use under MCC Chapter 17. **MANNER:** It is legal to use camp stoves and small cooking devices, as long as they are used in a safe manner and in conditions that do not place any person, property or structures in danger. It is against the law to store camp paraphernalia, such as tents, tarps, sleeping bags and other equipment, on the publicly owned property during the day (6:30 a.m. to 9:30 p.m.) It is against the law to camp on private property without the property owner's permission or as sanctioned under MMC 8.36.020 under Temporary Camping Program. Obstructing pedestrians or vehicle travel is against the law (ORS 166.025). This means that people may not: • Sit or lay in a manner that blocks passage of another person or vehicles or requires another person or driver to take evasive action to avoid contact. It is against the law to litter (MMC 8.16.168). All property should be treated with respect, regardless of the value of the property and, as a community, we have a right to keep the city beautiful be requiring citizens pick up after themselves. The City's parking code will continue to be enforced under MMC Chapter 10.		

City	City Council Public Process	Duration of Public process	Was an Ordinance Adopted	What does the Ordinance do	Location of Established Camping Site	Authorized Camping Site services and regulations
Tualatin (27,797)	June12, 2023: City Council work session to discuss the draft of the ordinance. June 26, 2023: Consideration of Ordinacne Prohibiting and Regulating camping in Tualatin	One month	Yes Ordinance 1475-23	**TIME:** A person without shelter may camp on outdoor City property as permitted by subsection (2)(a) only if the person complies with all of the following time restrictions. • A person may only camp between the hours of 7pm and 7 am. After 7 am, a person without available shelter must dismantle the campsite and remove all personal property and camp materials from the campsite. **PLACE:** A person without available shelter may not camp in the following places at any time. • Within any City-owned or maintained parking lot. • Within 500 feet from a public or private elementary school, secondary school, or career school attended primarily by minors. • within 500 feet from an egress or ingress toa a freeway. • Within 20 feet of a building, including but not limited to residences, commercial buildings and City buildings. • Within the Natural Resource Protection Overlay, Wetland Protected Areas, Natural Areas identified in the Parks and Recreation Master Plan, greenways, and landscaped areas on publicly owned land. • In the public right-of-way and railroad right-of-way. • within municipal grounds and Library Plaza. **MANNER:** A person without available shelter may camp on City property as permitted by subsection (2)(a) if the person complies with all of the following manner regulations. • A person may not accumulate, discard, or leave behind in or around a campsite any rubbish, trash, garbage, debris, or other refuse, unsanitary or hazardous materials, or any animal or human urine and feces. • Digging, excavating, terracing of soil or other alteration of City property, or causing environmental damage or damage to vegetation or trees is prohibited. • Obstruction or attachment of camp materials to public infrastructure or private property structures, including bridges or bridge infrastructure, fire hydrants, utility poles, streetlights, traffic signals, signs, fences, trees, vegetation, vehicles, or buildings is prohibited. • Erecting, installing, placing, leaving, or setting up any type of permanent or temporary fixture or structure of any material or materials in or around a campsite is prohibited. For purposes of this section, a “permanent or temporary fixture or structure” does not include a tent, tarpaulin, or other similar item used for shelter that is readily portable. • A campsite must be limited within a spatial footprint of 12 feet by 12 feet, or 144 square ft, and a campsite may not be within 10 feet of another campsite. Multiple persons may camp together in a single campsite, subject to the limitations of this subsection. • Unauthorized connections or taps to electrical or other utilities, or violations of building, fire, or other relevant codes or standards are prohibited. • Open flames, recreational fires, burning of garbage, and bonfires are prohibited except as specified in Chapter 5-2-040. • Camping materials may not create a physical impairment to emergency ingress or egress or emergency response including within 10 feet of any fire hydrant, utility pole, or other utility, fire gate/bollards, or public infrastructure used for emergency response.	Grassy Parcel along Southwest Tualatin Road adjacent to the police station.	

City	City Council Public Process	Duration of Public process	Was an Ordinance Adopted	What does the Ordinance do	Location of Established Camping Site	Authorized Camping Site services and regulations
West Linn (26,931)	April 2023: Infomed the community of the required upcomiong changes through social media and newsletter campains. May 8, 2023: City Council work session, offering public comment. May 15, 2023: Proposed Code read at City Council meeting. June 12, 2023: Present proposed ordinance around removal of any reference to camping in the municipal code (5.115)with no regulation in place for camping. June 20, 2023: Adopted new Code.	Two months: April - June 20, 2023	Yes Ordinance 1744	**TIME:** "Overnight" camping means occurring anytime during the hours of closure or between the hours of 7:00 p.m. and 7:00 a.m. **PLACE:** It is unlawful for any individual to camp at an established campsite, unless otherwise specifically authorized by this section or City council. Any campsite may not create a physical impediment to emergency or nonemergency access to City property or private property. Any campsite may not be set up on City property on a sidewalk that obstructs accessibility, passage, or otherwise interferes with the use of the sidewalk for its designed and intended purpose. It is not unlawful for an individual to camp on City property overnight excluding parks unless there is a designated camping area. **MANNER:** An established campsite may be authorized, notwithstanding subsection (5) of West Linn Municipal Code, when: (a) the City Manager has declared an emergency. (b) the City has issued an individual a parks permit or special event permit allowing camping in accordance with stated terms and conditions of the permit. A campsite may not obstruct access to fire hydrants, utility poles, or public infrastructure. A campsite may not be located within 10 feet of building entrance, exit, driveway, loading dock, or established park trail. A campsite may not be located within 300 feet of any school or licensed, certified, or authorized childcare center. A campsite may not be located on or within 50 feet of a river or stream.Any campsite must be limited in size to 10 feet by 10 feet. Individuals may not accumulate, discard, or leave behind garbage, debris, unsanitary or hazardous materials, or other materials of no apparent utility on City property or in City right-of-way. Individuals at a campsite may not connect to electrical or other utilities and may not violate any building, fire, or other City codes and standards. Individuals at a campsite may use cooking stoves or other devices to keep warm and dry; however, open flames, recreational fires, burning of garbage, bonfires or other fires are strictly prohibited. Individuals may not dump gray water (i.e., wastewater from baths or sinks) or black water (i.e., sewage water) onto City property or any other facility, including storm drains, not intended for gray water or black water disposal. VEHICLE CAMPING: Individuals may use motor vehicles for shelter and to keep warm and dry on City right-of-way to the extent the use complies with the requirements in this section: Motor vehicles are in compliance with the parking regulations set forth in Chapter 6 of the code. Per Section 6.280, Motor vehicles may not be parked at any time upon the southwesterly right of way of Portland Avenue (Oregon State Highway Route 43) within the corporate limits of the City, from a point located at mile post 10.52 (directly opposite the intersection of Holmes Street and Highway 43) to mile post 11.12 (directly opposite the intersection of Holly Street and Highway 43). Motor vehicles must be operational, i.e., capable of being started and driven under their own power, or ready to be towed if designed to be towed, and may not be discarded or left inoperable in the City right-of-way. Individuals may not attach or connect any structures to the motor vehicle, unless such structures are designed for such purposes. Individuals may use cooking stoves or other devices to keep warm and dry; however, open flames, recreational fires, burning of garbage, bonfires or other fires in, on, or around motor vehicles are strictly prohibited. Individuals may not accumulate, discard, or leave behind garbage, debris, unsanitary or hazardous materials, or other materials of no apparent utility around motor vehicles. Individuals may not dump gray water (i.e., wastewater from baths or sinks) or black water (i.e., sewage water) onto City property or any other facility, including storm drains, not intended for gray water or black water disposal.		

City	City Council Public Process	Duration of Public process	Was an Ordinance Adopted	What does the Ordinance do	Location of Established Camping Site	Authorized Camping Site services and regulations
Wilsonville (26,597)	Extensive community outreach 6 City Council work sessions Received input from the City's DEI Committee, Library Board, and Parks and Recreation Advisory Board February 23, 2023: City Council Work Session; March 6, 2023: City Council Work Session; Mrch 20, 2023: City Council Work Session; April 3, 2023: City Council Work Session; April 17, 2023: City Council Work Session; May 1, 2023: Public Hearing (ordinance adopted on first hearing) May 15, 2023: Second Reading (Ordinance and Administrative Rules adopted); Resolution 3058 adopted, establishes administrative rules that define the time, place and manner restrictions to be implemented locally by July 1, 2023.		Yes Ordinance 879 Resolution 3058	**TIME:** Camping is not allowed in Wilsonville, except in the following designated locations, between 9 pm and 7 am. : **PLACE:** Vehicle camping: in designated spots at City Hall parking lot (29799 SW Town Ctr. Loop E.) Tent camping: in designated area across the street from City Hall parking lot. (1) Except as authorized pursuant to WC 10.770, at all times it is unlawful for any persons to camp or to establish, maintain, or occupy a campsite on City-owned property not identified as a Designated Area, including, but not limited to: (a) All City parks and City parking lots within City parks. (b) All City parking lots, City structures, or other City property not designated for camping in the Administrative Rules, as provided in subsection 2 below. (c) All City rights-of-way, including rights-of-way within and adjacent to areas zoned for residential uses and rights-of-way adjacent to public and private schools and child care facilities. (d) All City sidewalks. (e) All public transit shelters. (f) All City property located in the SROZ. (g) All City property located within 20 feet of a tree designated as a heritage tree in the City's Heritage Tree program. (h) The City property at the northeast corner of SW Barber Street and SW Kinsman Road (taxlot number 31W14B 00700). (i) Stormwater treatment facilities, including, but not limited to swales, detention ponds, and drainage ways. (j) On areas underneath City-owned rights-of-way or bridges that are not open to the public. (k) On railroad tracks or within 15 feet of railroad tracks. (l) On any City property or City right-of-way that the City has closed to the public due to construction, heavy vehicle or machinery use, or other City or City-sanctioned work that is incompatible with camping in the City right-of-way (2) Designated Area(s). Individuals who are involuntarily homeless may occupy a campsite within the time regulations provided in WC 10.720 and pursuant to the manner regulations in WC 10.740 in the Designated Area(s) identified in the Administrative Rules. For avoidance of doubt, camping is prohibited on all City-owned property and City rights-of-way not designated for camping in the Administrative Rules. **MANNER:** Camping by individuals who are involuntarily homeless, when and where allowed (see WC 10.720 and 10.730), is subject to all of the following: (1) Individuals, camp materials, camps, or personal property, including shopping carts, may not obstruct sidewalk accessibility or passage, clear vision, fire hydrants, City or other public utility infrastructure, or otherwise interfere with the use of the right-of-way for vehicular, pedestrian, bicycle, or other passage. (2) For campsites other than those contained within a vehicle, the campsite must be limited within a spatial footprint of 10 feet by 10 feet, or 100 square feet. For campsites including a vehicle, the campsite and camp materials must be self-contained within the vehicle. The intent of this section is to allow a person to sleep protected from the elements and maintain the essentials for sheltering, while still allowing others to use public spaces as designed and intended. (3) For campsites located in Designated Area(s), the campsite locations must comply with the spacing requirements identified in the Administrative Rules. (4) Open flames, recreational fires, burning of garbage, bonfires, or other fires, flames, or heating are prohibited. (5) Individuals may not accumulate, discard, or leave behind garbage, debris, unsanitary or hazardous materials, human or animal waste, or other items of no apparent utility in public rights-of-way, on City property, or on any adjacent public or private property. (6) Dumping of gray water (i.e., wastewater from baths, sinks, and the like) or black water (i.e., sewage) into any facilities or places not intended for gray water or black water disposal is prohibited. This includes but is not limited to storm drains, which are not intended for disposal of gray water or black water. (7) Unauthorized connections or taps to electrical or other utilities, or violations of building, fire, or other relevant codes or standards, are prohibited. (8) Obstruction or attachment of camp materials or personal property to fire hydrants, utility poles or other utility or public infrastructure, fences, trees, vegetation, vehicles, buildings, or structures is prohibited.	Wilsonville City Hall property located at 29799 SW Town Center Loop East, Wilsonville, Oregon In the event that the areas and spaces identified are at capacity and an individual who is involuntarily homeless needs a location to shelter for survival, the City Manager may designate additional location(s) as may be necessary pursuant to WC 10.770(2). Such temporary action by the City Manager must be considered for ratification by the City Council at its next regularly scheduled meeting.	The City has identified where individuals who are involuntarily homeless may shelter for survival. Designated Area(s). It is prohibited at all times for any person to use City property or City rights-of-way to camp for survival, except at the following location(s). The City designates the following specific locations on the Wilsonville City Hall property located at 29799 SW Town Center Loop East, Wilsonville, Oregon for individuals who are involuntarily homeless to camp, pursuant to the time and manner regulations outlined in WC 10.720 and WC 10.740. **Outreach and Education** Resource Materials. The City will develop resource material(s), including, but not limited to, Washington County and Clackamas County resources for individuals who are involuntarily homeless and information of the City's camping for survival regulations. The City will have these educational materials printed in English and Spanish and available to employees, individuals who are involuntarily homeless, service providers, and community members at City facilities commonly utilized by the public. The information will also be provided on the City's website. County Coordination. The City will coordinate with Clackamas County and Washington County regarding each County's response to and resources for individuals who are involuntarily homeless. City personnel will provide regular updates to the City Council and community of each County's resources and projects to address homelessness. Porta potties and sanitation are available at the camps.

City	City Council Public Process	Duration of Public process	Was an Ordinance Adopted	What does the Ordinance do	Location of Established Camping Site	Authorized Camping Site services and regulations
				(9) Storage of personal property such as vehicle tires, bicycles or associated components (except as needed for an individual's personal use), gasoline, generators, lumber, household furniture, extra propane tanks, combustible material, shopping carts, or other items or materials is prohibited, other than what is related to camping, sleeping, or keeping warm and dry. (10) Digging, excavation, terracing of soil, alteration of ground or infrastructure, or damage to vegetation or trees is prohibited. (11) All animals must be leashed, crated, or otherwise physically contained at all times. (12) Smoking, vaping, and/or the use or distribution of tobacco or cannabis products is prohibited in Designated Area(s). "Tobacco or cannabis products" includes, but is not limited to, any tobacco cigarette, cigar, pipe tobacco, smokeless tobacco, chewing tobacco, any part of the plant Cannabis family Cannabaceae, or any other form of tobacco or cannabis which may be used for smoking, chewing, inhalation, or other means of ingestion. This regulation does not prohibit the use of prescribed medication when used in accordance with the prescription instructions and when used in location(s) allowed under Oregon law. (13) Alcohol may not be consumed, used, or distributed in Designated Area(s). (14) Controlled substances, as defined in ORS 475.005, may not be consumed, used, manufactured, or distributed in Designated Area(s). (15) Vehicle Camping. Individuals who are involuntarily homeless may use vehicles for shelter and/or sleeping in Designated Area(s) under the following circumstances and subject to the conditions and restrictions provided in subsections (1) through (14) above: (a) The vehicle is legally parked in compliance with the Wilsonville Code. (b) Storage of material outside vehicles is prohibited, other than what is incidental to activities such as short-term (maximum 30 minutes) loading or unloading a vehicle. (c) Vehicles must be operational, i.e., capable of being started and driven under their own power, or ready to be towed if designed to be towed and may not be discarded or left inoperable in public rights-of-way or on City property. (d) Vehicles must be registered and insured, as required by the Oregon Vehicle Code. (e) No building or erecting of any structures connecting or attaching to vehicles is permitted, including tents that are not designed and manufactured to be attached to a vehicle. (f) Connections from vehicles to public or private stormwater, sewer, water, and electrical systems or to vehicles from public or private stormwater, sewer, water, and electrical systems are prohibited.		

City	City Council Public Process	Duration of Public process	Was an Ordinance Adopted	What does the Ordinance do	Location of Established Camping Site	Authorized Camping Site services and regulations
Ashland (21,607)			No	In order to enforce the Prohibited Camping code the City has a location for overnight use and use the Dusk to Dawn site. Ashland Police monitor the site with drive by patrols each evening. Persons found not following the rules are subject to immediate expulsion. Failure to remove personal belongings by 7:30 a.m. constitutes a breach of the rules and expulsion from the Dusk to Dawn sleeping location.	1175 E Main Street, Ashland Behind the police station and city council chambers	The City will provide a portable toilet, a clean-up station, pet waste bag stand and trash waste receptacles at the Dusk to Dawn site. Overnight sleeping is allowed in this newly designated Dusk to Dawn site between the hours of **TIME:** 7 p.m. and 7:30 a.m., under the following conditions/rules: Guests must vacate the site by 7:30 a.m. and may not return until 7 p.m. each day **MANNER:** Sleeping space is limited to a 10-feet by 10-feet area allocation for each individual user or companion users of this site. The use of tents or similar temporary overnight cover is allowed within a sleeping space allocation. All camping gear and personal belongings must be contained in a sleeping space allocation and removed from the area by 7:30 a.m. each day. Any camping gear and/or personal belongings of value left on site after 7:30 a.m. will be removed and stored, campers will have 30 days to retrieve belongings. Items determined to pose a health or safety risk to the users of this site are subject to immediate removal and/or disposal. Children must be accompanied by a parent or guardian. Pets: Pets are allowed on-site and must be under their owners control at all time. Pets cannot be left unattended. If a pet is aggressive to other guests or pets, the guest and their pet are subject to immediate removal. Pet owners are required to pick-up after their pets and properly dispose of waste. All dogs six months of age or older must have received a rabies vaccine according to Oregon Health Authority guidelines, 333-019-0017. Upon request of law enforcement, the owner is obligated to provide proof of the rabies vaccine. Personal Behavior: Guests must treat other guests and members of the public with kindness, dignity, and respect Disrespectful, violent, disruptive, vulgar or combative behavior will not be tolerated, nor will racism or bullying. Campers must respect the allowable space of each camper. All guests must pick up after themselves and their pets and dispose of all refuse, including cigarette butts in the appropriate receptacles provided. Guests must adhere to a noise curfew from 10 p.m. to 7 a.m. Guests must adhere to any posted speed limits and traffic rules while on the property. Unauthorized and Illegal Activities - Unlawful behavior or noncompliance with rules for this site is immediate grounds for removal and future exclusion from access and use of this site, including for the following: No visitors are allowed on this site, only overnight guests. No unlawful weapons of any kind are allowed on this site. No cooking, campfires or open flames are allowed on this site. No illegal drug use, or legal recreational drug use including marijuana and/or alcohol use, is allowed on site.

COUNCIL BILL NO. 3226

ORDINANCE NO. 2616

AN ORDINANCE REQUIRING COMPLIANCE WITH ORS 195.530 AND DECLARING AN EMERGENCY

WHEREAS, the United States Court of Appeals for the Ninth Circuit has issued opinions in *Martin v. City of Boise*, 920 F.3d 584 and *Johnson v. City of Grants Pass*, 72 F4th 868; and

WHEREAS, the Oregon legislature has enacted ORS 195.530; and

WHEREAS, the City of Woodburn is aware of the above referenced court decisions and ORS 195.530 and is in the process of discussing policy issues and determining what, if any, future action is needed; **NOW, THEREFORE,**

THE CITY OF WOODBURN ORDAINS AS FOLLOWS:

Section 1. The City of Woodburn shall not apply or enforce any city law in violation of ORS 195.530.

Section 2. This Ordinance being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Ordinance shall take effect immediately upon passage by the Council and approval by the Mayor.

Approved as to form: _____ _____
City Attorney Date

Approved: _____
Frank Lonergan, Mayor

Passed by the Council _____

Submitted to the Mayor _____

Approved by the Mayor _____

Filed in the Office of the Recorder _____

ATTEST: _____
Heather Pierson, City Recorder
City of Woodburn, Oregon