NHLC

NATIONAL HOMELESSNESS LAW CENTER

September 8, 2020

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Via email

Dear Mayor Backus and City Council Members:

I write on behalf of the National Homelessness Law Center ("Law Center") regarding the proposed ordinance relating to camping and occupying public property that amends Chapters 2.22.210 2.22.220, 9.50.020, and 12.32.020 of the Auburn City Code and adding section 9.50.030 "Camping" to Chapter 9.50 of the Auburn City Code ("Proposed Ordinance"). Specifically, the Proposed Ordinance prohibits erecting or maintaining a tent in any city park and subjects a person to "arrest and prosecution for criminal trespass" for simply "entering or remaining in a park when it is closed." Additionally, the Proposed Ordinance expressly prohibits camping on public property or using "camp paraphernalia," which includes items as necessary as sleeping bags or blankets. While we appreciate that the City of Auburn referred to the 9th Circuit ruling in *Martin v. Boise* when constructing the Proposed Ordinance, we are concerned that the Proposed Ordinance falls afoul of *Martin* by criminalizing involuntary homelessness, and we urge you to vote against the amendments and instead repeal the ordinance.

The Law Center is the nation's only legal advocacy organization dedicated solely to ending and preventing homelessness. In 2017, we published *Tent City, USA: The Growth of America's Homeless Encampments, and How Communities are Responding* ("Tent City Report"), collecting data on 187 cities' policy responses to encampments, along with best practices, model policies, and case studies from across the country. The Tent City Report is available at https://nlchp.org/wp-content/uploads/2018/10/Tent_City_USA_2017.pdf. Additionally, since 1991, the Law Center has documented the dramatic increase in laws nationwide that punish homeless people for performing harmless, life-sustaining activities in public places, as well as the negative consequences of those discriminatory measures. The Law Center's 2019 Report addressing this issue, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* ("Housing Not Handcuffs Report"), is available at https://www.nlchp.org/documents/Housing-Not-Handcuffs. The Law Center's reports demonstrate that laws like the Proposed Ordinance do not address the underlying causes of homelessness, and instead injure homeless persons' rights and waste taxpayer resources.

In *Martin v. Boise*, the 9th Circuit ruled that punishing a person experiencing homelessness for sitting, sleeping, or lying on public property in the absence of adequate alternatives constitutes cruel and unusual punishment under the Eighth Amendment. *Martin v. City of Boise*, No. 15-35845, Opinion (2018). The

Proposed Ordinance attempts to comply with *Martin* by including an exception to the new section on camping if "the person is experiencing homelessness and there is no available shelter for persons experiencing homelessness on the date that the prohibited activity occurs." Unfortunately, this exception does not satisfy the City of Auburn's obligations under *Martin*. First, the Proposed Ordinance's definition of "available shelter" includes shelters 40 miles outside of the City of Auburn when homeless shelters within Auburn are unavailable. Under these circumstances, a person experiencing involuntary homelessness would have to risk losing their possessions, which could be bulky and not easily transported to or from a shelter, just to avoid violating the Proposed Ordinance. Enforcement of this statute would make all persons experiencing homelessness responsible for knowing the availability of shelter beds within a 40-mile radius or risk a criminal misdemeanor "punishable by a maximum penalty of 90 days in jail and/or a $1,000 fine."

Second, the Proposed Ordinance only requires a shelter bed be available overnight. This means on any given night, a person may be compelled to abandon their tent, sleeping bag, or other self-sheltering materials for one night's shelter without any commitment to shelter the next night, when they may be forced back onto the streets, only now, without any ability to shelter themselves. This is a frequent reason homeless individuals refuse offers of shelter, because they do not wish to put themselves in a worse-off situation. Only an offer of indefinite shelter or permanent housing truly makes the alternative "available."

Third, the Proposed Ordinance considers shelter to be available "if an individual's past or present voluntary actions such as intoxication, drug use, or unruly behavior prevent the use of an otherwise available shelter space." Not only does this provision punish a person experiencing homelessness for having been intoxicated or under the influence of drugs for using these substances while homeless—akin to the criminalization of "status offenses" as interpreted in *Martin*—but it also excludes this class of homeless persons from sleeping anywhere in the city. There would be nowhere for them to go in the City of Auburn.

Additionally, a recent district court decision further clarified the *Martin* ruling. In *Blake v. City of Grants Pass*,[1] Grants Pass, OR maintained a similar ordinance that prohibited sleeping on any public sidewalks or streets as well as camping on any public property. The City of Grants Pass argued that its anti-camping ordinances complied with *Martin* because it did not criminalize the act of sleeping, but instead prohibited sleeping in a campsite and the ordinances only imposed a civil fine, not a jail sentence. The Court found that these ordinances were unconstitutional under *Martin*, because "it is not enough under the Eighth Amendment to simply allow sleeping in public spaces; the Eighth Amendment also prohibits a City from punishing homeless people for taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available." The Proposed Ordinance criminalizes the use of camping paraphernalia on city property, which includes crucial items like sleeping bags and blankets that constitute the minimal measures interpreted by the *Grants Pass* court to fall under the umbrella of *Martin* protections.

The Proposed Ordinance also violates the Excessive Fines Clause of the Eighth Amendment. A fine violates the Excessive Fines Clause if it is determined to be punitive and excessive. *See United States v. Bajakajian*, 524 U.S. 321, 327-328 (1998). The fines in the Proposed Ordinance are clearly punitive. If a person experiencing homelessness is found loitering or camping in violation of the statute, they can be sanctioned with a $1,000 fine. The fine for violating the camping section is explicitly listed as the "penalty." A fine is considered excessive if it is

[1] *Blake v. City of Grants Pass*, Case No. 1:18-cv-01823-CL, Opinion and Order (2020).

"grossly disproportionate to the gravity of the offense." *United States v. Bajakajian*, 524 U.S. at 324. In *Grants Pass*, a person experiencing homelessness found in violation of the camping ordinance would be fined $295 and would increase to $537.50 due to collection fees. The *Grants Pass* court found that this fine was clearly disproportionate to the gravity of the offense.

> Here, the decisive consideration is that Plaintiffs are being punished for engaging in the unavoidable, biological, life-sustaining acts of sleeping and resting while also trying to stay warm and dry. Plaintiffs do not have enough money to obtain shelter, so they likely cannot pay these fines. . . . Fining a homeless person in Grants Pass who must sleep outside beneath a blanket because they cannot find shelter $295 ($537.60 after collection fees are inevitably assessed) is grossly disproportionate to the "gravity of the offense." Any fine is excessive if it is imposed on the basis of status and not conduct. For Plaintiffs, the conduct for which they face punishment is inseparable from their status as homeless individuals, and therefore, beyond what the City may constitutionally punish. The fines associated with violating the ordinances at issue, as applied to Plaintiffs, are unconstitutionally excessive.

See Blake v. City of Grants Pass, Case No. 1:18-cv-01823-CL, Opinion and Order, 22-23 (2020).

Similarly, the fines in the Proposed Ordinance are disproportionate to the gravity of the offense. Like in *Grants Pass*, a person experiencing homelessness could be fined under the Proposed Ordinance for "engaging in the unavoidable, biological, life-sustaining acts of sleeping and resting while also trying to stay warm and dry." Any fine imposed for this conduct would be excessive, let alone a $1,000 fine that almost doubles the fine found unconstitutional in *Grants Pass*.

Because people experiencing homelessness are not on the street by choice but because they lack choices, punishment serves no constructive purpose. Whether punished through civil fines or immediate incarceration, homeless persons usually cannot pay fines, and because they often miss notices to appear in court due to a lack of permanent address, those fines frequently turn into a bench warrant and a criminal arrest. As stated by the Department of Justice in the context of its argument regarding an anti-camping ordinance in *Bell v. Boise*:

> Criminalizing public sleeping in cities with insufficient housing and support for homeless individuals does not improve public safety outcomes or reduce the factors that contribute to homelessness… Issuing citations for public sleeping forces individuals into the criminal justice system and creates additional obstacles to overcoming homelessness. Criminal records can create barriers to employment and participation in permanent, supportive housing programs. Convictions under these municipal ordinances can also lead to lengthy jail sentences based on the ordinance violation itself, or the inability to pay fines and fees associated with the ordinance violation…Finally, pursuing charges against individuals for sleeping in public imposes further burdens on scarce public defender, judicial, and carceral resources. Thus, criminalizing homelessness is both unconstitutional and misguided public policy, leading to worse outcomes for people who are homeless and for their communities.

Bell v. Boise, et al., 1:09-cv-540-REB, Statement of Interest of the United States (Aug. 6, 2015).

Furthermore, recent reports indicate that homeless individuals infected by COVID-19 would be twice as likely to be hospitalized, two to four times as likely to require critical care, and two to

three times as likely to die than the general population. *See* https://endhomelessness.org/wp-content/uploads/2020/03/COVID-paper_clean-636pm.pdf. Displacing encampment residents from their private tents and vehicles – where they can self-isolate – to crowded congregate shelters will create a breeding ground for COVID-19 and rapidly increase the number of people requiring hospitalization and intensive care. The CDC has advised that communities should not clear any encampments unless they can provide individual housing units for those displaced, and we hope that you follow these guidelines during the pandemic. *See* https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html.

While this approach is necessary for the current crisis, it is also the best practice for the long term, from both a public health and fiscal policy perspective. We all share the goal of not having homeless persons sleep in our streets and parks—but the best, most cost-effective, and permanent way to achieve that is to ensure that all who are unsheltered are able to access adequate, alternative housing. The Proposed Ordinance misses the most significant feature of a homeless encampments policy—namely, where will those residing in the encampments live if not in the targeted encampments? The lack of plan or requirement to house or adequately shelter the displaced encampment residents besides single night shelter requirements means these people are merely dispersed to different public spaces, leading to the inevitable reappearance of outdoor encampments. Thus, we are concerned that this type of ordinance merely provides procedures for pursuing ineffective and expensive punishment strategies, rather than constructive solutions that can actually end homelessness in Auburn.

The proposed ordinance claims the budget impact of this ordinance is $0, but nothing could be further from the truth, and this is why cities frequently pursue criminalization rather than housing and services. But numerous studies have shown that communities actually save money by providing housing and services to those in need, rather saddling them with fines, fees and arrest records and cycling them through expensive hospital and jail systems. *See* Housing Not Handcuffs Report. The Economic Roundtable of Homelessness in Los Angeles found that housing reduced average monthly spending by 41% per person, even after including the cost of providing housing. This savings included a 95% reduction in jail facilities and services costs. Though it may hide the costs in the law enforcement and jail budget, the Proposed Ordinance will incur significant costs for Auburn and its taxpayers—without solving the problem of homelessness. If the city's true interest is in public health, safety, and economic growth, it could make a much better investment by providing housing and services, rather than making it harder for people to exit homelessness due to criminal penalties and arrest records.

Additionally, these types of ordinances run afoul of the federal government's policies to end homelessness, and may ultimately threaten the community's access to federal funding to provide homeless services. For several years, the U.S. Department of Housing and Urban Development has asked questions on its funding application for its $2.5 billion Continuum of Care funding stream to reward communities that have implemented constructive solutions to homelessness, and restrict funding for those that continue punishment strategies.

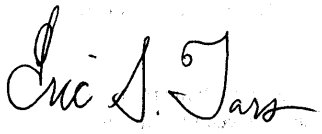
Finally, the Proposed Ordinance may spur litigation like the class action lawsuit in Grants Pass or other similarly situated municipalities, which would be an additional fiscal cost. When the city of Honolulu enforced similar camping bans, a certified class of "all homeless or formerly homeless individuals, whose property was seized and destroyed by the city and county of Honolulu officials," filed suit against the city alleging violations of the Fourth and Fourteenth Amendments of the U.S. Constitution. *See Martin v. City and County of Honolulu*, 15-cv-00363 (D. Haw. Aug. 15, 2016). More recently, sweeps of encampments in Oakland, California have

triggered litigation resulting in an order mandating the city to provide a new Notice to Vacate at least 72 hours in advance, offer shelter beds for the evicted and provide notice and storage of any property collected. *See Le Van Hung v. Schaaf*, No. 19-CV-01436-CRB, 2019 WL 1779584, at *1 (N.D. Cal. Apr. 23, 2019). Based on our observations, 57% of lawsuits brought against municipalities for anti-sleeping or anti-camping ordinances between 2014 and 2017 resulted in decisions favorable to the homeless plaintiffs. See National Law Center on Homelessness and Poverty, Housing Not Handcuffs: A Litigation Manual (2017) available at https://www.nlchp.org/documents/Housing-Not-Handcuffs-Litigation-Manual.

We hope you will draw on our experience and make use of the Law Center's Encampment Best Practices and Procedures found in the appendix to the Tent City Report. Any "solution" which does not meet the actual needs of those living in the encampments —including where they can find a safe place to be, day and night, with their belongings—will result in those individuals needing to improvise their own solutions, and most likely, Auburn will not like those solutions any more than they like the current ones. Only by providing a better alternative for these individuals that actually meets their needs will Auburn stop this wasteful and harmful cycle. In February, Los Angeles adopted our best practices into their own official guidance, which we consider the best model to date. *See* Los Angeles Homeless Services Authority, Guiding Principles and Practices for Unsheltered Homelessness (2019), https://www.lahsa.org/documents?id=2951-guiding-principles-and-practices-for-unsheltered-homelessness.pdf).

In an era of record poverty, prolonged unemployment, and a shrinking stock of affordable housing, sensible and cost-effective policies are needed. The City of Auburn should not continue to amend these ordinances so that they may further criminalize homelessness. Instead, the best way to address the problem is by removing the need for people to shelter themselves in public in the first place, by providing adequate housing and services. Our reports document numerous case studies of constructive alternatives. We urge you to reject the Proposed Ordinance. If Auburn would like, we would be happy to work with you to develop and implement solutions that work for everyone. Please feel free to contact me at etars@nlchp.org or 202-638-2535 x. 120.

Sincerely,



Eric S. Tars
Legal Director