Nos. 20-35752
20-35881

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBRA BLAKE, et al.,

Plaintiffs-Appellees,

v.

CITY OF GRANTS PASS,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Oregon, Medford (Hon. Mark D. Clarke)
Dist. Ct. No. 1:18-cv-01823-CL

OPENING BRIEF OF APPELLANT CITY OF GRANTS PASS

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OPENING BRIEF OF APPELLANT CITY OF GRANTS PASS

I. JURISDICTIONAL STATEMENT

The Oregon District Court had federal question jurisdiction over this matter under 28 U.S.C. § 1331. The parties consented to a Magistrate Judge under Fed. R. Civ. P. 73 and 28 U.S.C. § 636(c). Magistrate Judge Clarke issued a Judgment resolving all of the plaintiffs' claims on August 26, 2020. (1-ER-4-7). The Notice of Appeal was timely filed under Fed. R. App. P. 4(a)(1)(A), the same day the Judgment issued. (3-ER-485). A Supplemental Judgment regarding attorney fees and timely Amended Notice of Appeal related to the Supplemental Judgment were also filed. (1-ER-2-3; 3-ER-484). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

II. ISSUES PRESENTED FOR REVIEW

A. Whether plaintiffs' broadly defined class-wide, "web of ordinance," prospective relief claims remained within the redressable limits of Article III.

B. Whether the district court erred in certifying or refusing to decertify the broadly defined class when individual review is required to apply *Martin's* analysis properly.

C. Whether the district court erred by not holding plaintiffs' hybrid as-applied and facial challenges to the standard of a facial challenge.

D. Whether the district court erred in applying *Martin* and concluding that any punishment would be cruel and unusual and any amount of fine excessive as to the broadly defined class.

E. Whether the district court erred in granting plaintiffs summary judgment on their Procedural Due Process claim despite it not being fairly pled.

III. STATEMENT OF THE CASE

A. Procedural History

Just a month after this Court initially announced its ruling in *Martin v. City of Boise,* 902 F3d 1031 (9th Cir 2018), plaintiffs filed this prospective relief action on October 15, 2018, alleging Eighth and Fourteenth Amendment violations on behalf of themselves and seeking to represent a class of homeless individuals in and around the City of Grants Pass, Oregon. (3-ER-469-483). Over the subsequent year, plaintiffs amended their Complaint multiple times. (3-ER-412-468). The operative Third Amended Complaint was filed on November 13, 2019. (3-ER-412-430). As with each of the Complaints filed before it, plaintiffs alleged prospective relief claims under multiple Eighth and Fourteenth Amendment theories. *Id.*

On March 13, 2019, plaintiffs moved to certify the class. (ECF 25). Over the City's numerous objections that plaintiffs had failed to satisfy the

requirements of Fed. R. Civ. P. 23, the court granted plaintiffs' Motion to Certify the Class on August 7, 2019. (1-ER-42-54).

The parties eventually proceeded to file cross-motions for summary judgment. (ECF 62-110). On July 22, 2020, the court issued its Opinion and Order, granting in part and denying in part plaintiffs' Motion for Summary Judgment and denying the City's Motion for Summary Judgment. (1-ER-7-41). Without analyzing the post-*Martin* enforcement practice evidence in the record, the court held that the City's ordinances at issue violated both the cruel and unusual punishment clause and the excessive fines clause of the Eighth Amendment "as-applied" to the class. *Id.* The court rejected the City's arguments its ordinances were constitutional, its ordinances were being enforced constitutionally, the Eighth Amendment does not apply before a person has been "punished" in these circumstances, and that it would be inappropriate to determine whether a punishment was unconstitutionally cruel or a fine excessive on a class wide as-applied basis here. (ECF 50, pp. 19-37).

The court further held that the City's "appeal process for park exclusions in Grants Pass violates procedural due process rights," rejecting the City's contention, among others, that ruling on this unpled claim was improper. (1-ER-29-33; ECF 50, pp. 50-51).

On plaintiffs' Fourteenth Amendment equal protection theory, the court held that there were material issues of fact. (1-ER-34). The court also denied the City's Motion for Summary Judgment outright, despite holding plaintiffs had not carried their burden of proof as to their substantive due process claim. (1-ER-35-36). Plaintiffs subsequently filed a Stipulated Notice of Dismissal of their substantive due process and equal protection claims, allowing the court to issue a final Judgment as to all claims. (ECF 112).

The court issued its Judgment on August 26, 2020. (1-ER-4-6). The court's Judgment included an injunction allowing the City to enforce the ordinances at issue under certain conditions that largely followed the undisputed evidence of the City's post-*Martin* enforcement practices. (*compare* 1-ER-4-6 *with* 2-ER-276-296; 2-ER-298 at ¶¶ 3-5; 2-ER-301-317; 2-ER-336 at ¶ 9). Among other things, the injunction required the City to give at least 24-hours warning before taking any enforcement action and required that no enforcement action be taken during nighttime hours. *Id.*

The City timely filed its notice of appeal the same day the Judgment was issued on August 26, 2020. (ECF 115). After an attorney fee agreement was stipulated to, the City timely amended its appeal to include the Supplemental Judgment. (ECF 133).

B. Material Facts Related To Issues on Appeal

1. Relevant Facts About the City and Surrounding Area

The City of Grants Pass is located in southwestern Oregon and has a population of approximately 38,000. (ECF 62, pp. 10-11). By comparison, the City of Grants Pass is approximately six percent the size of Portland and less than one percent the size of Los Angeles, California. (2-ER-205-206; 210-215). Also, unlike these larger cities, the City of Grants Pass is surrounded by large tracts of rural area. (2-ER-205-206; 252-270).

Plaintiffs contend there are "602" homeless individuals in Grants Pass using the "HUD and McKinney Vento definitions" of homeless. (ECF 42, ¶¶ 5-6).[1] These definitions derive from federal regulations related to who can apply for and receive certain government assistance benefits. 24 C.F.R. § 582.5 (HUD definition, which also includes the additional definitions found in seven other pieces of legislation, including 42 U.S.C. § 11434a, the McKinney-Vento Act definition). These definitions of homeless include various categories that would have no need to sleep or camp on public property and no need to be exempted from any of the City's ordinances. *Id.* (e.g. anyone who has shelter that is not

[1] The same declarant that plaintiffs originally used to support the 602 figure later submitted another declaration showing the point-in-time number of homeless individuals had decreased by almost 25% to 440 in 2020. (2-ER-196-197). However, she contends this drop is inaccurate and blames local law enforcement. *Id.*

"fixed [and] regular"; anyone in a private or public shelter; any "unaccompanied" individual under 25 years of age; anyone with a roommate due to "economic hardship"; anyone living in a trailer park for lack of a better option; residents of transitional housing, etc.). The class certified by the court expressly included all individuals who met HUD's definition in the general area, including those living outside of the City. (1-ER-46-47).

The City has never denied there are individuals without permanent shelter in the Grants Pass area. However, the term "homeless" in the context of this class action lawsuit, which sought to prevent the City from enforcing numerous ordinances related to camping in its parks or sleeping in the City's rights of way, ignored those with vehicles, a friend's house, Union Gospel Mission shelter, and other possible locations where they could sleep and/or camp nearby. Using a more context specific definition of "homeless individual", the City's Department of Public Safety officer with the most frequent contact and familiarity with this population group was aware of less than fifty individuals during his time working for the City who were without shelter. (2-ER-336 at ¶¶ 6-7).

The area just outside the City's limits is primarily unincorporated County and federal property. (2-ER-257-259, 335 at ¶¶ 3-4). The federally managed land around the City's limits allows camping – without charge – for 14 out of any 29-day period. (2-ER-207, 252-258; 335 at ¶¶ 3-4). It is common knowledge in the

area neither the County nor the federal government pursue enforcement on these undeveloped properties around the City. *Id.* As a result, there are numerous people who have been camping unimpeded on these government properties for years. (2-ER-335 at ¶ 4; 319 at ¶¶ 2-3; 320-322). The court determined none of these other government owned properties where camping was allowed should count as alternatives under *Martin* because they were not within the geographic boundaries of the City and because plaintiffs questioned whether homeless individuals were allowed to "to live without interruption by law enforcement" at these locations. (1-ER-20-21).

Josephine County, where Grants Pass sits, also maintains several parks allowing overnight camping including two sites within a few miles of the City where space to camp can be rented for $10 per day. (2-ER-207 at ¶ 10; 2-ER-259-263). The court determined these options should not factor into the *Martin* formula because the campsites charged a fee. (1-ER-21).

Approximately four miles north of the City along Interstate 5 is also the Merlin Rest Area, maintained by the State of Oregon. (2-ER-336 at ¶ 8). By law, individuals with access to a vehicle can park in this rest area, which is equipped with restrooms, tables and other basic amenities, for 12 hours of any 24-hour period of time. OAR 734-030-0010(18). The court rejected this site as counting towards the *Martin* formula because it was not designed for those who do not

have access to a vehicle and because the allowance of "12 hours in a 24-hour period" was apparently an insufficient amount of time to count as anything. (1-ER-21).

If the City of Grants Pass was similar to the geographic boundaries of cities like Portland, Boise, or Los Angeles, all of these places where camping on government property for extended periods of time was legal and/or allowed, would be well within its borders. (2-ER-210-215) (showing Portland is twelve times the size of Grants Pass and the *City* of Los Angeles is more than one-third the size of *all* of Josephine County).

2. City Shelters

Ms. Wessels, the Chief Operating Officer and Director of Housing and Homeless Services for United Community Action Network ("UCAN"), submitted a Declaration for plaintiffs asserting there are no "low-barrier homeless shelter[s]" in the City. (3-ER-364 at ¶ 12). Ms. Wessels did note there was expected to be a warming center opening in the City in February 2020. (*Id.* at ¶ 13). This shelter did subsequently open. (2-ER-217-218). The center operated with forty beds when temperatures were expected to reach the freezing level. *Id.* The district court determined it was "not a shelter for purposes of the *Martin* analysis because the facility does not have beds and is not available consistently

throughout the year" and because even if it "count[ed]" as a shelter, it could not house all of the "homeless in Grants Pass." (1-ER-22).

Under the City's current strategic goal of "keep[ing] citizens safe," one of the four listed objectives is to "[l]everage and collaborate with other service agencies to address the prevention of homelessness, poverty issues and other high priority human services needs." (2-ER-223). As part of implementing this goal, the City financially supports a sobering center where individuals who are "intoxicated or impaired" can be sheltered and connected with local services. (2-ER-236). In addition to law enforcement agencies, the local hospital and other non-law enforcement agencies can refer individuals for services. *Id.* Individuals can also self-admit to this shelter. *Id.* In 2018, these services were utilized by 1,134 individuals including 251 who self-admitted. *Id.* The district court determined this option did not "count" for purposes of the *Martin* analysis because the shelter only served intoxicated individuals and referenced unsupported evidence implying residents were locked in rooms or otherwise restrained while living there. (1-ER-22).

The City also financially supports a local youth shelter, Hearts With a Mission. (2-ER-235). From its inception in the fall of 2016 to the time of the City's budget and planning report for 2019-2020 was prepared, this program "provided shelter to 104 of [the City's] youth with 4698 night[s of] sheltering

services" not otherwise available. *Id.* The court determined this shelter option did not "count" for purposes of *Martin*, because it did "not have enough beds to serve the number of homeless individuals in Grants Pass" and because it was "not 'practically available' to class members in this case because it is reserved for minors." (1-ER-22).[2]

A Gospel Rescue Mission with a 138-bed capacity also operates to serve homeless individuals in the City. (ECF 62, pp. 12-13; 2-ER-243-250). The facility in Grants Pass has been in operation since 1983 and currently functions with 60 beds for women and children and 78 beds for men. *Id*. The court concluded this shelter "cannot be included in the mathematical ratio" of *Martin* because due to its religious affiliation it is not a "HUD certified emergency shelter" and has "substantial religious requirements and other restrictive rules" that many may not be willing to comply with. (1-ER-20-21). The court further found that the Gospel Rescue Mission's "138 beds would not be nearly enough to accommodate the at least 602 homeless individuals in Grants Pass." *Id.* However, these shelter beds are available and utilized by homeless individuals for whom the rules and requirements are not a barrier and many otherwise

[2] It is unclear how the court determined this shelter does not count as anything when pursuant to 24 C.F.R. § 582.5(1)(iii) any "[u]naccompanied youth under 25 years of age" is considered "homeless." All individuals using this shelter would be members of a class.

homeless individuals have been and continue to be well-served by the Gospel Rescue Mission's program. (2-ER-243-250) (noting that the program is designed to move people from dependent to independent living and reciting mission statement).

After the briefing was concluded on the cross-motions for summary judgment, the City continued to move forward with another housing shelter option for the homeless called Hope Village. (1-ER-39-40, n.24). While the parties did not submit information about this program into the record, the court discovered and cited in its Opinion a news article about it. *Id.* Despite the article reviewing the program established in Grants Pass, the court referenced only a previous version of this same project in another City, and not Grants Pass. *Id.*

3. Recent Legal Changes

The legal landscape in the homeless area has seen significant change in the Ninth Circuit relevant to the relief sought, the City's current policies and the analysis applied by the court. In 2006, a divided three-judge panel of the Ninth Circuit announced a novel formula-based determination whereby the enforceability of a law proscribing "sitting, lying and sleeping in public" was conditioned on whether there was a "greater number of homeless individuals in Los Angeles than the number of available [shelter] beds" at the time of

enforcement. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006). The *Jones* opinion was later vacated. 505 F.3d 1006 (9th Cir. 2007).

In the twelve years between *Jones* in 2006 and the *Martin* decision in 2018, several district courts recognized the *Jones* opinion, analyzed its holding and declined to follow its logic. *Anderson v. City of Portland*, 2009 WL 2386056, *5-7, (D. Or. 2009) (warning that "disallowing criminal sanctions based on the involuntariness of such conduct creates a slippery slope that may not be contained"); *Lehr v. City of Sacramento*, 624 F.Supp.2d 1218, *1226-1234 (E.D. Cal. 2009) (the "Court's analysis of the merits of this cause of action requires a fundamental departure from *Jones*"; followed by a lengthy analysis as to why); *Ashbaucher v. City of Arcata*, 2010 WL 11211481, *8 (N.D. Cal., 2010); *Hendrick v. Caldwell*, 232 F.Supp.3d 868 (W.D. Va. 2017).

The most common reason for not following the *Jones* logic was that its conclusions were reached by way of attaching what it perceived as similar arguments found in Justice White's concurring opinion in *Powell v. State of Texas*, 392 U.S. 514 (1968), to the opinions expressed by the dissenting justices to cobble together what they deemed a "majority of the court." The practical result of this was to turn the *Powell* dissent into the surviving precedent of that plurality opinion. Notwithstanding the recission and criticism of *Jones*, on September 4, 2018, in *Martin v. Boise*, another divided panel of the Ninth Circuit

expressly revived and adopted much of the logic from *Jones*. *See Martin v. Boise,* 902 F.3d 1031, 1035 (9th Cir. 2018).

4. The City's Response to *Martin*, and Current Policies and Practices

On January 2, 2019, in direct response to the holding in *Martin v. Boise*, the City amended GPMC 6.46.090 to make it clear that the mere act of "sleeping" was to be distinguished from the prohibited conduct of "camping" under the City's Camping in the Parks Ordinance. (2-ECF-276-296) (including transcript of public hearing and ordinance amendments made). The City action was taken months before the Ninth Circuit had even finalized its own internal deliberations over whether to rehear *en banc* the *Martin* decision. *See Martin,* 902 F.3d 584 (9th Cir., April 1, 2019). The City's intent to apply the appropriate balancing of the constitutional concerns in *Martin* and the City's legitimate interests in protecting the health, safety and welfare of all was obvious. (2-ER-276-296). The City made it clear that it would ensure there was room within the law and its enforcement practices to allow individuals to engage in the involuntary acts of sleeping and resting, should they need to, but to maintain a prohibition on the voluntary conduct of remaining indefinitely at an established "campsite" in the parks as a "place to live" or sleeping in pedestrian and vehicular rights of way. *Id.*

The City's Department of Public Safety's policies explicitly bar any officer from making enforcement decisions based on any number of characteristics including "race, ethnicity…economic status, *homelessness*…political affiliation," etc. (2-ER-323) (emphasis added). A separate police policy exists guiding officers in their dealings with "homeless persons." (2-ER-326-329). This policy dictates the homeless are not to be treated differently from others and provides guidance on issues including available social services and storage of personal property. *Id.*

Consistent with these policies, the City's police officers carry and regularly hand out cards and flyers containing the contact information of local resources covering food pantries, hot meals, shelters, showers, clothing, laundry, domestic violence support, sexual assault support, food stamps, medical, dental, prescription, housing assistance, mental health, substance abuse, employment, information, and others -- including the Oregon Law Center, where the attorneys representing the plaintiffs work. (2-ER-337-343). Also consistent with the spirit of these City goals and the requirements of the ordinances, officers enforcing the challenged ordinances consistently provide warnings -- often multiple warnings -- before taking *any* enforcement action. (ER-2-336 at ¶ 9; 2-ER-281).

5. The Challenged Ordinances

The City of Grants Pass Municipal Code ("GPMC") Ordinances challenged by plaintiffs were the following:

GPMC 5.61.010 Definitions

Unless the context requires otherwise the following definitions apply to Chapter 5.61.

A. "To Camp" means to set up or to remain in or at a campsite.

B. "Campsite" means any place where bedding, sleeping bags, 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 5.61.020 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.

GPMC 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, unless (i) otherwise specifically authorized by this Code, (ii) by a formal declaration of the City Manager in emergency circumstances, or (iii) upon

> Council resolution, the Council may exempt a special event from the prohibitions of this section, if the Council finds such exemption to be in the public interest and consistent with Council goals and notices and in accordance with conditions imposed by the Parks and Community Services Director. Any conditions imposed will include a condition requiring that the applicant provide evidence of adequate insurance coverage and agree to indemnify the City for any liability, damage or expense incurred by the City as a result of activities of the applicant. Any findings by the Council shall specify the exact dates and location covered by the exemption.

GPMC 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, 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.

These ordinances carry only a violation level designation, as noted in this section of the Grants Pass Municipal Code:

GPMC 1.36.010 Violation -- Penalty

A. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of any provision of this code is guilty of a Violation.

* * * * *

The court repeatedly described the fines associated with these charges as "mandatory." (1-ER-16, 27). In so doing, the court referred to the Declaration of plaintiffs' counsel where the citations noting a "presumptive fine" and Judgments

for individuals who failed to appear for their court dates. (*Id.*, *citing* Johnson Decl., Ex 9 at 5-6). Neither that evidence nor any other evidence supports a conclusion that the State Circuit Court Judges who resolve these citations have no discretion over the amount of the fine, if any, to assess. Indeed, the court cited the provision of the Grants Pass Municipal Code where a "mandatory" fine would exist but the court was incorrect. (1-ER-27, *citing* GMPC 1.36.010(c) which sets a maximum but not minimum fine). The court also took issue with the City not conferring on its *officers* – who categorically do not impose a fine at all – "discretion over the amount of the fine." (1-ER-28).

6. The City's Post-*Martin* Enforcement Practices

The City's response to *Martin*, which included changes to the City's ordinances and its enforcement practices resulted in a total of two citations being issued for violation of GPMC 5.61.020 (Sleeping on Sidewalks, Streets, Alleys, or Within Doorways Prohibited); two citations issued under GPMC 5.030 (Camping Prohibited); and thirteen citations issued for GPMC 6.46.090 violations (Camping in Parks) for the entire year of 2019. (2-ER-298 at ¶¶ 3-5; 2-ER-301-317).[3] This represented approximately one-half-of-one-percent

[3] By way of comparison in the previous year (2018), the City issued nine Citations for GPMC 6.46.090 (previous version of camping in parks); eighteen Citations for GPMC 5.61.020 (sleeping on rights of way); and nineteen Citations for GPMC 5.61.030 (previous version of camping prohibited).

(0.55%) of the total citations issued by Grants Pass police officers in 2019. (2-ER-298 at ¶ 6).

As for time of day, the latest in the evening and earliest in the morning citations were the only two citations issued under GPMC 5.61.020. (2-ER-301-302). This ordinance is the only challenged ordinance that prohibits the conduct of sleeping, but it only does so in pedestrian and vehicle rights of way for obvious safety reasons. Those citations were issued were at 11:04 p.m. and 5:33 a.m., respectively. *Id.* Of all the other post-*Martin* citations issued under any of the challenged ordinances, the latest in the day one was issued was at 3:58 p.m. in the afternoon. (2-ER-303). All of these citations were issued after warnings and information was provided by the officers and there was no evidence that anyone was ever cited for the simple act of sleeping in a City park. (ER-2-336 at ¶ 9; 2-ER-281).

Despite the prospective relief sought and the significant intervening precedent of *Martin*, the court did not acknowledge this uncontroverted statistical evidence in its analysis. (1-ER-16-17). Instead, the court focused on statistics offered by plaintiffs related to an increase in citations in the year 2014. *Id.*

7. Plaintiff's Summary Judgment Evidence

For plaintiffs' part, they admit to only challenging the post-*Martin* ordinances and enforcement practices of the City. (ECF 88, p. 27) (plaintiffs

confirming that they "do not challenge the old ordinance"). Notwithstanding such admission and the uncontroverted evidence above, plaintiffs relied almost exclusively on evidence from pre-*Martin* practices for individual class members who did not have any relevant enforcement action taken against them:

Debra Blake: Class representative Debra Blake was cited on September 11, 2019 for camping in a city park and prohibited conduct. (2-ER-59 at ¶¶ 2-3; 2-ER-63-67; 2-ER-199-204; 2-ER-56-58 at ¶¶ 2-8). There are factual disputes about what occurred here. *Id.* (*compare* 2-ER-56-58 at ¶¶ 2-8, 2-ER-59 at ¶¶ 2-3; 2-ER-63-67 *with* 2-ER-199-204). Contrary to Ms. Blake's assertion that an officer "fined" her, no monetary assessment occurred until after she failed to appear for her court date. (2-ER-63-67). Ms. Blake contends she was just trying to stay warm at a time when the park was open to the public but admits the Officer "thought I had been there when the park was closed" and claims she was cited later on the same day for reasons she did not understand. (2-ER-199-204). Ms. Blake further admitted the park exclusion was rescinded after challenge by her attorneys. *Id.*

Officer McGinnis recalled the events surrounding those citations differently. (2-ER-56-58 at ¶¶ 2-8). He recalled he was with other officers the day prior and it appeared at that time Ms. Blake and a companion had been camping together in Riverside Park "for some time." *Id.* She was warned and

Officer McGinnis then found her still camping in the park the following morning and wrote her a citation. The "other" citation was actually an amended citation and was issued to her on September 25, 2019. *Id.* This was not a new or different incident from the September 10-11, 2019 incident. *Id.* Instead, when Officer McGinnis learned Ms. Blake's attorneys were challenging the park exclusion, Officer McGinnis checked on the prior incident and realized a charge he cited was in error and corrected it by issuing an amended citation. *Id.* The amended citation was issued to Ms. Blake and explained to her on September 25, 2019. *Id.*

The court failed to acknowledge there was competing evidence on this incident, despite it being the single citation where concrete enforcement facts were presented by both sides. (1-ER-13-14). Instead, the court adopted Ms. Blake's version holding she had been cited for "laying in the park in a sleeping bag" and issued another ticket the same morning. *Id.* The court also noted she had been convicted but did not acknowledge the conviction was only after she failed to appear for her court date. *Id.*

Gloria Johnson: Class representative Gloria Johnson, who stays in her van with a dog, had one charge in the relevant time period, but it was for driving uninsured. (2-ER-68-69). There was no record of Ms. Johnson ever having been prosecuted for violation of any of the challenged ordinances. *Id.*

John Logan: Class representative Mr. Logan had not been cited for any violation at any time relevant to this litigation. (Hisel Decl., ¶ 14). As the court noted, Mr. Logan has only been "intermittently homeless" over the past decade because, at times, he had an alternative residence where he was allowed to stay when he wanted to. (1-ER-14).

Kellie Parker: Since January 2019, court records show Ms. Parker has been charged five times for criminal trespass on *private* property; eight times for public consumption of alcohol; three times for consumption of alcohol in city parks; once for smoking in a city park; once for obstructing traffic; and once for camping in the city park. (2-ER-70-97). Ms. Parker was assessed a fine for *camping* in the city park only after failing to appear for her court date. (2-ER-77).

Alexis Krasco: Since January of 2019, Alexis Krasco has been charged with interfering with a peace officer, unlawful possession of methamphetamine, disorderly conduct, criminal mischief, attempted assault on a police officer, resisting arrest and two separate attempted assaults. (2-ER-98-121). None of these charges were related to simply trying to sleep or rest in public places.

Shawn Goode: Since January 2019, Mr. Goode has only been charged with unlawful possession of methamphetamine. (2-ER-122-125).

Michael Faber: Since January 2019, Mr. Faber has been charged with telephonic harassment, contempt of court (five times), using marijuana in a public

place, criminal trespass on *private* property, smoking in a city park, maintaining a nuisance dog and prohibited conduct in a city park. (2-ER-126-152). None of these violations or crimes were related to simply trying to sleep or rest in a public place.

Troy Patton: Since January 2019, Mr. Patton has been charged with public consumption of alcohol three times, prohibited debris on a public way, obstructing traffic, criminal trespass on *private* property and theft in the third degree. (2-ER-153-164). None of these charges related to simply trying to sleep or rest in a public place.[4]

Melody Cacho, Gregory Kempffer, Judy Ostrowski, Charles Naylor, Carrielynn Hill: Plaintiffs submitted declarations from all of these individuals as class members but none of them have any recent or relevant charges of any kind. (2-ER-61-62 at ¶ 14).

Beyond these thirteen declarants, plaintiffs supported their Summary Judgment Motion by referring to – not through declarations but through pre-*Martin* City records – the following individuals to attempt to support their

[4] In Mr. Patton's Declaration, he stated he was arrested for trespassing on *private* property on January 1 and January 4, 2020. (3-ER-388-390). No charges from either of these incidents appear in the Oregon e-Court case Management system such that it appears these statements are either false or that he was arrested but never charged twice in the same week. (2-ER-153).

contention the City maintains an unconstitutional policy and practice of enforcing its ordinances against homeless individuals for innocent activity like sleeping.

Delores Nevin: Plaintiffs noted Ms. Nevin was cited for criminal trespass on City property on December 31, 2019. (ECF 62, pp. 18, 23) (*citing* 3-ER-358). Plaintiffs provided no direct evidence or details of what actually occurred, but the limited information given showed Ms. Nevin was warned prior to any enforcement action being taken. (ECF 64-1, p. 35).

Peggy Scott: Plaintiffs referenced a 2015 record involving a Ms. Scott. (ECF 62, p. 20). This incident is not relevant. Ms. Scott has no recent or relevant charges. (2-ER-166-168). The last court activity Ms. Scott had was a 2016 charge in Jackson County Circuit Court reflecting she likely has not lived in or around the City of Grants Pass for years. *Id*.

James Pyle: Plaintiffs referenced to a 2016 incident related to Mr. Pyle. (ECF 62, p. 20). The incident is not relevant. Mr. Pyle has no recent or relevant charges. (2-ER-61-62 at ¶ 14).

Jerry Lee: Plaintiffs referred to contacts Mr. Lee had with police in 2017. (ECF 62, pp. 17). Mr. Lee's only charges during the relevant time period of this litigation was for trespassing on *private* property. (2-ER-188-192).

Nadine Haubbert and John McCullough: Plaintiffs also referenced a 2017 incident involving Nadine Haubbert and John McCullough. (ECF 62, p. 21). Ms.

Haubbert had no charges on record – ever. (2-ER-61-62 at ¶ 14). Other than an active drug possession warrant for his arrest at the time of the summary judgment briefing, Mr. McCullough had no recent or relevant charges. (2-ER-169-171).

Katherine Clawson and Georgette Hill: Plaintiffs referenced contacts in 2018 with Ms. Clawson and Ms. Hill. (ECF 62, p. 21). Since January 2019, Ms. Hill has been cited for pedestrian failure to obey traffic control devices, public consumption of alcohol (twice), and prohibited conduct in a City park. (2-ER-173-187). As for Ms. Clawson, she had no recent or relevant charges. (2-ER-61-62 at ¶ 14).

The above summary covers every individual plaintiffs offered as evidence of an "ongoing" pattern and practice of "unconstitutional" enforcement practices related to the "web" of challenged ordinances. The court concluded from this evidence, even on Cross-Motions for Summary Judgment, plaintiffs had sustained their burden and no dispute of fact existed that the City maintains "a practice of punishing people who have no access to shelter for the act of sleeping or resting outside while having a blanket or other bedding to stay warm and dry." (1-ER-23). As explained below, this conclusion was erroneous both factually and legally for multiple reasons.

III. SUMMARY OF THE ARGUMENTS

The court should have granted Judgment to the City for multiple reasons. Given that both parties filed Motions for Summary Judgment, there was an extensive record. However, there was very little overlap on the factual record and limited disputes of fact, material or otherwise. Plaintiffs' evidence focused on pre-*Martin* enforcement, while the City presented evidence of current practice and enforcement.

The court exceeded its Article III authority by allowing plaintiffs to proceed on intentionally broadly sweeping claims that expressly sought to prevent the City from enforcing its facially valid laws "unless and until" the class members were provided shelter or designated place(s) to camp indefinitely. While that might be a *policy* option the City could adopt, the alternative the City chose after the *Martin* decision was constitutional and enforced in a manner respectful of every individual's rights. The court expressly ruled against the City, in part, based on its policy preferences and perceived ineffectiveness of the challenged ordinances when such decisions are left, for better or for worse, to the other branches of government.

The court also erred in certifying a class so broad that it included individuals who had available shelter on any given night and should not,

therefore, be entitled to the protections the court granted them through the injunction.

The court expanded *Martin* well beyond anything likely contemplated by that panel or by either side of the later concurring and dissenting opinions on declining to rehear *Martin* en banc. Under the court's interpretation of *Martin*, all individuals who meet a definition of homeless under the federal Housing and Urban Development regulations are also homeless here and are placed on that side of the *Martin* ledger, despite many of these individuals having shelter. Conversely, the court ruled for numerous reasons that none of the shelters in Grants Pass counted on the City's side of the *Martin* formula. The reasons given were such shelters could not house all of the homeless, there were shelter rules, certain shelters were not HUD certified, and others were not year-round or served only part of the community, such as youth or the intoxicated. Those details, however, only further show the court's class certification was improper because an individualized analysis is required.

Having concluded that the *Martin* analysis was hundreds on the homeless side of the ledger and zero on the City's side, the court proceeded to excuse plaintiffs of their burden to show any other specific facts or unconstitutional enforcement conduct to meet their burden for class certification, or the substance of their Eighth Amendment claim. This was clearly erroneous.

The court ignored the City's uncontroverted evidence demonstrating the ordinances and practices had been modified to ensure enforcement consistent with the *Martin* decision and respecting of the rights of those they encountered; this evidence went largely unacknowledged. Even where disputes did exist in the record, the court improperly viewed the evidence only in the light most favorable to plaintiffs when the City had also filed for summary judgment.

Consistent with the court's other errors, plaintiffs were allowed to raise a new theory based on broad allegations asserting procedural due process grounds. The specific grounds were never pled and the City had no notice of it until raised for the first time in their Motion for Summary Judgment. What was alleged was an assertion that the procedural flaw was some failure to provide proper "notice" to the class and a list of "Relevant Ordinances" – none of which included the ordinance ultimately challenged. Notwithstanding these uncontradictable facts, the court held the challenge was sufficiently raised and granted plaintiffs summary judgment on that claim as well.

IV. ARGUMENT

A. Standard Of Review

The district court's grant of summary judgment is reviewed *de novo*. *Christian v. Umpqua Bank*, 984 F.3d 801, 808 (9th Cir. 2020). This Court's

review of the summary judgment record is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c).

A district court's decision regarding class certification is reviewed for abuse of discretion. *See Parra v. Bashas', Inc.,* 536 F.3d 975, 977 (9th Cir. 2008). A court abuses its discretion it if applies an impermissible legal criterion. *See Hawkins v. Comparet-Cassani,* 251 F.3d 1230, 1237 (9th Cir. 2001). The district court's decision must be supported by sufficient findings to be entitled to the traditional deference given to such a determination. *See Molski v. Gleich,* 318 F.3rd 937, 946 (9th Cir. 2003).

B. The District Court Erred in Failing to Recognize That The Extraordinarily Broad Relief Sought Was Beyond the Redressable Limits of its Article III Jurisdiction

At both the class certification and summary judgment stages of the litigation, the City argued the extraordinarily broad class and relief sought by the plaintiffs was beyond the limitations placed on the judiciary in Article III of the Constitution. (ECF 37, pp. 20-24, ECF 80, pp. 19-26). Plaintiffs claim a legal right, through various avenues, to remain indefinitely on the public property of their choosing without risk of consequence "unless and until the City provides a lawful place for people to rest, sleep and find shelter." (3-ER-414). The practical effect of granting plaintiffs this relief is to create a right to affirmative action by the government to either provide shelter or designate place(s) where anyone who

meets HUD's definition of homeless can occupy public property. The adverse effects of this ruling and the *Martin* holding on limiting enforcement on urban public ways, can be seen all over the public ways in West Coast cities large and small.

What plaintiffs sought and obtained from the district court departed from the bounds of Article III. The result derived from plaintiffs resting their requested relief on their intentionally detail-avoiding theory of there being a "web of ordinances, customs, policies and practices that, in combination, punish and criminalize the existence of homeless people in Grants Pass." (3-ER-413 at ¶ 3). The court reached its decision for this class action on an "as applied" basis without any analysis of specific circumstances of the City's post-*Martin* enforcement practices. (1-ER-7-41). This was error.

The Supreme Court has made "clear that 'standing is not dispensed in gross.'" *Town of Chester, N.Y. v. Laroe Estates, Inc.,* 137 S. Ct. 1645, 1651 (2017) (quoting *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008)). "[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* Just because a plaintiff would have standing to seek damages does not also mean standing is present to pursue injunctive relief -- and standing as to each plaintiff must be shown for *every* claim and *every* form of relief sought. *Id.* (citing *Los Angeles v. Lyons*, 461 U.S. 95, 105-106 (1983)).

The court erred in failing to recognize the excessive policymaking authority plaintiffs' broad claims and theories attempted to confer upon it. Article III does not tolerate such broadly sweeping claims. The net cast was simply too wide and too imprecise to address a redressable wrong.

The Article III power of the district court is "grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring). Article III of the Constitution is a "fundamental limitation" that "prevents the Federal Judiciary from 'intrud[ing] upon the powers given to the other branches,' and 'confines the federal courts to a properly judicial role' of deciding only 'cases' and 'controversies.'" *Town of Chester, N.Y.,* 137 S. Ct. at 1651 (2017) (quoting *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016)). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *Id.* (internal quotations omitted). The very point of these constitutional requirements is to "prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

The court disregarded these fundamental principles by allowing the plaintiffs to substitute the specific for the broad and then analyzing these class-wide, prospective relief claims as if the proper standard was could any class

member be impacted, and if so, then the entire class was only to inquire whether any class member could be impacted. If so, then the entire class was somehow entitled to relief. (1-ER-7-41).[5] Even at the summary judgment stage when plaintiffs could not show any evidence of unconstitutional enforcement practices by the City, the court still granted summary judgment to plaintiffs on the speculative basis that the City's "ordinances" did not provide the affirmative action of "allow[ing] sleeping in public" so there were "risks [of] being punished under the anti-camping ordinance" by some portion of the class members. (1-ER-19).[6]

Housing affordability and homelessness issues are not unique to the City of Grants Pass. To the extent there is a solution to the complicated and diverse reasons there are citizens who do not have permanent shelter, unrestricted

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[5] The inverse analysis there was applied to the shelters available in Grants Pass. (1-ER-19-21). The analysis flipped to if any shelter could not provide for the entire class then it did not count for anything in the *Martin* analysis.

[6] The court's analysis here appears to intentionally focus on the text of the ordinances to the exclusion of the actual and uncontroverted evidence of the City's enforcement practices. Throughout the court's Opinion and in the Judgment issued, it refers to the "enforcement" practices and the "policy and practices" of the City but then curiously never addressed the uncontroverted evidence the City's enforcement practices respected the constitutional issues raised in multiple material ways including: (1) only issuing citations very sparingly; (2) providing warnings prior to any enforcement; (3) removing "sleeping" from the conduct that could violate the challenged camping ordinances; and (4) not issuing citations at night; etc. (ER-2-336 at ¶ 9; 2-ECF-276-296).

camping is not a viable or safe solution. (2-ER-264-275) (collecting recent local news articles including a homeless man dying in a propane gas explosion in a Grants Pass park near areas recently ravaged by wildfires; a homeless man setting several acres on fire in Grants Pass; a homeless man telling the interviewers he would not use shelters no matter how low the barrier; and a homeless individual run over and killed by a truck while sleeping).

The City of Portland, which has experimented with various forms of legal camping, now finds itself using an independent "Hazardous Waste Company" to clean up needles, human waste and other trash from homeless camps throughout the City. (2-ER-240-241). The cost to Portland's taxpayers for just those contracted clean up services is $4.5 million a year. *Id.* This is not an option for a City like Grants Pass, which has about half of that amount to spend on its *entire* operating budget for all park maintenance services. (2-ER-230, 237-238) (includes all costs for "36 sites and trails totaling 1462 acres.").

The court's expansion of *Martin* to the point where government must "allow" or affirmatively provide exceptions *in their ordinances* – irrespective of actual enforcement practices - for only a certain portion of the population would be too far an expansion on its own. But where the court has also determined only shelters within the city boundaries that are HUD certified and can meet the needs of all class members, and are without any religious affiliation, etc., can "count"

to meet the *Martin* holding for available shelter, this is precisely the judicial policy making that "usurp[s] the powers of the political branches" prohibited by Article III. *Clapper*, 568 U.S. at 408 (2013).

This Court's recent opinion in *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) is illustrative of the Article III boundaries that the court overstepped here. There, a class of climate activists convinced an Oregon district court judge that their broadly sweeping allegations of harm were caused by the government's fossil fuel policies and were, therefore, redressable through a prospective relief action. *Id.* The relief sought was to enjoin the government from enforcing certain rules to essentially save the planet. Despite concluding that plaintiffs had established the challenged laws were impacting the climate *and* finding that the individual plaintiffs had established they were *actually* harmed as a result, this Court still concluded the claims were non-redressable under Article III. *Juliana*, 947 F.3d at 1164-1175. Replacing only the issue of climate change with the plight of homeless individuals, this Court's direction in *Juliana* fits well with the challenges raised by plaintiffs here.

> "There is much to recommend the adoption of a comprehensive scheme to [build affordable or no-cost housing for all] and combat [homelessness], both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' remedial plan. As the opinions of their [witnesses] make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and

> discretion of the executive and legislative branches." *Id.* at 1171. (alterations supplied). "[G]iven the complexity and long-standing nature of [homelessness], the court would be required to supervise the government's compliance with [the relief sought] for many decades." *Id.* at 1172 (citing *Nat. Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) (alterations supplied)).

Absent "limited and precise" standards, the federal judicial power could be "unlimited in scope and duration" and would inject "the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role." *Juliana*, at 1173 (quoting from *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019)). The Supreme Court had concluded in *Rucho* that even a mathematical formula involving an election map was too complicated to meet justiciability requirements. *Rucho* 139 S. Ct. at 2500-02. Here, the task is just as complex, diverse and longstanding, if not more so, than the issues addressed in *Rucho* and *Juliana*.

The court "does not have *carte blanche* to depart from the principle of party presentation." *Wood v. Milyard*, 566 U.S. 463, 472 (9th Cir. 2012). The court was required to hold plaintiffs to their burden of proof on standing as to every claim and every theory alleged and to determine if the relief requested by plaintiffs could be granted. Instead of recognizing these limits, the court allowed the claims to proceed in the broadest manner possible and then utilized the power it granted itself to impermissibly exert its *policy* preferences – many of which

were completely detached from the basis of the lawsuit before it – on the City.

Some examples of the court's reasoning include:

- The court cited extensively from homelessness advocate materials to conclude "[e]nforcing quality of life laws is an expensive endeavor." (1-ER-10). Of course, even if true, such determinations are left for better or worse to the political branches.
- The court asserted the challenged ordinances did not "actually further public health and safety" and directed the City to focus its enforcement efforts on other types of conduct. (1-ER-37).
- The court asserted requiring homeless individuals to move occasionally "does nothing more than shift a public health crisis from one location to another." (1-ER-37).
- The court "encourage[ed] Grants Pass to work with local homeless service experts and mental health professionals to develop training programs that cover techniques and tools for interacting with homeless individuals and for deescalating mental health crises" going so far as to endorse certain programs – even though these topics had not been an issue in this lawsuit. (1-ER-37-38).
- The court endorsed policies other communities have undertaken to address homelessness issues – while citing an article not previously in the record about the City of Grants Pass having already undertaken those efforts but then refusing to recognize that fact. (1-ER-39-40, n.24).
- The court claimed "enforcement of such 'quality of life laws' do nothing to cure the homeless crisis in this country." (1-ER-40). Apparently, the court believes its policy fix of preventing local governments from enforcing any laws impacting the homeless, including sleeping in the rights-of-ways, is the "cure." Illustrating the point being made.
- The court claimed "[a]rresting the homeless is almost never an adequate solution because, apart from the constitutional impediments, it is expensive, not rehabilitating, often a waste of limited public resources, and does nothing to serve those homeless individuals who suffer from mental illness and substance abuse addiction." (1-ER-40). Again, these explanations are policy considerations based on a subset of the extraordinarily broad class the court certified. The laws have to be allowed to be generally

enforceable even if specific exceptions might exist. This policy outcome turns that rule on its head in a case where the challenged ordinances are non-arrestable offenses.

- The court claimed enforcement of such ordinances challenged here also "erode the little trust that remains between homeless individuals and law enforcement." (1-ER-40). The court concluded this "erosion" increases the "risk of confrontations between law enforcement and homeless individuals" – even though there was no evidence of any problems in this case. *Id.* The evidence was seventeen citations in total had been issued to the supposedly more than 600 homeless individuals living in Grants Pass in 2019, and none involved a confrontation.
- The court asserted even civil citations, which by definition are non-arrestable, still somehow "contribute to a cycle of incarceration and recidivism" as another *policy* reason why the court disliked these types of ordinances. (1-ER-40). Yet again, there was no evidence anyone had been arrested on the challenged ordinances and even if the policies were unwise, they would still be facially constitutional. Similarly, the court concluded civil citations that require a court appearance can result in "warrants for failure to appear" even though the uncontroverted evidence showed no arrest warrants issued even when someone failed to appear. (2-ER-63-67).
- The court also rebuked the use of civil citations for any homeless individual on the grounds it "can impact a person's credit history", which can then in-turn impact access to housing in "competitive rental markets." (1-ER-40).

The extraordinary lengths the court went to insert its policy preferences on what it repeatedly refers to as "quality of life laws," in general, as opposed to the few limited camping ordinances and enforcement practices at issue, emphasizes the point clearly. Notwithstanding the court's disapproval, "any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Juliana.* 947 F.3d at 1171. The City's use of civil ordinances and enforcement

practices that distinguish between involuntary sleeping or resting, and the more permanent voluntary conduct of camping, is a part of those complex policy decisions. The court erred in both dispensing standing in gross and in failing to recognize that the class-wide, as applied, "web of ordinance" theories advanced by the plaintiffs were beyond the redressable limits of Article III.

On this basis alone, the decision of the court should be reversed.

C. The District Court Erred in Certifying and Later Failing to Decertify The Class

The certified class was 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 Defendant as addressed in this lawsuit." (1-ER-46-47).

Thus, according to plaintiffs, and as adopted by the court, even certain individuals who do have shelter and do not live in the City of Grants Pass are class members who could be represented through the plaintiffs. This despite two of the class representatives having never had any of the challenged ordinances enforced against them, despite being "homeless" in the area for years. (1-ER-42-54). This result was reached through the court's adoption of several impermissibly broad positions advocated by the plaintiffs.

Certainly, the commonality and numerosity requirements of Fed. R. Civ. P. 23 are easily met when the class is so broadly defined to include everyone in

or near the jurisdiction who meets HUD's financial assistant requirements. However, this cannot be the standard when the identity of who would or should qualify requires an individualized inquiry. There are several categories of "class members" who would not be eligible to be exempted from enforcement under *Martin* because they have available shelter.

Under the court's accepted definition of homeless, an individual staying in the "privately operated" Gospel Rescue Mission in Grants Pass is allocated to the homeless side of the ledger for purposes of the *Martin* formula, but because the shelter is religiously affiliated and has rules not acceptable to all of the class, the shelter does *not* count on the City's available shelter side of the ledger. (*compare* 1-ER-50 (court adopting HUD definition as the one to be used for "homeless", which includes those in private religious transitional housing *with* 1-ER-20-21) (noting that the Gospel Rescue Mission does not count because it is not HUD certified, has rules, and is religiously affiliated). The result for the court was "on the [shelter] side of the ledger, zero." *Id.* This cannot be how the *Martin* analysis is supposed to work. It must require a more individualized analysis than this.

Martin 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." *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019), *cert. den sub nom. City of*

Boise, Idaho v. Martin, 140 S. Ct. 674, 205 L. Ed. 2d 438 (2019). The *Martin* panel, however, did not stop its analysis there. Instead, it explicitly excepted "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" from any heightened protection under the Eighth Amendment. *Martin*, 920 F.3d at 617, n.8. (emphasis in original). The *Martin* panel further noted the point-in-time count for the number of homeless individuals in any area is not accurate for purposes of its analysis on a broad scale because "homeless individuals may have access to temporary housing on a given night." *Martin,* 920 F.3d at 604 (9th Cir. 2018).

For precisely those reasons, neither Fed. R. Civ. P. 23 nor *Martin* provide plaintiffs the ability to establish the type of sweeping class-wide claims they advanced in this case. Contrary to the court's holding, determining who is "involuntarily homeless" on any given night for purposes of *Martin*'s Eighth Amendment analysis is not a matter of simple mathematics. Nor is it the even simpler mathematics employed by the court here where one side of the equation was stacked with an unknown number of "homeless" individuals some of whom do have shelter and the other side of the equation remained at "zero" if any shelter did not serve perfectly the whole of the "homeless" group. Yet, this is precisely

how the court interpreted *Martin* to justify certifying and then refusing to decertify the class. (1-ER-7-54).

Plaintiffs' numerosity, commonality, and typicality arguments all fail when "homeless" and "involuntarily homeless" are correctly defined to apply *Martin*'s holding. Any Eighth Amendment right to sleep in public created by *Martin*, must afford the government the right to inquire whether the individual has access to alternative shelter. The court's holding restrains that inquiry by the broad class it accepted. This is clearly not what the *Martin* court envisioned, but it is where the court's conclusions lead.

The court's Opinion acknowledged that *some* individuals choose to be homeless, which affirms the individualized inquiry point once again. (1-ER-9) (emphasis added) (declaring that the "majority of homeless individuals are not living that way by choice."). Similarly, *some* individuals who would otherwise be homeless may benefit from and be willing to abide by the rules at the Gospel Rescue Mission; and *some* individuals who are minors are able to utilize the shelter beds at Hearts With a Mission; and *some* individuals who struggle with drug or alcohol addiction may be eligible to get shelter at the Sobering Center; and during certain seasonal times of the year, *some* individuals can take advantage of the warming shelter; and *some* individuals have their own financial resources and/or friends or family from which they could access shelter. The

resources available in the area and to the individual on any given night can change and must be considered on an *individualized* case-by-case basis.

One way to examine whether impermissible assumptions have sneaked past the class certification process is to review what evidence plaintiffs would have to produce to pursue the individual claims different from the class claims. *Gen. Tel. Co. of SW v. Falcon*, 457 U.S. 147, 159 (1982). As in *Falcon*, the plaintiffs here would necessarily have to prove individual claims with proof of specific conduct on a specific day based on that individual's circumstances and the enforcement action, if any, taken against them. But the class claims pursued here, at best, rely on "statistical evidence of disparate impact" and conjecture. This is precisely how plaintiffs attempted to support their class claims. (3-ER-358-360) (an attorney working for plaintiffs' counsel reviewing number of tickets going back to 2012 without any analysis of individual circumstances). Indeed, even when plaintiffs were required to produce evidence on summary judgment they filed numerous declarations by "class members" but with the exception of one disputed incident with Ms. Blake, the remainder had no recent or relevant enforcement action taken against them and they never sought to support their claims with any alleged unconstitutional enforcement action(s). (*See* Section B.6, and B.7 *supra*).

Much more than what plaintiffs offered would have been required to be entitled to class standing as to any, let alone all, of the claims and theories asserted. *Falcon*, 457 U.S. at 158-159 (1982) ("it was error for the District Court to presume that respondent's [discrimination based class action claim] was typical of other claims against petitioner.").

D. Notwithstanding Plaintiffs' Repeated Use of the Term "As-Applied" The Appropriate Standard Was A Facial One and The District Court Erred By Not Holding Plaintiffs To That Burden

"[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings or disposition in every case involving a constitutional challenge." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 331 (2010). Making a distinction is nonetheless "necessary for it goes to the breadth of the remedy employed by the Court." *Id.* Like the plaintiffs in *John Doe No. 1 v. Reed*, plaintiffs' claims here have the characteristics of both as applied and facial challenges. 561 U.S. 186, 194 (2010). They are " 'as applied' in the sense that [they do] not seek to strike the [ordinances] in all [their] applications, but only to the extent it covers [the homeless]. The claim[s are] 'facial' in that [they are] not limited to plaintiffs' particular [circumstances], but challenges application of the law more broadly [on behalf of all homeless]." *Id.* (modifications supplied). Allowing the Constitutional standards to be dictated by these labels would

"invite[ ] pleading games." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1127-28 (2019). This is why "[t]he label is not what matters." *Doe*, 561 U.S. at 194. Instead, where the relief sought reaches "beyond the particular circumstances of these plaintiffs" they "must [ ] satisfy [the Supreme Court's] standards for a facial challenge." *Id.* (citing *United States v. Stevens*, 559 U.S. 460, 472-473 (2010) for facial challenge standard).

> "To succeed in a typical facial attack, [plaintiffs] would have to establish that '**no** set of circumstances exists under which [the ordinances] would be valid.'" *United States v. Stevens*, 559 U.S. at 472 (emphasis added).[7]

The manner in which plaintiffs strategically framed their claims represents a distinct case of the "pleading games" the Supreme Court cautioned about in *Bucklew*. 139 S.Ct. at 1127-28 (2019). When a plaintiff chooses to pursue claims that exist between a facial and an as-applied challenge, they must "satisfy [the Supreme Court's] standards for a facial challenge." *John Doe No. 1,* 561 U.S. at 194 (2010).

Plaintiffs never sought to meet the correct standard because the very basis of their claims was that laws are valid as to everyone else, but should not apply

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[7] The lone exception has been in the context of First Amendment cases where "a second type of facial challenge" exists. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008). That "second type" is really the type of challenge plaintiffs attempted to mount here but is categorically inapplicable. *Id.*

to them. Both the plaintiffs and the court framed their respective arguments and Opinion in terms of "as-applied" challenges. (1-ER-5, 14, 26, 29; 3-ER-414, 427, 429; ECF 62, pp. 7, 32, 36) (plaintiff and court expressly framing the arguments and opinions in these terms and the Judgment being noted in the same manner). To the extent plaintiffs' challenges and relief sought were even redressable on a class-wide basis, the appropriate standard was one of a facial challenge, notwithstanding their tactical use of the "as applied" label. The court erred in failing to hold plaintiffs to this standard and in determining the ordinances (all of them) were unconstitutional "as applied" to the class. (1-ER-5, 14, 26, 29).

E. The District Court Erred in Concluding Plaintiffs Were Entitled to Summary Judgment on Their Eighth Amendment Theories

Both sides of this dispute filed Motions for Summary Judgment. (ECF 62-110). Because of differences in how each side viewed the *law*, the evidence submitted by each has very little overlap for material disputes of fact to even manifest. (*compare* 2-ER-56-192, 205-343 *with* 2-ER-193-204, 3-ER-345-411). Despite seeking injunctive relief based on an expanded view of the Eighth Amendment formulaic approach announced in *Martin,* the court relied almost *entirely* on plaintiffs' **pre**-*Martin* evidence, and its unilateral expansion of *Martin* to support its Opinion. (1-ER-7-41; 2-ER-193-204, 3-ER-345-411). The City offered uncontroverted evidence of its **post**-*Martin* policies, practices, and ordinances showing the rights of homeless individuals were being respected. (2-

ER-56-192, 205-343). The only direct dispute of fact was found in a single incident involving Ms. Blake. (*compare* 2-ER-56-58 at ¶¶ 2-8, 2-ER-59 at ¶¶ 2-3; 2-ER-63-67 *with* 2-ER-199-204). Even there, the court failed to acknowledge this dispute of fact. (1-ER-13-14). Instead, the court adopted the plaintiffs' version of these events and gave them significant weight in its analysis. *Id.*

Given the prospective relief sought and the change in the law *Martin* represented, the City's post-*Martin* evidence should have carried dispositive weight, but did not. In fact, most of the relevant evidence the City offered was not even evaluated, whereas "evidence" of a single statement made by a single City Council member at a meeting a decade prior was offered by plaintiffs and incorporated by the court in its decision. (1-ER-11).

The court's analysis of the facts and law was clearly erroneous. As discussed above, the *Martin* panel determined "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 F3d 1031, 1035 (9th Cir. 2018)*, opinion amended and superseded on denial of reh'g,* 920 F3d 584 (9th Cir. 2019)*, cert. den sub nom. City of Boise, Idaho v. Martin,* 140 S. Ct. 674 (2019). The panel further clarified the scope of this determination:

> 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 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.

Martin, 902 F3d at 1048 n.8. (emphasis in original).

The *Martin* panel did not hold that any ordinance regulating the conduct of homeless regarding sleeping or camping is *per se* unconstitutional. On the contrary, it specifically envisions ordinances that might prohibit even the involuntary conduct of sleeping in a constitutional manner.[8] Nor did the *Martin* panel even suggest the less temporary and voluntary conduct of *camping* cannot

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[8] One of the challenged ordinances, GPMC 5.61.020, does prohibit sleeping as distinct from the camping conduct prohibited by the other challenged ordinances, but only in places such as sidewalks, streets, alleys, and doorways where it would impede vehicular or pedestrian traffic. This type of regulation is expressly contemplated by the *Martin* panel, but the court here in allowing plaintiffs to proceed on the vague "web of ordinances" theory, lumped this ordinance in with the others concluding that <u>any</u> enforcement of this "as applied" to the class to be unconstitutional. (1-ER-5). Notably, the Judgment includes a statement that this ordinance is unconstitutional as applied but does <u>not</u> enjoin the City from enforcing this ordinance in any way. This highlights the redressability, standing in gross, and class certification issues discussed above that were created by plaintiffs being allowed to pursue a "web of ordinances" theory.

be distinguished from the involuntary act of *sleeping* and therefore beyond the reach of local governments to regulate.

Further, the *Martin* panel did not suggest changes in the law then being announced created an unconstitutional "punishment" under the Eighth Amendment as opposed to the simple act of initiating due process through a citation. The clarifying statements in *Martin* reflect some manner of due process would be required in many instances for either the government or the accused to demonstrate whether *Martin's* stated exemptions from "punishment", in whole or in part, should apply. That same due process would also serve as a safeguard between any citation and the imposition of any excessive fine or unconstitutionally cruel punishment for purposes of the Eighth Amendment. *Martin*, 902 F3d at 1048 n.8.

For any other accusation, whether it be a civil traffic violation or a criminal complaint, the government needs to only have probable cause to initiate due process and if there is a defense of "I did not do it" or "the law does not apply to me because of my circumstances" or Oregon's affirmative defense of necessity, then the process followed will allow the opportunity for an individual to raise those defenses. ORS 161.200. Here, the undisputed evidence was that the City's police had been utilizing the challenged ordinances post-*Martin* very sparingly and only after warnings were given and it was clear the individual was not simply

sleeping but was attempting to establish a campsite on public property. (2-ECF-276-296; ER-2-336 at ¶ 9; 2-ER-281).

Principally relying on the Supreme Court's decision in *Robinson v. California,* 370 U.S. 660, 667 (1962) the court concluded the "conduct for which [the class members] face punishment is inseparable from their status as homeless individuals, and therefore, beyond what the City may constitutionally punish." (1-ER-29). This conclusion by the court both misses the point and makes it at the same time.

The conclusion misses the point because "camping," both as defined by the City's ordinances and as enforced under its policies and practices, is unquestionably conduct, not status. The logic the court applied on this point is inconsistent with its own conclusions elsewhere in the same Opinion. The court concluded the City could not take enforcement action that even attempts to distinguish between sleeping, resting or camping, because it would be directed at those with an "unavoidable status." (1-ER-25-26). The court then revealed the weakness of its logic a few pages later dismissing the challenged ordinances as not "actually further[ing] public health and safety" and suggesting the City should instead just enforce "laws restricting littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence." (1-ER-37).

The court's *policy* preferences are clear: the City should focus enforcement efforts on these types of *conduct*, but the logic is faulty. If the conduct of maintaining a campsite is "status", unless and until there is available shelter provided that meets the court's standards, then so must the *conduct* of "urination and defecation" unless and until the City provides sufficiently convenient restroom facilities to the class. *Id.* The same is true for the "littering" the court suggests is part of the City's "large toolbox" of options it could use. *Id.* Indeed, in the next paragraph of the court's Opinion, it notes that class members do not have access to "toilets, and trash disposal." *Id.* Notwithstanding the court's references to some "large toolbox" the City could use to address these issues, the court's interpretation of *Martin* leaves no room for even the things the court left in the City's "toolbox" to be constitutionally enforced.

The court also asserts the City's "large toolbox" of constitutionally available options still includes ordinances preventing the "obstruction of roadways" while *simultaneously* holding the City's ordinance prohibiting that precise conduct is unconstitutional "as applied" to the class. (*See* GPMC 5.61.020; 1-ER-5). This illogical reasoning is likely why the Supreme Court has never used the Eighth Amendment to prevent the government from initiating due process of otherwise facially valid laws on the premise that *derivative* conduct

associated to ones' inclusion in a group is also part of their "status." *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

Distinguishing between sleeping and camping, even if not always a clear line, with enforcement via a citation only and only against those who attempt to usurp public property as their own domain through a campsite and only after warnings are given, is not in the same realm as criminalizing the "status" of being "mentally ill, or a leper" as was discussed in *Robinson*. *Id.*; *See also Powell v. Texas*, 392 U.S. 514 (1968). Instead, between *Robinson* and *Powell,* the Supreme Court addressed and rejected efforts to grease that slippery slope in precisely that manner. *Id.* (*Robinson* held California could not criminalize status of being a drug addict; plurality of opinions in *Powell* refused to expand *Robinson's* holding to alcoholic's public drunkenness charge). Although there were similarities between the two cases, the Supreme Court was particularly concerned with expanding the "very small way" that *Robinson* allowed the Eighth Amendment to be used as the vehicle that took the Court into the policy-making decisions of "substantive criminal law." *Powell*, 392 U.S. at 532-36. Four judges reasoned that the expansion of *Robinson* from anything beyond the striking down of laws that facially criminalized status "under the aegis of the Cruel and Unusual Punishment Clause [would turn the Courts into] the ultimate arbiter of the standards of criminal responsibility" and declined to usurp that role. *Id.*

In this context, it takes little imagination to see how boundless it would become when any conduct that can be deemed "unavoidable" or "necessary" attaches to an individual's "status." Such reasoning results in exemption from due process even being initiated if it could theoretically result in "punishment" of any kind as to the class (e.g., defecation in public, urination in public, littering, theft of medicine, food, etc.).

The other error in the court's conclusion here is that it fails to recognize the City's efforts to distinguish between unavoidable sleeping or resting and the intentional conduct of camping and only initiating due process for the latter group. (2-ECF-276-296; ER-2-336 at ¶ 9; 2-ER-281).

The court's conclusion that the "conduct for which [the class members] face punishment is inseparable from their status as homeless individuals" also serves to highlight another reason the City is entitled to Judgment in its favor. (1-ER-25-26, 29) (emphasis added). Providing an individual with a citation and court date is categorically not "punishment" under the Eighth Amendment. "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.... [T]he 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 in accordance with due process of law." *Ingraham v. Wright,* 430 U.S.

651, 671–672, n.40 (1977). The Supreme Court has held on multiple occasions that even being arrested and held in jail pre-trial is not "punishment" under the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 526-35 (1979); *see also Schall v. Martin*, 467 U.S. 253, 269 (1984) (noting that pretrial matters are covered by the Fourteenth Amendment's due process clause). Nor has the simple act of issuing a civil citation with a court date ever been found to be unconstitutional "punishment" under the Eighth Amendment.

Even in instances where an accused seeks exemption from a criminal conviction for reasons of mental disease or defect, it is consistent with the Constitution to institute due process (even if it means being placed in custody) and to then place the burden on the accused to prove their exemption from the law. *Leland v. State of Or.*, 343 U.S. 790, 798-802 (1952). Just as "every [individual] is presumed to be sane" and responsible for their own conduct, so too can the law presume those who choose to remain for an extended period of time on public property, even after multiple warnings, are no longer engaging in an "unavoidable" human activity such as resting or sleeping, but instead have transitioned to the voluntary conduct of usurping the public property as their own "place to live" by establishing a campsite. *Id.* Should the individual wish to challenge the government's accusation, or offer an excuse as to why the law should not apply to them, the citation issued affords them the opportunity to

present that defense – just like it works for all of the rest of society, even the mentally ill. *Id.*

For all these same reasons, the entirety of the court's preemptive striking of the City's ability to issue citations as to any of the challenged ordinances because of its conclusion that any amount of a fine would be "excessive" suffers from these same legal and factual shortcomings. (1-ER-26-29). Notwithstanding the court's repeated assertion the fines associated to the challenged ordinances are "mandatory," they are not and there is nothing in the record to support that conclusion. (1-ER-16, 27; 1-ER-28, *citing* GMPC 1.36.010(c) which sets a maximum but not minimum fine). The one piece of evidence the Court refers to on this point is simply fines that were assessed by the State Court for individuals who did not appear for their court dates. (1-ER-16, 27, *citing* 3-ER-348-357). The Circuit Court Judges no doubt retain the ability to assess a different amount or no fine at all to avoid an unconstitutional punishment from being rendered. If someone was cited for camping after weeks in a City park and then assessed a $10.00 fine, even if they met one of the many definitions of "homeless" per HUD, there would clearly be no constitutional violation. The limits of the use must be analyzed on a case-by-case basis, not with a blanket injunction preventing the City from taking the most basic enforcement action of simply issuing a citation when appropriate.

"A state law enforcement agency may be enjoined from committing violations where there is proof that officers within the agency have engaged in a persistent pattern of misconduct" and plaintiffs are also required to "establish more than repeated incidents of misconduct." *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1153 (9th Cir. 2007) (*quoting Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1500 (9th Cir. 1996) and *Steffel v. Thompson*, 415 U.S. 452 (1974) (internal quotations omitted). Nothing of the sort appears in this record but the court still granted plaintiffs summary judgment, issued an injunction, and awarded attorney fees. (1-ER-4-6). The City's post-*Martin* ordinance amendments, enforcement practices and policies are all constitutional and uncontroverted entitling the City to Judgment in its favor.

At an absolute minimum, the City's post-*Martin* evidence raised a material dispute of fact as against plaintiff's historical pre-*Martin* and conjectural evidence as to whether any City policy, practice or custom exists resulting in unconstitutional enforcement against anyone. *Los Angeles County, Cal. v. Humphries*, 562 U.S. 29, 33-39 (9th Cir. 2010) (holding that the *Monell* standards apply in prospective relief claims).

F. The District Court Erred in Granting Plaintiffs Summary Judgment on an Unpled Procedural Due Process Theory

The court erred by granting Summary Judgment to plaintiffs on a theory of recovery that was first raised on summary judgment. (1-ER-29-33). The court

incorrectly determined that because the City did not "ask that [the Third Amended Complaint be clarified or made more specific" that it "was on notice" of plaintiff's challenge to the appeal process found in GPMC 6.46.355. (1-ER-30). The court made this finding despite recognizing the ordinance being challenged under this theory did not appear in the Third Amended Complaint. (*Id.*; 3-ER-412-430).[9] Plaintiffs first raised their challenge at summary judgment regarding GPMC 6.46.355 as to the appeal procedures. (ECF 62, pp. 46-48). This was remarkable both for what *is* in the Third Amended Complaint and what is *not*. In addition to excluding the ordinance plaintiffs later claimed to be challenging, there is also no mention of "appeal" or a single factual allegation related to the theory plaintiffs only raised at summary judgment. (*compare* 3-ER-412-430 *with* ECF 62, pp. 46-48).

In addition to failing to put the City on notice of this theory in the Third Amended Complaint, even what is included in this claim describes something different. The title of the claim is "Fourteenth Amendment to the U.S. Constitution (Procedural Due Process/**Notice**). (3-ER-429) (emphasis added). This same "notice" theory had also been pled in each of the previous complaints. (3-ER-448, 467, 482). Yet, when plaintiffs filed their summary judgment motion

[9] Nor did GPMC 6.46.355 appear in any prior version of the Complaint. (3-ER-431-483).

they not only raised a challenge to an ordinance not mentioned in their complaint, but the substance of the argument was not the "notice" related theory they did plead.

Additionally, the Third Amended Complaint contains a section titled "Relevant Ordinances" but the ordinance they eventually challenged here is omitted, and no allegations were made related to the underlying park exclusion ordinance. (3-ER-422-423). Had plaintiffs raised a procedural notice issue arising from an ordinance listed in the "relevant ordinances" section, the City would have no objection. However, the court's conclusion that a complaint challenging the "procedural due process" of a specific appeal ordinance for something other than the "notice" mentioned in the Third Amended Complaint should not stand. Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain [ ] a short and plain statement of the claim showing the pleader is entitled to relief.") (emphasis added).

The law is well settled that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the element of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Furthermore, plaintiffs cannot add a new theory of liability at the summary judgment stage. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000).

"A complaint guides the parties' discovery, putting the defendant on notice of the evidence it needs to adduce in order to defend against the plaintiff's allegations." *Coleman*, 232 F.3d at 1292. This Court in *Coleman* explained that if plaintiffs failed to properly plead a theory in their complaint, they could not pursue the claim on summary judgment unless they made their intention to pursue the claim known during discovery. *Id.* at 1294. Plaintiffs failed to disclose their intent to pursue this claim during discovery, which closed two days after the Third Amended Complaint was filed. (ECF 48, 50). Notwithstanding those truths, the court determined that "[a]lthough the City correctly points out that GPMC 6.46.355 [Appeal and Hearing]" is missing from the operative complaint, plaintiffs still somehow "made clear" their claim. (1-ER-30).

The recurring theme of the court allowing plaintiffs to substitute the specific details the law requires for something far broader and then ruling in their favor, unfortunately continued here. In this instance, the court concluded that because a *different* notice claim was pled (and not raised at summary judgment) the City was somehow on notice for an entirely different claim asserted for the first time at summary judgment. Even the "close enough" analysis applied by the court refers only to a <u>different</u> ordinance than the one eventually challenged, and even then the mention is in the prayer for relief only. (3-ER-412-430). This cannot be fairly characterized as good enough. *Twombly*, 550 U.S. at 555 (2007).

The court even went as far as to assert the City should have objected or asked plaintiffs to clarify their allegation. (1-ER-30). The City, however, had no reason to object or ask for clarification because the operative Third Amended Complaint alleged a procedural due process claim for a notice issue related to the "Relevant Ordinances." *That* theory had appeared throughout the various versions of the Complaint, but was not even close to what was argued at summary judgment. (3-ER-431-483; ECF 62, pp. 46-48).

Plaintiffs failed to give the City notice of a claim challenging the appeal process in GPMC 6.46.355 (park exclusion appeal) until plaintiffs filed their cross motion for summary judgment. The court's granting of summary judgment on a claim that was not pled was improper and should be reversed.

VI. CONCLUSION

This Court should reverse the district court's grant of summary judgment to plaintiffs, and award of attorney fees, revoke the class certification, and remand this case to the district court for entry of judgment in the City's favor.

DATED this 31st day of March, 2021.

Respectfully submitted,

s/ Aaron P. Hisel
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Attorneys for Defendant-Appellant

STATEMENT OF RELATED CASES

Defendant-Appellant is not aware of any related cases currently pending before this Court.

DATED this 31st day of March, 2021.

s/ Aaron P. Hisel
Aaron P. Hisel, OSB #161265
Of Attorneys for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(B) and 9th Cir. R. 32-1, the attached Opening Brief of Defendant-Appellant complies with the type-volume limitations because it is:

Proportionately spaced, has a typeface of 14 points or more and contains 13,738 words.

DATED this 31st day of March, 2021.

s/ Aaron P. Hisel
Aaron P. Hisel, OSB #161265
Of Attorneys for Defendant-Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 31, 2021, I electronically filed the foregoing Opening Brief of Defendant-Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users.

s/ Aaron P. Hisel
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Of Attorneys for Defendant-Appellant