

1 Benjamin L. Rundall (No. 031661)  
2 **ZWILLINGER WULKAN PLC**  
3 2020 North Central Avenue, Suite 675  
4 Phoenix, Arizona 85004  
5 Tel: (602) 609-3800  
6 Fax: (602) 609-3800  
7 Direct: (602) 962-2969  
8 Email: ben.rundall@zwfirm.com

9 **AMERICAN CIVIL LIBERTIES UNION**  
10 **FOUNDATION OF ARIZONA**  
11 Jared G. Keenan, State Bar No. 027068  
12 Christine K. Wee, State Bar No. 028535  
13 3707 N. 7th Street, Suite 235  
14 Phoenix, AZ 85014  
15 Tel: (602) 650-1854  
16 Email: jkeenan@acluaz.org  
17 cwee@acluaz.org

18 **AMERICAN CIVIL LIBERTIES UNION**  
19 Leah Watson (admitted pro hac vice)  
20 Scout Katovich (admitted pro hac vice)  
21 125 Broad Street, 18th Floor  
22 New York, NY 10004  
23 Tel: (212) 549-2500  
24 Email: lwatson@aclu.org  
25 [skatovich@aclu.org](mailto:skatovich@aclu.org)

26 *Attorneys for Plaintiffs*

27 **IN THE UNITED STATES DISTRICT COURT**  
28 **FOR THE DISTRICT OF ARIZONA**

29 Fund for Empowerment, et al.

30 Plaintiffs,

31 v.

32 City of Phoenix, et al.

33 Defendants.

34 Case No. CV-22-02041-PHX-GMS

35 **PLAINTIFFS' RESPONSE TO**  
36 **DEFENDANTS' MOTION TO**  
37 **MODIFY PRELIMINARY**  
38 **INJUNCTION AND MOTION FOR**  
39 **EXPEDITED CONSIDERATION**  
40 **AND EMERGENCY STATUS**  
41 **CONFERENCE**

42 For their response to City Defendants' Motion to Modify Injunction, Plaintiffs  
43 state as follows:  
44  
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1 **I. The Amended Grants Pass Opinion Does Not Require This Court to Alter Its Injunction.**

2 The City of Phoenix (the “City”) asks this Court to modify its preliminary  
3 injunction (Dkt. No. 34 or “Motion”) to disregard the constitutional protections of  
4 unhoused individuals to (1) effectively endorse their eviction from the Zone through any  
5 means the City sees fit, and to (2) allow the City to resume enforcement of its Camping  
6 and Sleeping Bans, so long as the City can find some other “alternative public, outdoor  
7 space” where an unhoused individual can be moved. To justify this sweeping revision  
8 (and near-dissolution) of the existing injunction, the City points to the Ninth Circuit’s  
9 amended opinion in *Johnson v. City of Grants Pass*, 72 F. 4th 868 (9th Cir. 2023) (the  
10 “Amended Opinion”). But the City overstates the minimal amendments to the *Grants*  
11 *Pass* opinion, which does not fundamentally alter the basic holding of *Martin v. City of*  
12 *Boise*, 920 F.3d 584 (9th Cir. 2019), nor address whether outdoor space satisfies the  
13 prerequisite for enforcement of Camping and Sleeping Bans under *Martin*. The City also  
14 fails to present the Court with a change in facts that would merit revision of the  
15 preliminary injunction. Accordingly, the Court should reject the City’s improper request  
16 for an advisory opinion untethered to a change in facts or law.  
17  
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19 **A. The Amended Opinion does not change *Martin*’s holding or address whether alternative outdoor space satisfies *Martin*.**

20 The only change to the *Grants Pass* Amended Opinion appears in a single  
21 paragraph, with the removed language indicated in strikethrough and the added language  
22 in red:  
23

24 ~~The formula established in *Martin* is that the government cannot prosecute homeless people for sleeping in public if there “is a greater number of homeless individuals in [a jurisdiction] than the number of available” shelter spaces. *Id.* (alteration in original).~~  
25 Pursuant to *Martin*, it is an Eighth Amendment violation to criminally punish involuntarily homeless persons for sleeping in public if there are no other public areas or appropriate shelters where those individuals can sleep. *Id.* at 617 n.8 (“Naturally, our holding does not cover individuals who *do* have access to adequate  
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28

1 temporary shelter, whether because they have the means to pay for  
2 it or because it is realistically available to them for free, but who  
3 choose not to use it.”). When assessing the number of shelter  
4 spaces, *Martin* held shelters with a “mandatory religious focus”  
could not be counted as available due to potential violations of the  
First Amendment's Establishment Clause. *Id.* at 609-10 (citing  
*Inouye v. Kemna*, 504 F. 3d 705, 712-13 (9th Cir. 2007)).

5 72 F.4th at 877. The City argues the disjunctive language in the added sentence (“no  
6 public areas or appropriate shelters”), combined with the removal of language in the prior  
7 panel opinion referring to “[t]he *formula* established in *Martin*,”<sup>1</sup> creates “a more flexible  
8 recitation of the law,” under which the City may resume enforcement of its Camping and  
9 Sleeping Bans, even if there are no shelter beds available for unhoused individuals, “so  
10 long as there are alternative *public spaces*.” Mot. 6 (emphasis added).

11 The revised *Grants Pass* opinion, however, does not support the City’s  
12 interpretation they may now enforce the Camping and Sleeping Bans *carte blanche*  
13 without first confirming reasonably suitable alternative spaces. Indeed, the opinion in  
14 *Grants Pass*, explicitly confirms the key holding in *Martin* which noted the “Eighth  
15 Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying  
16 outside on public property for homeless individuals who cannot obtain shelter.”  
17 Amended Opinion, 72 F.4th at 877 (quoting *Martin*, 920 F.3d at 616). If anything, the  
18 amended decision in *Grants Pass* merely reemphasized that “access to adequate  
19 temporary shelter” is another prerequisite for enforcement of similarly situated Camping  
20 and Sleeping Bans.<sup>2</sup>

21 As a result, the City’s argument the amended *Grants Pass* decision allows any  
22 undefined outdoor space to constitute as “shelter” for purposes of *Martin* is foreclosed by

23  
24 <sup>1</sup> *Johnson v. City of Grants Pass*, 50 F. 4th 787, 795 (9th Cir. 2022), *amended on reh’g*  
25 72 F.4th 868 (9th Cir. 2023).

26 <sup>2</sup> Importantly, Plaintiffs would also note that one panel opinion cannot overrule another,  
27 explicitly or implicitly. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (“[A]  
28 later three-judge panel considering a case that is controlled by the rule announced in an  
earlier panel’s opinion has no choice but to apply the earlier-adopted rule; it may not any  
more disregard the earlier panel’s opinion than it may disregard a ruling of the Supreme  
Court.”).

1 what remains unchanged in the Amended Opinion. Indeed, the Court specifically  
2 proclaimed it is “not decid[ing] whether alternate outdoor space would be sufficient under  
3 *Martin*” and expressly declined to make any pronouncement about whether an unhoused  
4 individual may lawfully be punished for sleeping or camping outside if they have access  
5 to alternate outdoor space because, as is the case here, “the City has not established any  
6 realistically available place within the jurisdiction for involuntarily homeless individuals  
7 to sleep.” *Id.* Amended Opinion, 72 F.4th at 894 n.33. Additionally, as in *Grants Pass*,  
8 Phoenix’s Sleeping and Camping Bans cover the entire City with no exceptions, and the  
9 City has identified no legal outdoor place where unhoused people can sleep. So, like the  
10 panel in *Grants Pass*, here, this Court should decline to depart from Ninth Circuit  
11 precedent when no reasonably suited alternative space has been identified by the City.<sup>3</sup>

12 **B. Neither the Amended Opinion, nor the facts presented by the City**  
13 **should alter this Court’s analysis of time, place, and manner**  
14 **restrictions.**

15 *Martin* and *Grants Pass* have always acknowledged that “an ordinance prohibiting  
16 sitting, lying, or sleeping outside at particular times or in particular locations might well  
17 be constitutionally permissible.” *Martin*, 920 F.3d at 617 n.8. The Amended Opinion had  
18 nothing new to say about time, place, and manner restrictions, but, instead, reiterated the  
19 principle that “a city is not required to ... allow anyone who wishes to sit, lie, or sleep on  
20 the streets ... at any time and at any place.” 72 F.4th at 877 (quoting *Martin*, 920 F.3d at  
21 617; *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated as moot*  
22 505 F.3d 1006 (9th Cir. 2007)).

23 Indeed, Plaintiffs agree *Martin* or *Grants Pass* has never prevented the City from  
24 enacting reasonable time, place, and manner restrictions. Rather, the City confuses the  
25 case law in failing to recognize that the enforcement, not enactment, of such laws on

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26 <sup>3</sup> Nor do the district court decisions cited by the City support their requested relief. *See*  
27 *Mot. 7*. The City merely copies and pastes the cases and parentheticals that *Grants Pass*  
28 considered and determined were inapplicable because, unlike *Grants Pass* and *Phoenix*,  
those cases involved jurisdictions with “lawful places within the jurisdiction for  
involuntarily homeless individuals to sleep.” *Id.*

1 involuntarily unhoused individuals gives rise to a potential Eighth Amendment violation.  
2 *Jones*, 444 F.3d at 1138 (“By our decision, we in no way dictate to the City that it must  
3 ... allow anyone who wishes to sit, lie, or sleep on the streets of Los Angeles at any time  
4 and at any place within the City. All we hold is that, so long as there is a greater number  
5 of homeless individuals in Los Angeles than the number of available beds, the City may  
6 not *enforce* section 41.18(d) at all times and places throughout the City against homeless  
7 individuals for involuntarily sitting, lying, and sleeping in public.”).

8  
9 While the City wants this Court’s blessing to move unhoused individuals out of  
10 the Zone, nothing in *Grants Pass*, *Martin*, or any other Ninth Circuit decision warrants  
11 such an endorsement, especially as the Sleeping and Camping Bans still apply to *all*  
12 public places at *all* times. *id.* at 5. The City’s arrest records confirm that the City has  
13 continued to enforce the Sleeping and Camping Bans outside of the Zone since the  
14 issuance of the preliminary injunction. Ex. A. Similarly, the City’s vague allusion to an  
15 “alternative public location within the jurisdiction that will accommodate tents or other  
16 temporary shelter from the elements” neither changes the City’s blanket prohibitions on  
17 sleeping and camping, nor transforms those laws into reasonable time, place, and manner  
18 restrictions. Mot. 8. “[B]ecause the problematic ordinances remain unamended,” so too  
19 should this Court’s preliminary injunction. Mot. 7 (recognizing that a statement of  
20 administrative policy does not alter the preliminary injunction analysis).

21  
22 **II. Lawful Enforcement of Any Revised Sleeping or Camping Ban Would Turn on**  
23 **Whether Alternate Space Is Reasonably Suited to the Needs of Those Who Are**  
**Involuntarily Unhoused.**

24 Even if this Court is inclined to provide advisory guidance to the City regarding  
25 the constitutionality of outdoor shelter space, Plaintiffs urge the Court to prohibit the City  
26 from enforcing the Camping and Sleeping Bans against unhoused individuals unless they  
27 have immediate access to outdoor space that is reasonably suited to their individualized  
28 needs. Indeed, the amended *Grants Pass* decision does nothing to disrupt the holding in

1 *Martin* which instructs that the City must provide individualized assessments to determine  
2 “access to *adequate* temporary shelter.” 920 F. 3d at 617 n.8 (emphasis added). A person  
3 against whom sleeping or camping bans are enforced should, where possible, be given  
4 the choice of a specific shelter that is “practically” or “realistically available to them.” *Id.*

5       Importantly, that choice may not require a person to give up their rights in the  
6 process. *See Parks v. Watson*, 716 F. 2d 646, 650 (9th Cir. 1983) (“the government may  
7 not impose a choice between the government benefit and the exercise of a constitutionally  
8 guaranteed right”). All of this requires a more discerning analysis than simply  
9 determining that outdoor public space is open and will fit “tents or other temporary  
10 shelter.” Mot. 8. Indeed, “[c]alling a plot of land a shelter does not make it so.” *Warren*  
11 *v. City of Chico*, No. 221CV00640, 2021 WL 2894648, at \*3 (E.D. Cal. July 8, 2021)  
12 (rejecting argument that outdoor temporary shelter at city’s airport was “shelter” that  
13 permitted city to criminalize resting in public”). Accordingly, before the City is  
14 effectively allowed to recriminalize the state of being unhoused by being freed from the  
15 preliminary injunction’s terms (i.e., by being permitted to enforce the Camping and  
16 Sleeping Bans without restriction), it must provide assurances that its “shelters” for  
17 unhoused individuals take individual circumstances into account. And those  
18 circumstances may demand, in the case of certain individuals, that “adequate shelter” can  
19 only be provided indoors.

20       Moreover, any temporary arrangement should be time-limited—or, at least,  
21 routinely updated—to ensure that any shelter remains “adequate.” An outdoor shelter may  
22 be adequate in a mild winter, together with “the most rudimentary precautions to protect  
23 [unhoused individuals sleeping in an outdoor shelter] from the elements.” *Grants Pass*,  
24 72 F. 4th at 891. But that shelter may not be adequate come summer, especially if  
25 unhoused individuals are exposed to the open air and heat. *E.g.*, *Sacramento Homeless*  
26 *Union v. Cnty. of Sacramento*, No. 22-cv-1095, 2023 WL 5835750, at \*2 (E.D. Cal. Aug.  
27 3, 2023) (enjoining the “widespread clearing of encampments, which displaces unhoused  
28

1 individuals from areas of protection from the sun and heat into more exposed areas”).  
 2 Indeed, as Plaintiffs have alleged in their Complaint, heat related deaths are an epidemic  
 3 caused by the City’s continued use of outdoor spaces to redress the needs of those who  
 4 are voluntarily unhoused.

5 **III. To the Extent That this Court Modifies the Preliminary Injunction, It Should**  
 6 **Do So in A Manner That Aligns with *Martin* and *Grants Pass*.**

7 While Plaintiffs believe this Court’s current injunction aligns with the Amended  
 8 Decision in *Grants Pass*, they also note that any modification should only affect the first  
 9 of the three prongs of this Court’s injunction.<sup>4</sup> Plaintiffs also affirmatively reject the three  
 10 modifications requested by the City and argue they are untethered to *Grants Pass* and  
 11 *Martin* for the following reasons:

12 **Closure of the Zone.** The City asks this Court to “permit[] the City to close the  
 13 area Plaintiffs refer to as the ‘Zone’ to camping by November 4, 2023.” The City does  
 14 not say why, other than to gesture vaguely at the fact that it “may be forced to choose  
 15 between violating one injunction or the other.” Mot. 2. But the City does not explain how  
 16 modifying the injunction to endorse closure of the Zone would make that burden any  
 17 easier. And it is unclear whether it is appropriate at all for this Court to enforce the *Brown*  
 18 court’s order—this case is not, after all, a nuisance action about the Zone, but a lawsuit  
 19 about Plaintiffs’ rights to not be subjected to unconstitutional enforcement action or  
 20

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21 <sup>4</sup> The order preliminarily enjoined the City, its agents and employees from doing any of  
 the following:

- 22 1. Enforcing the Camping and Sleeping Bans against individuals who cannot  
 23 practically obtain shelter as long as there are more unsheltered individuals in  
 Phoenix than there are shelter beds available;
- 24 2. Seizing any property of the unsheltered without providing prior notice at the  
 25 property’s location that the property will be seized, unless the agent or employee  
 26 has an objectively reasonable belief that it is (a) abandoned, (b) presents an  
 immediate threat to public health or safety, or (c) is evidence of a crime or  
 contraband; and
- 27 3. Absent an immediate threat to public health or safety, destroying said property  
 without maintaining it in a secure location for a period of less than 30 days.

28 Mot. 19.

1 property seizure. *Cf. Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863  
2 F. 3d 96, 122 (2d Cir. 2017) (“Actions to enforce state court judgments in federal court  
3 are rare.”). The City also does not explain why this Court’s preliminary injunction, which  
4 is in place to protect rights guaranteed by the federal Constitution, must give way to a  
5 state-court order on a state-law nuisance claim. *Cf. Armstrong v. Exceptional Child*  
6 *Center, Inc.*, 575 U.S. 320, 324 (2015) (the Supremacy Clause “creates a rule of decision:  
7 Courts ‘shall’ regard the ‘Constitution,’ and all laws ‘made in Pursuance thereof,’ as ‘the  
8 supreme Law of the Land.’ They must not give effect to state laws that conflict with  
9 federal laws.”). Interlocutory safeguards that preserve and protect constitutional rights  
10 should not be lifted simply because the City finds them inconvenient.

11 More importantly, *Grants Pass* has no effect on the property-based underpinning  
12 of the injunction—i.e., that the injunction protects the property rights of unhoused  
13 individuals. “Closing” the Zone will inevitably require moving personal effects—indeed,  
14 the City admits as much. As one court observed in *Lavan v. City of Los Angeles*, “before  
15 the city can seize and destroy [unsheltered individuals’] property, it must provide notice  
16 and an opportunity to be heard at a meaningful time and in a meaningful manner, except  
17 in extraordinary situations where some valid governmental interest is at stake that justifies  
18 the postponing of the hearing until after the event.” 797 F. Supp. 2d. at 1016-17 (internal  
19 citations omitted). *Grants Pass* did not alter this obligation. Nor did it opine at all on the  
20 Fourth Amendment’s prohibition on unreasonable seizure. U.S. Const. Amend IV.  
21 Because the City’s obligation remains unchanged after the amended *Grants Pass* order,  
22 this Court should maintain the prohibition on the seizure of property without “notice as  
23 to when [sic] property will be deemed abandoned and taken, nor an opportunity to retrieve  
24 those items before they are destroyed.” Mot. 10.

25 **Allowing the City to move the Zone’s residents to other outdoor public areas,**  
26 **and to resume enforcement of the Camping and Sleeping Bans.** Similarly, the City’s  
27 request for permission to redefine “shelter” to encompass all indoor and outdoor options,  
28

1 including placements never considered in *Grants Pass*, is a thinly veiled attempt to  
2 eliminate any precondition to the enforcement of the Camping and Sleeping Bans. For  
3 the reasons explained above, this change would be antithetical to *Martin* and *Grants Pass*.  
4 Even assuming, however, that “public, outdoor space” writ large can theoretically  
5 constitute “shelter” for purposes of the Eighth Amendment, the City’s approach leaves  
6 no room to determine whether such a space constitutes shelter for a particular  
7 individual—*i.e.*, whether, in fact, the public area provides the individual with “access to  
8 adequate temporary shelter.” *Martin*, 920 F. 3d at 617 n.8 (emphasis added). In fact, the  
9 City provides no details at all on where individuals within the Zone are to be relocated,  
10 or how the City will ensure that an “outdoor space[]” is “safe.”

11 **Confirming the City’s Understanding of *Grants Pass*.** As explained above, the  
12 City’s argument that “shelter” means any outdoor place “for an unsheltered person to go”  
13 is unfounded under *Grants Pass*. Accordingly, this Court should reject the City’s attempt  
14 to retool the preliminary injunction into a facility for violating the Constitution. The  
15 preliminary injunction faithfully applied the Ninth Circuit’s Eighth Amendment caselaw,  
16 and *Grants Pass* (in both its original or amended form) did not alter that caselaw in any  
17 way that is material to the injunction here.

18 If this Court determines that some change to the preliminary injunction is  
19 necessary to ease the City of its so-called Catch-22,<sup>5</sup> any change must comport with  
20 *Martin* and *Grants Pass*: all unhoused individuals in the City must have “access to  
21 adequate temporary shelter” before the City can begin enforcing the Camping and  
22 Sleeping Bans on unhoused individuals and the City must continue to provide notice and  
23 an opportunity to be heard before destruction of unhoused individuals’ belongings. To the  
24 extent that the Zone’s residents are to be relocated elsewhere, they should be relocated to  
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26 <sup>5</sup> A Catch-22 arises when contradictory logic results in a paradox, not when there are  
27 “mutually conflicting obligations.” Mot. 1. In any event, there is nothing “mutually  
28 conflicting” about the preliminary injunction in this case and the order in *Brown*: the City  
can comply with both by providing the Zone’s residents with adequate shelter.

1 a place with adequate shelter based on an individualized assessment—and should have  
2 the assurance that they will not be subjected to the City’s enforcement whims upon their  
3 relocation.

4  
5 RESPECTFULLY SUBMITTED this \_\_\_\_ day of October, 2023.

6  
7 **ZWILLINGER WULKAN PLC**

8  
9 By: /s/ Benjamin L. Rundall  
Benjamin L. Rundall  
2020 North Central Avenue, Suite 675  
10 Phoenix, Arizona 85004

11 **AMERICAN CIVIL LIBERTIES**  
12 **UNION FOUNDATION OF**  
13 **ARIZONA**

14 By: /s/ Jared G. Keenan (with permission)  
Jared G. Keenan  
Christine K. Wee  
15 3707 N. 7th Street, Suite 235  
Phoenix, AZ 85014

16 **AMERICAN CIVIL LIBERTIES**  
17 **UNION**

18 By: /s/ Leah Watson (with permission)  
Leah Watson (admitted pro hac vice)  
19 Scout Katovich (admitted pro hac vice)  
125 Broad Street, 18th Floor  
20 New York, NY 10004

21 *Attorneys for Plaintiffs*  
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**CERTIFICATE OF SERVICE**

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I hereby certify that on October 17, 2023, I electronically filed the foregoing with the Clerk of the Court for the U.S. District Court for the District of Arizona by using the CM/ECF System. All participants in the case who are registered CM/ECF user will be served by the CM/ECF system.

*/s/ Benjamin L. Rundall* \_\_\_\_\_