

TESTIMONY OF HEATHER ZIMMERMAN

**In Opposition to the City Manager's  
Proposed Order Declaring a State of Limited  
Emergency at 654 Riverside Street**

City Council of Portland

September 26, 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's third district. On behalf of the ACLU of Maine and our members who live in Portland, I submit this public comment in opposition to the proposed emergency order (the Order).

As homelessness continues to rise, the City of Portland continues to underinvest in homeless services, shelter, and affordable housing. The City has turned, instead, to local laws and policies that punish and criminalize unhoused residents for engaging in life-sustaining conduct in public. The Order before you will only serve to advance the same failed policies that have driven the increase in unsheltered homelessness in Portland over the past five years. This proposal wastes public resources on a plan that will fail to increase practically available shelter and the related, necessary resources, all while the City increases violent sweeps of encampments.

We encourage the City Council to reject the proposed order for two reasons. First, the Order will increase racial inequities by continuing the City's trend of underinvesting in homeless services, shelter, and housing, while wasting public resources on the policing and criminal punishment of unsheltered residents. Second, the Order raises serious concerns for residents' constitutional rights as this proposal would hastily add inaccessible, high-barrier shelter beds at the Homeless Services Center while the City simultaneously increases enforcement of its anti-camping policy and sweeps. Ultimately, this Order recognizes the unsheltered crisis in our city but fails to address the drivers of unsheltered homelessness and adequately invest in solutions. We encourage the City Council to vote no on this proposed Order and to take two immediate steps: (1) order city staff to immediately stop all encampment sweeps, and (2) send the policy discussion to the Health and Human Services and Public Safety Committee, where a full discussion about proven housing-based policy solutions can take place.

**I. The Proposed Order Will Increase Racial Inequities by Underinvesting in Homeless Services and Shelter, While Wasting Public Resources on Policing and Punishing Unsheltered Residents.**

Homelessness—and the laws, policies, and practices that municipal governments use to manage it—are racial justice issues. In Maine, homelessness poses an acute—and growing—threat to

racial justice. The number of Black residents experiencing homelessness has increased dramatically: five years ago, 19 percent of unhoused people in Maine were Black. Two years ago, the number rose to 26 percent, and last year, 35 percent of people experiencing homelessness were Black. According to the 2023 Point in Time Count, Black or African American people now make up 47.3 percent of the homeless population, while comprising only 2 percent of the state population. This means that in Maine, Black people experience homelessness at 24 times the rate of the Black population, while nationally, Black people experience homelessness at 3 times the rate of the Black population. Proposals like this Order will disproportionately harm Black residents by underinvesting in homeless services, shelter, and housing.

In addition to the racial disparities in housing access, the increasing criminalization of homelessness also disproportionately harms Black people in Maine—compounding the violence of systemic racism in our state. The criminalization of homelessness is embedded in the United States’ history of systemic racism. That laws and policies criminalizing homelessness have a disproportionate impact on Black people is no mistake: modern anti-camping policies and loitering prohibitions are rooted in vagrancy laws that entered U.S. law and legal culture through colonialism and then proliferated as the broad prohibitions were used to enforce racist legal agendas like the Black Codes.<sup>1</sup> The “vague and flexible” nature of vagrancy laws gave police virtually unlimited discretion and made it particularly easy to arrest and punish certain types of people—namely, poor people, racial minorities, and people who didn’t conform to societal norms.<sup>2</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.”<sup>3</sup>

Here in Portland, the City Council has been informed before about the disproportionate harm and trauma inflicted on Black residents and other people of color when the City pursues criminalization, under the guise of public health and safety. In April 2021, the City’s Racial Equity Steering Committee, in its final report, noted its concern that the City’s policies and practices for issuing criminal trespass orders (CTOs) to unhoused residents “push[] already marginalized people further into the margins by prohibiting them from accessing the social services they need to survive.”<sup>4</sup> The Committee recommended the City develop strategies to minimize the risk of CTOs, create a standing review committee to review CTOs, and promulgate a clear and accessible appeals process for CTOs.<sup>5</sup>

Instead of revising the City’s policies and practices for issuing CTOs, the July 2022 Administrative Policy on Enforcement and Removal Policies and Procedures Relating to

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<sup>1</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).

<sup>2</sup> Risa Goluboff, *The Forgotten Law that Gave Police Nearly Unlimited Power*, Time (Feb. 1, 2016 11:00 AM).

<sup>3</sup> <https://homelesslaw.org/criminalization-of-homelessness-is-racially-discriminatory/#:~:text=David%20Peery%2C%20Executive%20Director%20of,escape%20the%20trauma%20of%20homelessness..>

<sup>4</sup> At 13.

<sup>5</sup> See id. at 13-14.

Unauthorized Campsites on City Properties (the City’s anti-camping policy) expanded the policies and procedures the City uses to push its most vulnerable residents to the margins. While the policy claims to view “campsites through the lens of not criminalizing people,” the policy has been enforced to consistently punish unhoused residents for sleeping and existing in public spaces when there is no practically available shelter. Now, instead of just barring unhoused individuals from public spaces on the peninsula through CTOs, the City prohibits the entire unhoused population from engaging in life-sustaining conduct by designating ever-increasing portions of the peninsula as “emphasis areas.” We encourage the City Council to begin its policy discussion about unsheltered homelessness by abandoning the criminalization efforts that have failed the city and its residents for decades, and, instead, focusing on investing in compassionate, low-barrier shelter and affordable housing.

## **II. The Order Raises Serious Constitutional Concerns Because It Continues the City’s Trend of Criminalizing Homelessness by Creating Inaccessible Shelter Beds While the City Increases Enforcement of Camping Bans and Sweeps**

Municipal laws and policies that provide for civil and criminal punishment for sleeping outside in public can amount to cruel and unusual punishment, in violation of the Eighth Amendment to the U.S. Constitution. At the September 14 workshop on encampments, Corporation Counsel Michael Goldman reviewed the Ninth Circuit Court of Appeals’ ruling in *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019), *cert. denied sub nom. City of Boise, Idaho v. Martin*, 140 S. Ct. 674 (2019). In *Martin*, the court 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.” Thus, when there is a greater number of unhoused people in a city than the number of available shelter beds, the city “cannot prosecute homeless individuals for ‘involuntarily sitting, lying, and sleeping in public.’” *Id.* Importantly, *Martin* recognized that the criminalization of public camping is unconstitutional when shelter space is not “practically available”—whether because shelters are inaccessible to people with disabilities or due to other restrictions. *Id.* at 618.

Since *Martin* was decided in 2019, courts have continued to strike down municipal anti-camping laws and regulations as unconstitutional. In *Johnson v. City of Grants Pass*, the Ninth Circuit extended *Martin*, holding, first, that civil citations amount to cruel and unusual punishment, where they are intertwined with criminal punishment, and, second, just as municipalities cannot prohibit sleeping in public, neither can anti-camping ordinances prohibit unhoused people from sleeping outside with “rudimentary protection from the elements . . . when there is no other place in the City for them to go.” 72 F.4th 868, 896 (9th Cir. 2023).

As the Order acknowledges, the Homeless Services Center has been operating at full capacity since it opened in late March. Despite the shelter being full, the City has continued to enforce its anti-camping policy and has used encampment sweeps to forcibly displace and destroy the property of unsheltered residents. Punishing unsheltered people for staying in encampments, when they have no choice but to stay outside is cruel and unusual punishment. For years, there has not been enough practically available shelter in Portland to meet the needs of our unhoused neighbors. This proposed Order fails to provide a solution. While the Order proposes to formally create up to 150 additional shelter beds, it fails to acknowledge, let alone address, the many rules, regulations, and practices that create barriers at the Homeless Services Center and make

shelter practically unavailable.<sup>6</sup> At the first workshop on encampments, it was concerning, as Councilor Phillips and others pointed out, that City staff were unable to answer why some unsheltered people at the Fore River Parkway encampment did not accept offers of shelter. We encourage the City Council to investigate the barriers to shelter at the Homeless Services Center before investing public resources in a model that is likely to further exacerbate existing barriers.

Recognizing that the proposed Order is unlikely to increase practically available shelter, we encourage the Council to oppose it. We urge you to instead invest significant time and resources in creating adequate low-barrier shelter and affordable housing.

We agree that the city is facing a crisis of unsheltered homelessness. But the City should not adopt approaches that ignore and underinvest in the root causes of this crisis. The Order's flawed approach will continue to displace unsheltered residents from the heart of the city. The current crisis has been long in the making. For the past 5-6 years, city policies, procedures, and practices have made shelter less accessible and available to our most vulnerable neighbors. It is therefore no surprise that the City is facing this current crisis. Solutions to this crisis will require the City to invest significant time and resources in creating adequate low-barrier shelter and affordable housing.

## **CONCLUSION**

To pursue policy solutions to Portland's unsheltered crisis, the City must first stop criminalizing poverty and homelessness. We urge the City to immediately stop enforcing its anti-camping policy and encampment sweeps. Policies and practices that punish unhoused residents are ineffective, perpetuate racism, and violate constitutional and human rights. We also encourage the City Council to send the policy discussion about encampments to the Health and Human Services and Public Safety Committee.

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<sup>6</sup> In addition to the accessibility concerns raised by bunk beds, the Order fails to provide any plans for addressing other barriers to the Homeless Services Center commonly listed by unsheltered residents, including insufficient transportation, onerous rules, and insufficient accommodations for people with disabilities.