

TESTIMONY OF HEATHER ZIMMERMAN

**In Support of Order 68-23/24**

City Council of Portland

November 20, 2023

My name is Heather Zimmerman, and I am a legal fellow at the ACLU of Maine, a statewide organization committed to advancing and preserving civil liberties guaranteed by the Maine and U.S. Constitutions. I am also a resident of Portland. On behalf of the ACLU of Maine and our members, I submit this public comment in support of Order 68, which would temporarily stop harmful sweeps and allow unhoused people to camp in certain public places until April 30, 2024.

We recognize that addressing Portland's homelessness crisis is not quickly or easily done. This crisis is not unique to our city; unsheltered homelessness is soaring in cities and towns across the United States. The severe lack of access to affordable housing drives the homelessness crisis.<sup>1</sup> Knowing that unsheltered homelessness is a complex problem, the question is what we will do in response.

Since July 2022, the city has responded not by addressing the root causes, but, with efforts to criminalize and forcibly displace unhoused community members. The forcible displacement of unhoused residents continues deeply entrenched and brutal practices of discrimination against Black people and people of color, LGBTQ+ people, people with disabilities, and poor people. Tonight, we urge Portland City Council to pass Order 68 as a first step in turning away from criminalization and toward real solutions.

We encourage council to pass Order 68 for three reasons. First, Order 68 recognizes that we cannot punish our way out of the city's homelessness crisis. By continuing to enforce Portland's loitering and camping bans, the city persists in a misguided attempt to punish unhoused people out of unsheltered homelessness. Punishment exacerbates inequity and injustice in our city, inflicting further trauma and harm on unhoused people seeking to survive. Second, Order 68 recognizes that criminalization and forcible displacement are not solutions to unsheltered homelessness, and that sweeps needlessly exacerbate health and safety issues for all people in our community. Third, Order 68 preserves the constitutional rights of every person in Portland—sheltered or unsheltered.

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<sup>1</sup> Alex Horowitz et al., *How Housing Costs Drive Levels of Homelessness*, PEW (Aug. 22, 2023), <https://www.pewtrusts.org/en/research-and-analysis/articles/2023/08/22/how-housing-costs-drive-levels-of-homelessness>.

**I. Order 68 recognizes that the city cannot solve homelessness, including unsheltered homelessness, by arresting and punishing people who don't have access to housing.**

We cannot punish or arrest our way out of social problems like homelessness. In Portland, this lesson was made clear when City Council passed a median ban in July 2013—a law that was subsequently struck down as unconstitutional. Like the situation that Portland faces today, a decade ago the city's homeless population was growing.<sup>2</sup> The increasing number of unhoused people resulted in more people panhandling in the city's medians. This, in turn, led to more complaints to the police about the presence of unhoused people. Instead of addressing the root of the issue, council instead responded by passing a ban on panhandling in medians—a clear example of a law designed to target, criminalize, and punish people for having limited resources. The panhandling ban misused the language of public health and safety to target unhoused people with the purpose of removing them from highly visible public spaces. Following the ban's enactment, the ACLU of Maine filed and won a lawsuit in federal court because the ban violated people's First Amendment rights.<sup>3</sup>

Today, we find history repeating itself, with the city using the language of public health to enact bans that experts have decried as antithetical to public health. There is widespread public and political recognition that punitive approaches do not work to undo deep-seated social problems. The Movement for Black Lives has led the nationwide call for municipalities to divest from brutal and discriminatory policing and invest in the public infrastructure and services that build community safety. These demands were brought home to Portland by Black POWER and successfully spurred several changes to make the city a more livable and safe home for Black people and people of color. This council even adopted a goal of “[a]lways using a lens that prioritizes racial, social and justice equity.”

But in response to the growing number of people living unsheltered in our city, the city has doubled down on punitive approaches, including deploying police to monitor, harass, and forcibly displace unhoused people. Any discussion about unsheltered homelessness cannot be separated from discussions about institutional racism, colonialism, and state violence. The city's practice of forcibly displacing unhoused people has a clear racist impact: the vast majority of unsheltered Black people and people of color live in downtown Portland. The city tends to focus sweeps and enforcement of its camping ban on these same downtown locations. As a result, Black people and people of color have been disproportionately harmed by the violence of forced displacement. Yet, in the executive department's 12-page memo outlining its opposition to Order 68, the city wholly failed to analyze the racial impact of the city's current policies and practices that criminalize and forcibly displace unhoused people.

If we are serious about cultivating racial justice and equity in Portland, we must insist that our analyses of city actions take a racial justice lens, and we must also abolish the laws, policies, and

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<sup>2</sup> The number of people experiencing homelessness in the City of Portland nearly doubled from 276 to 480 people, according to Maine Housing estimates. Maine State Housing Authority, Homeless People in the Portland COC: Annual Point in Time Survey—Jan. 30, 2013 (Jan. 30, 2013), <http://www.portlandmaine.gov/ArchiveCenter/ViewFile/Item/217>.

<sup>3</sup> *Cutting v. City of Portland*, No. 2:13-CV-359-GZS, 2014 WL 580155 (D. Me. Feb. 12, 2014).

practices rooted in the violence of colonialism, slavery, and institutional racism. We urge council to pass Order 68 as an important first step.

## **II. Order 68 reflects that criminalization and forced displacement are not a solution to homelessness.**

Criminalization and forced displacement efforts targeting unhoused residents will not force people into shelters. The evidence is right in front of us. For 18 months, the city has policed, displaced, banished, and punished people for being unhoused and seeking to survive in public places. The city has also segregated unhoused people by moving its adult homeless shelter to the outskirts of the city;<sup>4</sup> shamed and socially marginalized people whose needs are not met by the shelter;<sup>5</sup> banished unsheltered people to remote locations by designating most public places on the peninsula as “emphasis areas”; and withheld lifesaving public goods and services, like clean water.<sup>6</sup>

As a result of these actions, unsheltered homelessness has continued to grow; the city has wasted public resources on policing and punishing unhoused community members instead of investing in adequate housing and shelter; and unhoused residents have repeatedly been traumatized, subjected to greater dangers, and lost their possessions. Some people have even lost their lives. Through this process, people without access to housing have been completely dehumanized and stripped of their basic legal rights and dignity. As we have seen, encampment sweeps do not make many unsheltered residents leave Portland, and future sweeps will not solve, or even alleviate, the issue of unsheltered homelessness in our city, despite what the executive department’s memo and fiscal note imply.

Continuing sweeps will also make the humanitarian crisis in Portland worse. Medical and public health experts have made clear that forcibly displacing unhoused people significantly increases morbidity and mortality, overdoses, hospitalizations, and the spread of serious infection.<sup>7</sup> Last week, the American Public Health Association adopted a statement against encampment sweeps. The statement, titled “protecting the health and well-being of people living unsheltered by stopping forcible displacement of encampments,” recognizes that “being displaced from an

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<sup>4</sup> Troy R. Bennet, *Portland’s New \$24 Million Homeless Shelter Will Be ‘at Capacity on Day One’*, BANGOR DAILY NEWS (March 22, 2023), <https://www.bangordailynews.com/2023/03/22/news/portland/portland-riverside-street-homeless-shelter/>.

<sup>5</sup> Brad Rogers, *‘Sweeping People up Like They’re Trash’: City Crews Clear out Another Homeless Encampment in Portland*, WGME (Sept. 6, 2023), <https://wgme.com/news/local/maine-housing-crisis-crews-clear-another-homeless-encampment-due-to-health-and-safety-concerns-fore-river-parkway-preble-street-unhoused-homelessness>.

<sup>6</sup> The city has consistently failed to provide clean water at the largest and most congested encampments in the city. This lack of access to clean water harms public health, as evidenced by the current Hepatitis A outbreak within Portland’s unhoused community. Grace Benninghoff, *Hepatitis A Outbreak Spreads in Portland’s Homeless Encampment*, Portland Press Herald (Nov. 18, 2023), <https://www.pressherald.com/2023/11/18/hepatitis-a-outbreak-spreads-in-portlands-homeless-population/>.

<sup>7</sup> Joshua A. Barocas et al., *Population-Level Health Effects of Involuntary Displacement of People Experiencing Unsheltered Homelessness Who Inject Drugs in US Cities*, JAMA (April 10, 2023), <https://jamanetwork.com/journals/jama/fullarticle/2803839>; *Study Shows Involuntary Displacement of People Experiencing Homelessness May Cause Significant Spikes in Mortality, Overdoses and Hospitalizations*, National Health Care for the Homeless Council (April 10, 2023), <https://nhchc.org/media/press-releases/study-shows-involuntary-displacement-of-people-experiencing-homelessness-may-cause-significant-spikes-in-mortality-overdoses-and-hospitalizations/>.

encampment reduces the odds of accessing emergency shelter.”<sup>8</sup> The U.S. Interagency Council on Homelessness and the Department of Housing and Urban Development have both issued statements against encampment sweeps. Many national organizations focusing on homelessness and housing access have also condemned the forcible displacement of unhoused people. Order 68 heeds this advice from national experts and pushes pause as we approach winter.

In the past, Portland has been a leader in addressing homelessness, but the city’s current punitive approaches will only worsen the homelessness crisis. We urge council to pass Order 68 as an initial step to correct course.

**III. Continuing the forcible displacement of unhoused residents risks violating their constitutional rights.**

Portland’s encampment sweeps and enforcement of its anti-camping policy and ordinances likely violate the Fourth, Eighth, and Fourteenth Amendments of the U.S. Constitution and various sections of Article 1 of the Maine Constitution. Our October 26 letter to City Manager West (attached) outlines the ACLU of Maine’s legal concerns with sweeps. Order 68 will briefly pause enforcement of the city’s anti-camping laws and policies through the winter, when forcible displacement is even more dangerous due to cold weather. We urge council to pass Order 68 because it is an important first step in addressing our legal concerns and the city’s legal liability when it violates residents’ constitutional rights.

**CONCLUSION**

We all want to end homelessness, including unsheltered homelessness. To do this in Portland, the city must turn away from punitive approaches, like policing, forcible displacement, and criminalization. Forcibly displacing unhoused residents wastes public resources, makes the homelessness crisis worse, increases trauma and harm to unhoused community members, and threatens people’s constitutional rights.

We urge Portland City Council to pass Order 68 tonight. This is a chance to turn away from punitive approaches and save lives before winter sets in. While the order will not solve Portland’s homelessness crisis, it will be an important first step. The city must stop punishing and forcibly displacing unhoused people before we can seek solutions to the root causes of the issue.

Heather Zimmerman  
Legal Fellow  
ACLU of Maine

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<sup>8</sup> Amy Hagopian et al., *Protecting the Health and Well-being of People Living Unsheltered by Stopping Forcible Displacement of Encampments*, American Public Health Association (2023).

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*By Mail and E-Mail*

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RE: Protection of People Without Housing in Portland

Dear City Manager West and Commissioner Van Note,

We write on behalf of the ACLU of Maine and its members asking you to cancel the planned encampment sweeps scheduled for November 1, 2023, in Portland. The ACLU of Maine is a nonprofit, nonpartisan organization dedicated to protecting the rights, liberties, and dignity of all people who call Maine home. For over fifty-five years, we have worked to ensure everyone from Eastport to Madawaska to Berwick to Jackman can participate in our democracy and in our society, but our headquarters has always been in Portland. The proposed encampment sweeps will take place right outside our door. We could not ignore these punitive sweeps if we wanted to, nor should anyone ignore the deep and painful harm these actions will inflict on members of our community. Our fellow human beings residing in Portland – whether unhoused or housed – deserve much better.

We urge you to cancel the encampment sweeps from city and state land planned for November 1 and to stop enforcing the City of Portland's (City's) Administrative Policy on Enforcement and Removal Policies and Procedures Relating to Unauthorized Campsites on City Properties (anti-camping policy) and city ordinances prohibiting loitering and public camping.<sup>1</sup> Portland's anti-camping policy purports to adopt a "general non-involvement approach to any found unauthorized campsites,"<sup>2</sup> but the policy has been used to punish and criminalize Portland's unhoused residents who are forced to sleep and live outside due to inadequate shelter options.

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<sup>1</sup> See PORTLAND, ME., CODE OF ORDINANCES chs. 17, 18 & 25 (1992, 2014, 1982).

<sup>2</sup> City of Portland Exec. Dep't, Administrative Policy on Enforcement and Removal Policies and Procedures Relating to Unauthorized Campsites on City Properties (July 1, 2022).

Since July 2023, the City has used the anti-camping policy and ordinances to repeatedly conduct encampment sweeps and forcibly displace unhoused people from public places. During this same period, the State of Maine (State) has conducted sweeps and involuntarily removed unhoused people from Department of Transportation (DOT) land. These government actions have resulted in the seizure and destruction of unhoused residents' property and the punishment of unhoused residents for sleeping and living outside, even when there are no adequate shelter alternatives available.

This forcible displacement of unhoused Portland residents threatens their life and health and exacerbates already stark racial inequities. Moreover, the City's and State's actions have likely violated the Fourth, Eighth, and Fourteenth Amendments of the United States Constitution, as well as Sections 1, 5, 6-A, and 9 of Article 1 of the Maine Constitution. If you move forward with the planned enforcement actions, including the two encampment sweeps from city land and the encampment sweep from state land planned for November 1, 2023, the City and the State risk incurring substantial legal liability for violating the constitutional rights of unhoused residents. The forcible displacement and criminalization of people simply because they cannot afford shelter must immediately end. Instead, City and State leaders should dig into the underlying causes of unsheltered homelessness to remove barriers to shelter for those who want it, as well as address the root causes of homelessness: a lack of access to affordable housing, jobs, health care, and education.

## Discussion

The number of people experiencing homelessness in Maine has grown dramatically since 2018. This growth has been acute in Portland, where for years shelters in the City have been full and unhoused people have been forced to stay in makeshift overflow spaces. In 2023, the already growing unhoused population in Portland was compounded by three factors: the lack of housing placements due to the significant shortage of affordable housing stock and rapidly rising housing costs;<sup>3</sup> the end of pandemic-era federal funding for rental assistance and temporary use of hotels for additional shelter capacity;<sup>4</sup> and the growth of asylum seekers coming to Portland and seeking shelter.<sup>5</sup>

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<sup>3</sup> See Alex Horowitz, Chase Hatchett & Adam Staveski, *How Housing Costs Drive Levels of Homelessness*, PEW (Aug. 22, 2023), <https://www.pewtrusts.org/en/research-and-analysis/articles/2023/08/22/how-housing-costs-drive-levels-of-homelessness> (discussing that homelessness in Maine increased by 110% from 2020 to 2022 due, in large part, to the state's traditionally restrictive zoning that has limited the building of new homes matched with the influx of people that moved to the state during the COVID-19 pandemic); Daniel Brennan, *Housing in Maine: An Overview*, MAINEHOUSING (Sept. 13, 2022), <https://legislature.maine.gov/doc/8866>; see also TANYA DE SOUSA ET AL., THE 2022 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 17 (The U.S. Dep't Housing & Urban Development 2022) (noting that Maine had one of the largest increases in homelessness from 2007 to 2022).

<sup>4</sup> Mal Meyer, *Thousands of Mainers Could End Up Homeless as Pandemic-era Relief Programs End*, WGME (Dec. 20, 2022), <https://fox23maine.com/news/local/thousands-mainers-homeless-pandemic-era-relief-programs-end-maine-governor-janet-mills-hotels-covid>.

<sup>5</sup> See, e.g., Rachel Ohm, *Influx of Asylum Seekers Pushing Portland to Brink of Its Ability to Serve Those in Need*, PORTLAND PRESS HERALD (Feb. 28, 2023), <https://www.pressherald.com/2023/02/27/influx-of-asylum-seekers-pushing-portland-to-brink-of-its-ability-to-serve-those-in-need/>; Ari Snider, *Portland Officials Warn the City Is Facing a 'Cliff' as it Struggles to House Asylum Seekers*, MAINE PUBLIC (Feb. 28, 2023),

The number of unhoused people in Portland now greatly exceeds the number of shelter beds.<sup>6</sup> On March 27, 2023, the City of Portland opened the Homeless Services Center (HSC), the City’s emergency adult shelter. Within one day of opening, the HSC, which has a 208-bed capacity, has been full every night.<sup>7</sup> Because the City does not have sufficient emergency shelter space, people experiencing homelessness are increasingly being forced to stay unsheltered – living and sleeping outside with nowhere to go.

Despite the lack of adequate and available shelter capacity, the City and State have aggressively enforced the anti-camping policy and laws through encampment sweeps and the forcible displacement of unhoused residents, resulting in the seizure and destruction of unhoused people’s property. This punitive enforcement has resulted in almost nowhere for unhoused people to sleep and engage in other life-sustaining conduct. The City of Portland’s procedure for designating and clearing “Emphasis Areas” has resulted in unhoused residents losing public places where they can sleep and live after each encampment sweep.<sup>8</sup> If the City and State conduct the planned encampment sweeps on November 1, the **only** remaining public place for unsheltered people to sleep and live in downtown Portland will be Harbor View Memorial Park – an area already at capacity with unsheltered residents and likely to be swept soon.

### **I. The Forcible Displacement of Unhoused Portland Residents Threatens Their Life and Health and Increases Racial Inequities.**

Portland’s anti-camping policy, issued in July 2022, claims City staff will “take a general non-involvement approach to any found unauthorized campsites, viewing those campsites through the lens of not criminalizing people creating shelter due to a lack of housing.”<sup>9</sup> Since then, the number of people experiencing homelessness in Portland has rapidly increased, while the city has failed to invest in building sufficient, practically available safe shelter space. The number of unhoused people in Portland now far exceeds the number of emergency shelter beds. As a result, more and more people experiencing homelessness are being forced to stay unsheltered – stuck outside with no other options. Additionally, as the number of unhoused people sleeping outside in Portland has increased, the City and State have enforced the anti-camping policy and related

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<https://www.mainepublic.org/business-and-economy/2023-02-28/portland-officials-warn-the-city-is-facing-a-cliff-as-it-struggles-to-house-asylum-seekers>.

<sup>6</sup> As of October 23, 2023, there were recorded to be 275 tents in Portland, plus an uncounted number of individuals sleeping rough outside. City of Portland, Maine, Unhoused Community Dashboard, <https://www.arcgis.com/apps/dashboards/705d51d834b64f488d16b6e6fccb5bd>. In contrast, the City’s Homeless Services Center has been at capacity every night since it opened on March 27, 2023, leaving unsheltered people no alternative options but to sleep outside. *See generally* Norah Hogan, *Portland City Council Considers Declaring State of Emergency to Add Beds at Homeless Services Center*, WMTW (Sept. 26, 2023), <https://www.wmtw.com/article/portland-city-council-considers-declaring-state-of-emergency-to-add-beds-at-homeless-services-center/45331701>; Nicole Ogrysko, *Portland Considering How Shelter Capacity Can Be Expanded*, MAINE PUBLIC (Sept. 15, 2023), <https://www.mainepublic.org/maine/2023-09-15/portland-considering-how-shelter-capacity-can-be-expanded>.

<sup>7</sup> Ogrysko, *supra* note 6.

<sup>8</sup> The anti-camping policy expanded the scope of anti-camping prohibitions by creating “Emphasis Areas,” broadly defined in Section 5 as any “area or location where homeless campsites have become a repeated or consistent problem.” City of Portland Exec. Dep’t, *supra* note 2, at 2.

<sup>9</sup> *Id.* at 1.

laws to forcibly remove unhoused people from public places and effectively prohibit unsheltered people from living outside regardless of the lack of shelter availability.

Encampment sweeps forcibly displace unhoused people and deprive them of the life-saving property used to create makeshift shelter. This puts lives at risk. A 2023 study by the Journal of the American Medical Association found that the involuntary displacement of people experiencing homelessness – forcibly relocating people away from essential services and community – “will lead to substantial increases in overdose deaths, hospitalizations and life-threatening infections as well as hinder access to medications for opioid use disorder (along with other detrimental impacts).”<sup>10</sup> Encampment sweeps and enforcement of anti-camping policies to forcibly displace unhoused people deepen the homelessness crisis and contribute to significant increases in morbidity, mortality, and shortened life expectancy among unhoused residents.<sup>11</sup>

Ironically, public health concerns are often used to justify encampment sweeps, even though the forcible displacement of unhoused people increases the risks of danger and harm for unhoused residents and others in the community.<sup>12</sup> The City’s and State’s enforcement actions run counter to federal guidance provided by the Centers for Disease Control and Prevention (CDC), U.S. Interagency Council on Homelessness (USICH),<sup>13</sup> and the U.S. Department of Housing and Urban Development (HUD).<sup>14</sup> Sweeps do not address or end homelessness. Instead, “encampment sweeps cause four general problems: [1] Sweeps damage health, well-being, and connections to care; [2] Sweeps compromise personal safety and civic trust; [3] Sweeps undermine paths to housing and financial stability; [and] [4] Sweeps create unnecessary costs for local communities.”<sup>15</sup> Medical and public health experts agree that cities and states should stop encampment sweeps and not remove unhoused residents’ property, which often includes vital

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<sup>10</sup> Press Release, National Healthcare for the Homeless Council, Study Shows Involuntary Displacement of People Experiencing Homelessness May Cause Significant Spikes in Mortality, Overdoses and Hospitalizations (Apr. 10, 2023), <https://nhchc.org/media/press-releases/study-shows-involuntary-displacement-of-people-experiencing-homelessness-may-cause-significant-spikes-in-mortality-overdoses-and-hospitalizations/>.

<sup>11</sup> *Id.*

<sup>12</sup> Nat’l Healthcare for Homeless Council, *Impact of Encampment Sweeps on People Experiencing Homelessness* (Dec. 20, 2022), <https://nhchc.org/wp-content/uploads/2022/12/NHCHC-encampment-sweeps-issue-brief-12-22.pdf>.

<sup>13</sup> USICH guidance for addressing homeless encampments recognizes that approaches that close encampments without offering shelter and housing “result in adverse health outcomes, exacerbate racial disparities, and create traumatic stress, loss of identification and belongings, and disconnection from much-needed services. While these efforts may have the short-term effect of clearing an encampment from public view, without connection to adequate shelter, housing, and supportive services, they will not succeed.” U.S. Interagency Council on Homelessness, *7 Principles for Addressing Encampments* (June 15, 2022), <https://www.usich.gov/tools-for-action/7-principles-for-addressing-encampments/>. The USICH guidance concludes that “[e]ncampments should not be closed unless there is access to low-barrier shelter or housing. Moving encampment residents around without a place to go to will only cause further instability and trauma.” *Id.*

<sup>14</sup> See Interim Guidance on People Experiencing Unsheltered Homelessness, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html> (last updated Feb. 10, 2022); U.S. Interagency Council on Homelessness, *supra* note 13; *Leading with Kindness in Encampment Resolution*, HUD EXCHANGE, <https://files.hudexchange.info/resources/documents/Leading-With-Kindness-in-Encampment-Resolution.pdf>; see also Rebecca Cohen, et al., *Understanding Encampments of People Experiencing Homelessness and Community Responses: Emerging Evidence as of Late 2018*, U.S. DEP’T HOUS. & URBAN DEV. (January 2019), <https://www.huduser.gov/portal/sites/default/files/pdf/Understanding-Encampments.pdf>

<sup>15</sup> Nat’l Healthcare for Homeless Council, *supra* note 12, at 2.



medications and other life-sustaining equipment.<sup>16</sup> For many unsheltered people, property loss is “the greatest threat” to their survival.<sup>17</sup>

Moreover, the forcible displacement of unhoused Portland residents exacerbates already stark racial inequities. Homelessness disproportionately affects Black people, so laws and policies that punish unhoused people for living in public places disproportionately harm Black people and people of color.<sup>18</sup> Laws and policies criminalizing homelessness are embedded in our country’s history of systemic racism. Modern anti-camping policies and loitering prohibitions stem from anti-vagrancy laws that were brought to this country through colonialism and then used to enforce racist legal agendas like the Black Codes.<sup>19</sup> Encampment sweeps in Portland continue this shameful tradition by increasing racial harm and inequities in Portland. The vast majority of unsheltered Black people and people of color living in the city stay in the remaining three encampments on the peninsula. As a result, Black people and people of color are disproportionately displaced and harmed by City and State action.

The City of Portland has announced no viable public plan for whether – and how – it will meet the shelter and housing needs of unsheltered residents. Without significantly increasing adequate, practically available shelter and long-term, housing-oriented solutions, unhoused residents in Portland will have virtually nowhere to go after these camps are forcibly disbanded, perpetuating destructive cycles of insecurity and discrimination.

## **II. Government Enforcement of the Anti-Camping Policy and Related Laws Against Unhoused Portland Residents Likely Violates the U.S. and Maine Constitutions.**

The City’s and State’s punitive encampment sweeps likely violate the Fourth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Sections 1, 5, 6-A, and 9 of Article 1 of the Maine Constitution. We therefore urge you to immediately cancel the encampment sweeps planned for November 1, 2023, and to cease enforcing the anti-camping policy and related laws. Instead, the City and State should focus on investing public resources in solutions that will meaningfully address and end – rather than further criminalize – homelessness.

### **a. Punishing Life-Sustaining Conduct Violates the Eighth Amendment.**

Enforcement of anti-camping policies and laws – like the City’s and State’s past and planned enforcement actions – likely violate the Eighth Amendment when there is not adequate and

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<sup>16</sup> *Id.* at 8-9.

<sup>17</sup> Chris Herring, *Complaint-Oriented Policing: Regulating Homelessness in Public Space*, 84 AM. SOCIO. REV. 769, 790 (2019).

<sup>18</sup> Recognizing that racism is inherent to the criminalization of homelessness, the United Nations Committee on the Elimination of Racial Discrimination called on the U.S. to “abolish laws and policies that criminalize homelessness.” Press Release, National Homelessness Law Center, *Criminalization of Homelessness is Racially Discriminatory, Must be Abolished, Say UN Human Rights Experts* (Aug. 30, 2022), <https://homelesslaw.org/criminalization-of-homelessness-is-racially-discriminatory/#:~:text=David%20Peery%2C%20Executive%20Director%20of,escape%20the%20trauma%20of%20homelessness.>

<sup>19</sup> RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YLJ 2249, 2257-59 (1998).

practically available shelter. In 2019, the Ninth Circuit Court of Appeals ruled, in *Martin v. City of Boise*, 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.”<sup>20</sup> This is because “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.”<sup>21</sup> Therefore, “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.”<sup>22</sup>

It is unconstitutional for the government to punish unhoused people for sleeping somewhere in public when they have nowhere else to go – whether that punishment is through civil or criminal means.<sup>23</sup> Civil punishments, such as civil citations, exclusion orders, and trespass orders, are closely intertwined with criminal punishments.<sup>24</sup> “A local government cannot avoid the [*Martin*] ruling by issuing civil citations that, later, become criminal offenses.”<sup>25</sup> And the government may not sidestep the Eighth Amendment’s prohibition of cruel and unusual punishment by enforcing its anti-camping ordinances and policies to prohibit “the most rudimentary precautions a homeless person might take against the elements,” including the use of sleeping and camping equipment needed to sleep and live outside.<sup>26</sup> Anti-camping ordinances violate the Eighth Amendment “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.”<sup>27</sup> Notably, the holdings in *Martin* and *Grants Pass* are not unique to the Ninth Circuit: courts across the country have similarly found that a government’s enforcement of anti-camping ordinances against unhoused residents sleeping in public may violate the Eighth Amendment.<sup>28</sup>

In Portland, there have not been available shelter beds for months and the City’s HSC has been at capacity every night since it opened on March 27, 2023. Moreover, the shelter beds offered by the City are inadequate to meet the needs of many unsheltered Portland residents. To the extent

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<sup>20</sup> *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019).

<sup>21</sup> *Id.* at 616.

<sup>22</sup> *Id.* at 617.

<sup>23</sup> *Johnson v. City of Grants Pass*, 72 F.4th 868, 891 (9th Cir. 2023).

<sup>24</sup> *Id.* at 896.

<sup>25</sup> *Id.* at 890.

<sup>26</sup> *Id.* at 891.

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., *McArdle v. City of Ocala*, 519 F. Supp. 3d 1045, 1052 (M.D. Fla. 2021) (enjoining city’s anti-camping ordinance, finding that it likely violated the Eighth Amendment because—as in *Martin*—the city ordinance punished unhoused people for sitting, lying, or sleeping in public without first inquiring whether alternative shelter was meaningfully available to them); *Phillips v. City of Cincinnati*, 479 F. Supp. 3d 611, 649-53 (S.D. Ohio Aug. 13, 2020) (plaintiffs stated a claim under the Eighth Amendment where they alleged perpetual shortage of shelter, shelter rules that created barriers to entry, and policy that did not require determination of shelter bed availability before camping ban enforcement); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992) (concluding that the city’s conduct there “violates the eighth amendment ban against cruel and unusual punishment”: “[a]s 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 eighth amendment—sleeping, eating and other innocent conduct”).

alternative shelter is unavailable and inadequate for hundreds of unsheltered people residing in Portland, the encampment sweeps likely violate the Eighth Amendment.

**b. Unlawful Seizures and Property Destruction Violate the Fourth and Fourteenth Amendments.**

The City's and State's punitive encampment sweeps likely violate the Fourth and Fourteenth Amendments because they have resulted in the unlawful seizure and destruction of unhoused people's property.

The Fourth Amendment protects against an unreasonable seizure of unabandoned property.<sup>29</sup> Unhoused residents "have a compelling ownership interest in their personal property, especially given the vulnerability of [] homeless residents."<sup>30</sup> Whether the government recognizes the value or significance of unhoused people's property, that property may represent everything that unhoused people own and use to survive.<sup>31</sup> Moreover, while the loss of personal possessions may inconvenience many people, "the loss can be devastating for the homeless."<sup>32</sup>

Importantly, a government's interest in keeping its streets and parks clean and clear is plainly outweighed by the more urgent interests of unhoused people to not have their property seized and destroyed because the loss of clothes, camping equipment, medicines, and legal documents risks harm to their already precarious existence.<sup>33</sup> Additionally, a government's confiscation and destruction of unhoused people's personal belongings amounts to an unreasonable seizure in violation of the Fourth Amendment – even if those belongings are left on city sidewalks in violation of a city ordinance.<sup>34</sup> Unhoused people have the Fourth Amendment's protection against unreasonable seizures even if a city seizes the property while acting to enforce prohibitions contained in local ordinances.<sup>35</sup> Moreover, merely giving some advance notice of a sweep, without providing a meaningful opportunity to challenge the seizure and destruction of personal property, does not satisfy the requirements of due process under the Fourteenth Amendment.<sup>36</sup>

The City's and State's enforcement practices have routinely resulted in the confiscation and summary destruction of unhoused residents' personal property. The anti-camping policy makes it unlawful for people to create campsites or use a tent or other equipment and personal belongings as a means for living accommodation, even if there is no alternative emergency shelter available, whenever the City of Portland deems such campsites or other life-sustaining activities to

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<sup>29</sup> *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1027-28 (9th Cir. 2012).

<sup>30</sup> *See v. City of Fort Wayne*, No. 1:16-cv-00105-JVBSLC, 2016 U.S. Dist. LEXIS 185598, at \*27 (N.D. Ind. June 16, 2016) (alterations in original; quotations omitted), adopted 2017 U.S. Dist. LEXIS 49956 (N.D. Ind. Mar. 31, 2017).

<sup>31</sup> *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1016 (C.D. Cal. 2011).

<sup>32</sup> *See*, 2016 U.S. Dist. LEXIS 185598, at \*27 (quoting *Pottinger*, 810 F. Supp. at 1559).

<sup>33</sup> *Lavan*, 797 F. Supp. 2d at 1015.

<sup>34</sup> *Lavan*, 693 F.3d at 1029-30 (affirming the district court's conclusion that "even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable").

<sup>35</sup> *Id.* at 1030.

<sup>36</sup> *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993).

constitute an “obstruction,” present an immediate hazard, or are found in an “Emphasis Area.”<sup>37</sup> The policy claims that personal property from campsites will be temporarily stored when such sites are removed. In reality, however, the City and State have used staff, as well as equipment like bulldozers, to summarily destroy property at campsites while subsequently alleging that no personal property was found and that any valuable items were taken by police under the belief – with no apparent probable cause – that such things were stolen.<sup>38</sup>

The seizure and destruction of unhoused residents’ unabandoned property violates their Fourth and Fourteenth Amendment rights. Continuing these practices will likely result in further constitutional violations: “the property of homeless individuals is due no less protection under the fourth amendment than that of the rest of society.”<sup>39</sup>

### **c. State-Creation of Danger for Unhoused Residents Violates the Fourteenth Amendment.**

When the government sweeps homeless encampments, forcibly displaces unhoused people from “well-lit and high-traffic public land,” and confiscates and destroys unhoused residents’ property, it constitutes an unlawful state-created danger in violation of the Due Process Clause of the Fourteenth Amendment.<sup>40</sup>

The state-created danger doctrine protects the fundamental right to life and bodily integrity and is established “where a state or local official acts to place a person in a situation of known danger with deliberate indifference to their personal and physical safety.”<sup>41</sup> Where people are experiencing unsheltered homelessness, an unlawful state-created danger is established when the government puts unhoused residents in a known, more dangerous situation than the one in which they were found.<sup>42</sup> A government knowingly places unhoused residents at increased risk of danger when government officials remove encampments or seize and destroy property used for shelter without sufficient warning or plans for providing adequate alternative shelter, because this exposes unhoused residents to increased dangers (like inclement weather) they otherwise would not face.<sup>43</sup>

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<sup>37</sup> See City of Portland Exec. Dep’t, *supra* note 2, at 1-2.

<sup>38</sup> Grace Benninghoff, *Portland Promised to Store Personal Items from Encampment Sweeps. But Nothing Is in Storage.*, PORTLAND PRESS HERALD (Sept. 18, 2023), <https://www.pressherald.com/2023/09/18/portland-promised-to-store-personal-items-from-encampment-sweeps-but-nothing-is-in-storage/>.

<sup>39</sup> *Pottinger*, 810 F. Supp. at 1559 (finding that “[r]equiring the City to follow its own written policy with respect to the property of the homeless class members should not be significantly more burdensome than it is with respect to any other property”); see also *Lavan*, 693 F.3d at 1030 (upholding a preliminary injunction against a city’s seizure and destruction of unhoused people’s “unabandoned legal papers, shelters, and personal effects” because the city’s action meaningfully interfered with the people’s possessory interests in such property).

<sup>40</sup> *Phillips v. City of Cincinnati*, 479 F. Supp. 3d 611, 621 (S.D. Ohio 2020).

<sup>41</sup> *Jeremiah v. Sutter County*, 2018 WL 1367541, \*4 (E.D. Cal. Mar. 16, 2018) (citing *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006)).

<sup>42</sup> *Blain v. California Department of Transportation*, 616 F. Supp. 3d 952, 957 (N.D. Cal. 2022).

<sup>43</sup> See, e.g., *Jeremiah*, 2018 WL 1367541, \*4-\*5; *Blain*, 616 F. Supp. 3d at 957; *Janosko v. City of Oakland*, 2023 WL 187499, \*2-\*3 (N.D. Cal. Jan. 13, 2023) (“Alleging that the government demolished an unhoused individual’s ‘shelter and property essential to protection from the elements’ including ‘cold and freezing temperatures, rain, and other difficult physical conditions’ is sufficient to state a claim for state-created danger under the Fourteenth Amendment.”).

Encampment sweeps can amount to state-created danger, regardless of their policy intent, because removal forces unhoused people to lose possessions used for shelter, relocate to more isolated and dangerous locations, and break connections with community and service providers. For example, a federal district court held that unhoused residents adequately alleged that the city took an affirmative act to create a danger by forcing them to “abandon encampments located in well-lit and high-traffic areas,” because the city “created a threat of violence and victimization by other members of the public.”<sup>44</sup> The court rejected the city’s defense that its encampment ban policy was “designed to connect [residents] with shelter and service providers.”<sup>45</sup> Importantly, the court also rejected the city’s argument that residents did not show they were safer in an encampment than at a shelter or elsewhere. Because the city had inadequate shelter beds available, unhoused people were forced to sleep outside, and while “sleeping in an encampment is not free of risks,” those inherent risks did not refute the “argument that sleeping in more isolated and secluded areas to avoid arrest presents greater risks.”<sup>46</sup>

The City’s and State’s use of encampment sweeps to forcibly displace unhoused residents and destroy their property likely constitutes unlawful state-created danger in violation of the Fourteenth Amendment. The three encampment sweeps planned for November 1 will affirmatively expose unsheltered residents to harsher, more dangerous conditions than if people were allowed to stay in the camp. Encampment sweeps always threaten the life and health of unhoused residents, but the timing of this plan make matters worse. The planned encampment removal and property destruction will coincide with the approach of winter, including colder temperatures, increased chance of inclement weather, and reduced daylight hours. As a result, the City and State are knowingly subjecting unhoused people to even greater risks. Additionally, the November 1 sweeps taking place when the City does not have sufficient shelter beds further increases the likelihood of state-created danger.<sup>47</sup>

Finally, the November 1 sweeps threaten unhoused residents’ rights to be free from disability discrimination. A number of encampment residents are living with disabilities. Cities violate the Americans with Disabilities Act and other disability rights statutes during sweeps and property seizures when they fail to provide reasonable accommodations to unhoused residents with mental and physical disabilities.<sup>48</sup> This is especially true here, where it does not appear that the City has provided reasonable accommodations to allow people with disabilities to stay at the HSC, nor

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<sup>44</sup> *Phillips*, 479 F. Supp. 3d at 648.

<sup>45</sup> *Id.* at 649 (quoting Doc. 51 at 35).

<sup>46</sup> *Id.* (citing *Estate of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 492 (6th Cir. 2019) (“When looking for an increased risk, we focus on ‘whether [the plaintiff] was safer before the state action than he was after it.’”)).

<sup>47</sup> See *Janosko*, 2023 WL 187499, \*3 (concluding that a city’s planned eviction of unhoused residents living in an encampment should be postponed until the city had sufficient available shelter options for all encampment residents to relocate). The City’s Homeless Services Center is currently at capacity every night. While up to 100 beds are predicted to become available after the Riverside Industrial Parkway shelter opens in November 2023, those beds are not currently available and even the number of predicted beds is insufficient to shelter the 500-600 people estimated to be living unsheltered in Portland.

<sup>48</sup> See, e.g., *Where Do We Go Berkeley v. California Department of Transportation (Caltrans)*, No. 21-cv-04435, 2021 WL 5964594, at \*8–11 (N.D. Cal. Dec. 16, 2021) (denying motion to dismiss ADA claim where defendant failed to give reasonable accommodation to disabled persons to relocate or find housing before removing homeless encampments).

has it provided additional time or assistance to support people with disabilities who need to relocate from encampments targeted for the November 1 sweeps.

### **Conclusion**

Eradicating poor people is not the same as eradicating poverty. We all want to end homelessness in Portland and ensure that every resident, regardless of their income, can live in a safe and dignified home. This goal can only be achieved through increased and sustained investment in adequate emergency shelter and affordable housing. Using punitive encampment sweeps to forcibly displace unhoused residents only results in moving encampments from one location to another, seizing and summarily destroying personal property, and pushing our most vulnerable residents further into the margins. Ultimately, the City's and State's actions to enforce its anti-camping policy and related laws further entrench the homelessness crisis in our city and risk lives.

We urge the government to follow federal agency guidance, federal precedents, and the U.S. and Maine Constitutions by immediately canceling the planned November 1 encampment sweeps and suspend all enforcement of the City's anti-camping policy and related laws. We are happy to discuss this matter with you further and we are eager to work with the Portland City Council and City staff and the Maine Department of Transportation to establish policies and practices that meaningfully address homelessness by recognizing the humanity and constitutional rights of our unhoused neighbors.

Sincerely,



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