SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Josett Banks, Kyla Friedenbloom, and Kristine Shawanokasic, Appellants, v. **Municipality of Anchorage,** Appellee.	No. 3AN-23-06779-CI
Joene Atoruk, Heather Wolfe Aragon, Leonly Fratis III, Seone Lima, Darrell Dean Miller, Beulah Moto, Lillian Sheakley, Gregory Michael Smith, Tracy Lynn Thompson, Della L. Tunkle, Larry C. Tunley, Brian Keith Vaughan, and Lucille Jane Williams, Appellants, v. **Municipality of Anchorage,** Appellee.	No. 3AN-23-07037-CI

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> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

Amendment V

> No person shall be . . . be deprived of life, liberty, or property, without due process of law[.]

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AS 01.10.060(a)(9) – "Personal Property"

> In the laws of the state, unless the context otherwise requires, . . . "personal property" includes money, goods, chattels, things in action, and evidences of debt[.]

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AMC 1.70.010 – Land Acknowledgement

> The municipality acknowledges that the Municipality of Anchorage lies within the traditional lands of the Dena'ina Athabascans. For more than a thousand years the Dena'ina have been and continue to be the stewards of this land. It is with gratitude and respect that we recognize the contributions, innovations, and contemporary perspectives of the Upper Cook Inlet Dena'ina.

AMC 8.45.010 – Trespass

A. A person commits the crime of criminal trespass if the person:

. . .

3. Knowingly enters or remains on public premises or property, or in a public vehicle:
    a. when the premises, property, or vehicle is not open to the public; or
    b. after the person has been requested to leave by someone with the apparent authority to do so.

AMC 15.20.010 – Definitions

The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

. . .

Camping means use of space for the purpose of sleeping or establishing a temporary place to live including, but not limited to:

1. Erection of a tent, lean-to, hut, or other shelter;
2. Setting up bedding or equipment in such a manner as to be immediately usable for sleeping purposes, whether indoors or outdoors, on or under any structure not intended for human occupancy;
3. Sleeping outdoors with or without bedding, tent, tarpaulin, hammock or other similar protection or equipment; or
4. Setting up cooking equipment, including a campfire, with the intent to remain in that location overnight.

AMC 15.20.020 – Public Nuisances Prohibited; Enumeration

B. Public nuisances include, but are not limited to, the following acts and conditions:

. . .

15. *Prohibited campsites.* A prohibited campsite is an area where one or more persons are camping on public land in violation of section 8.45.010, chapter 25.70, or any other provision of this Code. A prohibited campsite is subject to abatement by the municipality. The

municipal official responsible for an abatement action may accomplish the abatement with the assistance of a contractor, association or organization. Notwithstanding any other provision of this Code, the following procedure may be used to abate a prohibited campsite:

a. Prior to beginning the removal of a prohibited campsite, a notice of campsite abatement shall be posted on or near each tent, hut, lean-to, or other shelter designated for removal, or, if no structure for shelter exists, a notice shall be affixed in a conspicuous place near the bedding, cooking site, or other personal property designated for removal. The notice shall:
    i. State the approximate location of the campsite, the code provision under which the campsite is prohibited, and that the campsite may be removed under one of the procedures set forth in subparagraph B.15.b.
    ii. State an appeal may be filed with the court, and include the court's address, except this statement is not required where the municipality commences a forcible entry and detainer action under subparagraph B.15.b.iv.
    iii. State a notice of intent to appeal may be filed with the municipality, and include the appropriate address, except this statement is not required where the municipality commences a forcible entry and detainer action under subparagraph B.15.b.iv.
    iv. State that either an appeal or notice of intent to appeal received before the abatement date will delay abatement pursuant to subparagraph B.15.e.
    v. Also be given orally to any persons in or upon the prohibited campsite or who identifies oneself as an occupant of the campsite that the campsite is subject to abatement as provided for in the posted notice.
    vi. If personal property is to be stored, the notice shall include contact and location information for reclaiming it or disclaiming an interest in the property.
b. A notice of campsite abatement shall identify whether it is a 24-hour wildfire danger area notice, 72-hour notice, 15-day campsite notice, ten-day zone notice, or notice to quit; and the subsequent abatement activities of the municipality shall comply with the

respective procedure for removal of a prohibited campsite and the personal property thereon:

i. Twenty-four hours' notice, wildfire danger area abatement. When a municipal burn ban is in effect, the municipality may post a wildfire danger area with notices describing the area in which prohibited campsites may be abated after 24 hours by removal and storage of personal property. Notices shall be posted in accordance with subsec. 15.20.020B.15.b.v.(A).

ii. Seventy-two hours' notice, protected land use. After verbal notice to an apparent occupant of a prohibited campsite within 100 feet of protected land uses the municipality may post the prohibited campsite with a notice stating all personal property not removed within 72 hours of the date and time the notice is posted may be removed and stored. For the purposes of this section:

    A. Protected land uses shall include: paved greenbelt and major trail systems (including but not limited to Coastal, Chester Creek, Ship Creek, Campbell Creek); schools; playgrounds; habilitative care facilities; the Harry J. McDonald Memorial Center; community centers; neighborhood recreation centers; and athletic fields.

    B. The separation distance shall be measured from the lot line of the protected land use to the nearest illegal camp structure.

iii. Seventy-two hours' notice. The municipality may post a prohibited campsite with a notice stating all personal property not removed within 72 hours of the date and time the notice is posted may be removed and stored.

iv. Fifteen days' notice, campsite abatement. The municipality may post a prohibited campsite with a notice stating all personal property not removed within 15 days of the date and time the notice is posted may be removed and disposed of as waste, unless sooner claimed or disposal authorized by the owner. At the expiration of this 15-day period the personal property may be disposed of as

waste if no person has either given notice or removed property in accordance with this section.

v. Ten days' notice, zone abatement. The municipality may post a zone or campsite area with notice stating all personal property in or around the posted zone at the end of ten days of the date and time the notice is posted may be removed and disposed of as waste, unless sooner claimed or disposal authorized by the owner.

A. Notice shall be conspicuously posted under the circumstances and describe in detail the zone to be abated. The notices shall be within sight of one another and reasonably maintained for the entire notice period.

B. At the expiration of the notice period any personal property in the zone may be disposed of as waste if no person has either given notice or removed the property in accordance with this section.

C. Tents, structures, and associated personal property placed in the zone after notices were posted shall be stored pursuant to subparagraph B.15.c.

D. Zones shall be contiguous, reasonably compact, identifiable areas with boundaries that are recognizable landmarks, clear transition areas between developed and undeveloped lands, or physical features of development such as roads, rights-of-way cleared of trees, paved trails, utility lines, private property yards or fences, or named structures. At any one time, the municipality shall post no more than ten zones to be abated.

E. If the action to physically remove the campsite is not commenced by the municipality within ten days of the removal date provided in the notice, the municipality shall repost notice before abatement may occur. Nothing shall prohibit the municipality from posting notice that the removal

in a zone or campsite area will occur over a period of several days.

vi. Forcible entry and detainer action. The municipality may post a "notice to quit" and commence a forcible entry and detainer action in court consistent with the procedures of AS 09.45.060—09.45.160 and Alaska Rule of Civil Procedure 85. At the conclusion of the eviction hearing, the court shall include in its decision the date after which personal property remaining on the premises may be presumed abandoned and disposed of by the municipality.

c. Storage of personal property removed from a prohibited campsite. The municipality may store in any reasonable manner the personal property removed from a prohibited campsite. At the time of removal a notice shall be posted at the location, unless previously posted notices are still visible and accurate, with contact and location information for reclaiming personal property or disclaiming an interest in it. If no person removes the property, the municipality may dispose of the personal property 30 days from the date a notice in paragraph B.15.b. was posted. If the person(s) in possession of the personal property at the time it was removed or the prohibited campsite posted identify it and disclaim any interest, the personal property may be disposed of immediately. If a person reclaims stored personal property, it shall be released upon payment of an administrative fee not to exceed ten dollars. For purposes of this section, the following criteria applies:

i. Junk, litter, garbage, debris, lumber, pallets, cardboard not used to store other personal items, and items that are spoiled, mildewed, or contaminated with human, biological or hazardous waste shall not be stored and may be disposed of summarily.

ii. A weapon, firearm, ammunition or contraband, as those terms are defined in section 7.25.020, shall be delivered to the Anchorage Police Department and processed in accordance with chapter 7.25.

iii. If not subject to paragraph i. or ii. above, the following items, when in fair and usable condition and readily

identifiable as such by persons engaged in removing a prohibited campsite, shall be deemed valuable and eligible for storage:

A. Tents and similar self-contained shelter,
B. Sleeping bags,
C. Tarps,
D. Toiletries and cosmetics,
E. Clocks and watches,
F. Medication,
G. Personal papers and identification,
H. Photographs,
I. Luggage, backpacks and other storage containers,
J. Books and other reading materials,
K. Radios, audio and video equipment,
L. Generators,
M. Cooking equipment in clean condition,
N. Shoes and clothing, and
O. Property stored in a manner that reasonably suggests the owner intended to keep it.

d. Within 24 hours after posting the notice of campsite abatement or of zone abatement, the municipal official responsible for posting is directed to inform the director of the Anchorage Health Department, or a designee, of the notice posting and prohibited campsite or zone location, and the Anchorage Health Department is directed to provide written or electronic notification to community social service agencies within the first work day after receipt of the notice. The community council(s) containing or within 500 feet of the area shall also be notified of a pending zone abatement. The purpose of the notices under this subsection is to encourage and accommodate the transition of campsite occupants to housing and the social service community network, and report zone abatement activities to affected communities. Failure of notice under this subsection shall not invalidate the abatement. To facilitate these purposes, the notice will include:
   i. The location of the camp;
   ii. The date for removal; and

iii. An estimate of the number of structures to be removed and of the number of residents of the camp or zone.

e. Appeal procedure. A posted notice of campsite abatement is a final administrative decision and appeals shall be to the superior court within 30 days from the date the notice of campsite abatement is posted, in accordance with the Alaska court rules. If the owner or person in possession of personal property at the time the notice is posted responds in writing to the municipality prior to expiration of a ten-day notice of the owner's intention to appeal the campsite abatement to the superior court, the municipality shall not remove the personal property until at least 30 days have passed from the date the notice was first posted, except as provided in subparagraph B.15.f.ii.

f. Before abatement, the responsible municipal official shall verify whether an intention to appeal or an appeal of the notice of campsite abatement was filed within the applicable time period. If no timely appeal was filed removal of the campsite may proceed. If an appeal was timely filed:
   i. Abatement of the campsite area is stayed until the appeal is withdrawn, settled, or a decision is issued and any subsequent appeal rights expire; provided that:
   ii. At any time after the expiration of the notice period, the municipality may remove personal property and store it until either the appeal is withdrawn, settled, or a decision is issued and any subsequent appeal rights expire. Storage of personal property and its release shall be in accordance with subparagraph B.15.c.

g. At the time removal is to begin, if any individuals are present at the campsite, they shall be verbally notified the campsite is prohibited and to be removed. Prior to actual removal:
   i. The individuals shall be given at least 20 minutes to gather their personal property and disperse from the area; and
   ii. The responsible municipal official or persons working under their authority shall not prevent individuals claiming personal property from removing that property

immediately, unless the personal property is unlawful or otherwise evidence of criminal activity.

h. Exceptions:
    i. Nothing in this section shall prevent a peace officer from conducting an investigation, search, or seizure in a manner otherwise consistent with the state and federal constitutions, or federal, state or local law.
    ii. Nothing in this section shall prevent lawful administrative inspection or entry into a prohibited campsite, nor prevent clean-up of any items not listed in subparagraph c.iii., or of garbage, litter, waste or other unsanitary or hazardous conditions on public land at any time.
    iii. Where exigent circumstances posing a serious risk to human life and safety exist, the abatement of a campsite may proceed without prior notice. Personal property removed under this paragraph shall be stored in accordance with subparagraph B.15.c., to the extent reasonable and feasible under the circumstances.
    iv. When the public land where a prohibited campsite is located is clearly posted with no trespassing signage, no camping signage, or as not being open to the public, including posting of closed hours, the abatement of the campsite may proceed without additional notice, and after the occupants of the prohibited campsite are provided at least one hour to remove their personal property. Personal property removed under this exception may only be disposed of in accordance with chapter 7.25 or subparagraph B.15.c.
i. The right of action provided in section 15.20.130D. is not available when the public nuisance is a prohibited campsite located on public property.
j. The municipality and its employees or agents shall not be liable for damages as a result of an act or omission in the storage, destruction, disposition or release of property under this subsection B.15., but this does not preclude an action for damages based on an intentional act of misconduct or an act of gross negligence. The municipality and its employees or agents

shall not be liable in any case release of property to a person when the personal property lacks affirmative marks identifying its owner.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over administrative appeals pursuant to AS 22.10.020(d). Here, Appellants have appealed "Notice[s] of Zone Abatement" that the Municipality posted in and around Cuddy Park on May 24, 2023, and in and around Davis Park on June 22, 2023. The posted notices constituted final administrative decisions.[1] The Anchorage Municipal Code does not provide any opportunity to appeal the determination with the Administrative Hearings Office, instead providing for direct appeals to this Court.[2] As such, this court has jurisdiction over the matter.[3]

STATEMENT OF THE ISSUES

Appellants are unhoused Anchorage residents who do not have access to housing or indoor shelter. The Anchorage Municipal Code designates all locations where unhoused persons can shelter themselves as public nuisances subject to government abatement, enforced under threat of arrest. Are Anchorage's "prohibited campsite" provisions unconstitutional, on their face and as applied, for violating (1) Due Process; (2) the right to be free from Cruel and Unusual Punishment; and (3) protections against Unreasonable Searches & Seizures?

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[1] AMC 15.20.020.B.15.e.
[2] *Id.*
[3] AS 22.10.020(d).

STATEMENT OF THE CASE

I. The Anchorage Municipal Code Prohibits Self-Sheltering

Anchorage Municipal Code chapter 15.20 governs "public nuisances." Subsection 15.20.020.B.15 specifically governs the Municipality's treatment of "prohibited campsites." This "prohibited campsite" law is explicitly predicated on the Municipality's penal code prohibitions against trespass, among other areas of the code.[4] This section of code defines "camping" broadly, to include any attempts to sleep outside:

> [U]se of a space for the purpose of sleeping or establishing a temporary place to live including, but not limited to: 1. Erection of a tent, lean-to, hut, or other shelter; 2. Setting up bedding or equipment in such a manner as to be immediately usable for sleeping purposes, whether indoors or outdoors, on or under any structure not intended for human occupancy; 3. Sleeping outdoors with or without bedding, tent, tarpaulin, hammock or other similar protection or equipment; or 4. Setting up cooking equipment, including a campfire, with the intent to remain in that location overnight.[5]

II. "Prohibited Campsite" Notice and Abatement Enforcement

The Code also provides for enforcement of its "prohibited campsite" provisions, establishing six categories of notice the city can issue, some providing more or less time to self-abate than others.[6] If a nuisance has not been abated by

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[4] "A prohibited campsite is an area where one or more persons are camping on public land in violation of section 8.45.010 [Penal Code: Trespass], chapter 25.70 [Prohibited Conduct: Penalties], or any other provision of this Code." AMC 15.20.020.B.15.

[5] AMC 15.20.010.

[6] AMC 15.20.020.B.15.b. It also provides for abatement "without prior notice" in "exigent circumstances posing a serious risk to human life and safety." AMC 15.20.020.B.15.h.iii.

the end of the notice period, the Municipality's enforcement action includes confiscating the relevant property and either—depending on which category of notice was issued—temporality storing qualifying property or disposing of all property "as waste."[7] At issue in the present appeals is the posting of a 10-day "zone" abatement in three locations.[8] This provision permits the Municipality to designate an entire "zone" for abatement. Individuals must "disperse from the area."[9] The Code also requires the official who posts an abatement notice to inform, within twenty-four hours, the Anchorage Health Department, "community social service agencies," and nearby community councils.[10]

III. Appeal Procedures

The "prohibited campsite" code includes no means for a person to be heard prior to being deprived of their belongings—whether those belongings are fated to be stored or to be destroyed. Instead, the code affords a person whose belongings are targeted for abatement thirty days to initiate appeal procedures in the superior court.[11] Any stay of enforcement that might otherwise apply pursuant to an appeal having been filed is caveated by a provision that gives the Municipality the

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[7] AMC 15.20.020.B.15.b.v. As to the property that does not qualify for storage, AMC 15.20.020.B.15.c.i provides, "Junk, litter, garbage, debris, lumber, pallets, cardboard not used to store other personal items, and items that are spoiled, mildewed, or contaminated with human, biological or hazardous waste shall not be stored and may be disposed of summarily"; while B.15.c.ii provides for discrete handling of a "weapon, firearm, ammunition or contraband."
[8] AMC 15.20.020.B.15.b.v.
[9] AMC 15.20.020.B.15.g.i.
[10] AMC 15.20.020.B.15.d.
[11] AMC 15.20.020.B.15.e.

authority to "remove personal property and store it until either the appeal is withdrawn, settled, or a decision is issued and any subsequent appeal rights expire."[12] In other words, even if a person files an appeal, they can be deprived of their belongings until the appeal is resolved.

The Code's "prohibited campsite" appeal provisions stand apart from the appeal provisions that apply to all other public nuisances enumerated in Chapter 15.20. Persons deemed responsible for any other public nuisance are afforded fifteen days from receipt of service of an enforcement order to appeal to the Administrative Hearing Office.[13] The Code allows this class of appellants to request a hearing,[14] and provides detailed pre-hearing and hearing procedures,[15] affording appellants a means to exercise their due process rights to be heard, to develop a factual record, and to challenge the Municipality's determination that they have created a nuisance in violation of Municipal law. Upon an adverse decision from the Administrative Hearing Office, an "appeal may be filed in the superior court for the state within 30 days of issuance of the final decision."[16]

IV. Appellants

The appellants in this case are unhoused residents of Anchorage who lack stable or temporary housing. [Exc. 22 ("I do not have a house or apartment, and I

[12] AMC 15.20.020.B.15.f.ii.
[13] AMC 15.20.120.
[14] AMC 14.30.050.
[15] AMC 14.30.080, AMC 14.30.090.
[16] AMC 14.40.010.

cannot afford to rent or buy one.")]. They do not have anywhere they can sleep indoors and they rely on a modicum of personal possessions to protect themselves from the elements. [Exc. 22, 24 ("I am currently living outside because I do not have anywhere else to go . . . I rely on my personal belongings—such as a tent, warm clothing, and pallets—to protect me from the elements and to provide as much safety and privacy as possible.")]. Many have formed small communities where they shelter themselves: "By camping together, we are safer from the elements, wildlife, and other people than we otherwise would be." [Exc. 24-25]. Appellants thus rely on their property, and one another, to survive living outdoors in Anchorage.

A. Banks Appellants

On May 24, 2023, the Municipality of Anchorage posted "Notice of Zone Abatement" signs in and around Cuddy Park.[17] [Exc. 1]. Thirteen affected unhoused residents signed notices of intent to appeal. [Exc. 14-16]. Between June 6 and June 18, the Municipality abated the "campsites" that remained in the zone.

On June 16, three persistently homeless residents, the Banks appellants, appealed the Municipality's determination that their belongings constituted a violation of the prohibited "campsite" law and were therefore subject to abatement, in administrative appeal case no. 3AN-23-06779-CI.

[17] The text of the notice signs defined a targeted zone area to include "Loussac Library, Cuddy Park, & Old Archive Site," alternatively described as "36th Ave. to the S. Municipal Property Line / Denali to B St.," and further identified in a map image on the notice. [Exc. 1].

On July 31, as directed by the superior court, the Municipality transmitted its agency record, containing a mere twenty-four pages. It included one page containing what appears to be a two-row spreadsheet (one header row, and a row indicating that 70 structures and one van were in the targeted zone); a copy of the abatement notice sign; thirteen notices of intent to appeal, with a letter advancing the position that the abatement plans appear to be unconstitutional; and six pages of the Municipality's "Storage Form" and supplemental pages.

B. Atoruk Appellants

On or around June 23, 2023, the Municipality of Anchorage posted a "Notice of Zone Abatement" sign defining a targeted zone area from "McCarey to Boniface [Roads], Mt. View [Drive] to Glenn Hwy." [Exc. 18]. This area is adjacent to space that the Municipality uses to dump snow in winter and is commonly referred to as the "snow dump." The zone was further identified in a map image. On or around the same date, the Municipality also posted "Notice of Zone Abatement" signs defining a targeted zone area located in "Davis Park, N. Pine Street to McPhee Ave. to Mt. View Drive," also including a map. [Exc. 17].

On June 28, thirteen persistently homeless residents, the Atoruk appellants, appealed the Municipality's determination that their belongings constituted a violation of the "prohibited campsite" code and were therefore subject to abatement, in administrative appeal case no. 3AN-23-06779-CI. [Exc. 67]. The Atoruk appellants on the same day also filed a Motion for Stay Pending Appeal and a Motion for Expedited Consideration. On June 30, counsel for the

Municipality informed counsel that the Municipality could "agree to take down the signs at Davis Park (including the snow dump) and not abate."[18] Counsel then voluntarily withdrew the Motions for Stay and for Expedited Consideration.

On August 29, the Municipality transmitted its agency record, containing four pages. It included, in total: one cover sheet; one page containing what appears to be a three-row (one header row; one row with entries indicating that twenty-eight "camps" were located in the Davis Park zone and that abatement plans had been cancelled; and one row with entries indicating that seventy-eight "camps" were located in the "Mountainview Snowdump" [sic] zone and that abatement plans had been cancelled); and a copy of the two abatement notices.

V. Abatement Notices

All three locations' notice signs invoked the ten-day zone abatement provision of the Municipal Code.[19] [Exc. 1, 17, 18]. The notices declared that the zone is "not a legal area for storage or shelter" and declared that "[a]ny personal property in or around this zone at the end of 10 days shall be removed and disposed of as waste," citing AMC 15.20.020B.15. The notice signs also explained that any property moved into the zone between the notice date and the abatement date would be placed into storage.[20] And it described appeal rights, including that

[18] Opp'n to Mot. for Exp. Consid. and Partial Opp'n to Mot. to Stay (dated July 3, 2023) at 2. ("The Municipality agrees to hold off on beginning abatement of Davis Park on July 5, 2023.").
[19] AMC 15.20.020.B.15.b.v.
[20] AMC 15.20.020.B.15.b.v.(C) ("Tents, structures, and associated personal property placed in the zone after notices were posted shall be stored.").

"[t]his notice serves as a final decision of the Municipality of Anchorage that this posted zone/campsite is subject to abatement" and that one "may appeal this decision to the Alaska Superior Court within 30 days of the posting date." It added, "[w]ritten notice to the Municipal Attorney's Office of an intent to appeal is also sufficient notice. If the Municipality is able to confirm that either an appeal or intent was timely received, that person's property shall be stored."

VI. Shelter Capacity in Anchorage

The Municipality concedes that Anchorage lacked any available shelter space at the time the relevant locations were noticed.[21] Appellants' belief is that Anchorage still has insufficient shelter space to meet the needs of its unhoused residents.

ARGUMENTS

> *"Winter shelter is a matter of life and death in a cold-weather city like Anchorage."* – Office of the Mayor of Anchorage[22]

The choices a government makes as to what it allows or forbids on the land it governs are among the most fundamental exercises of its authority. In

[21] Opp. to Mot. for Trial de Novo (dated Nov. 14, 2023) at 4 ("[T]he undersigned concedes adequate shelter space did not exist at the time of either abatement.").
[22] Memorandum from Farina Brown and Thea Agnew Bemben, Mayor's Office, to the Anchorage Assembly, *Update to Assembly Work Session on Winter Homelessness Strategy and Shelter* (Oct. 4, 2024), providing justification for the Administration's limited indoor winter shelter initiative. [Appx. 24]. This Court can take judicial notice of government records and proceedings, including statements of government officials. Alaska Evid. R. 201(b); *see, e.g.*, *State v. Arctic Vill. Council*, 495 P.3d 313, 323, 323 n.26 (Alaska 2021) (taking judicial notice of public records, including "information and directives from the CDC, the

Anchorage, decisions as to how the land has been subdivided and property rights assigned have contributed to a housing crisis that leaves thousands of residents without stable housing. As the Anchorage Assembly stated when adopting its *Housing Action Plan*, "Anchorage has been experiencing a housing shortage and affordability crisis for several years, documented as a policy issue for over a decade." [Appx. 12 (Assembly Resolution No. 2023-433, approved and adopted Dec. 19, 2023)]. This directly contributes to Anchorage's disproportionately high level of homelessness.[23] As the Assembly Resolution adopting the *Housing Action Plan* continues: "[O]ur current housing shortage is at the root of many other issues, including homelessness." [Appx. 12 (Assembly Resolution No. 2023-433, approved and adopted Dec. 19, 2023)]. Homelessness contributes to adverse health outcomes, including higher rates of mortality.[24] Such outcomes can be a

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World Health Organization, and State and local officials in their complaint and their motion for preliminary injunction"). For the Court's convenience, Appellants have prepared an appendix of the judicially-noticeable Municipal documents it cites in this brief.

[23] Assembly Resolution No. 2023-176, approved May 9, 2023 (observing that Anchorage's "population of people actually experiencing homelessness . . . is on par with much larger major cities in the lower 48," noting reported numbers of people experiencing homelessness in Anchorage similar to those of Fort Worth, TX, and Baltimore, MD).

[24] *See, e.g.*, Municipality of Anchorage, *Complex Behavioral Health Needs Community Task Force Recommendations Final Report* 9 (Sept. 2023) ("[R]esearch has shown that individuals who are homeless have a risk of mortality that is 1.5 to 11.5 times greater than the general population."), https://www.muni.org/Departments/Assembly/SiteAssets/Pages/FOCUS-Homelessness/ComplexBHTaskForceFullRecos_FINAL_9-5-23rev.pdf.

product of Anchorage's cold climate.[25] The Municipality agrees that living without shelter "requires a person to enter survival mode, [which] dramatically restricts a person's ability to meet their physical and mental needs." [Appx. 4, AR No. 2023-188(S-1), As Amended, Approved June 6, 2023]. As the Mayor's Office recently remarked, "Winter shelter is a matter of life and death in a cold-weather city like Anchorage."[26]

Compounding the effects of this crisis for Appellants—who were unhoused and without indoor shelter at all relevant times—the Municipality's conceptions of public nuisance and criminal trespass work in tandem to deprive them of any place where they can legally be alive in Anchorage. According to the letter of the law, an unhoused person's very existence in the city overnight makes them trespassing criminals and public nuisances wherever they might shelter themselves. As the Municipality itself has summarized: "AMC 25.70.040A.1. prohibits camping on municipal land and AMC 8.45.010 prohibits trespass on both public and private land, which creates a situation where there is no legal place for individuals to sleep

[25] *See, e.g.*, The State of Alaska Department of Health, Division of Public Health, *State of Alaska Epidemiology Bulletin no. 12*, "Cold Exposure Injuries among People without Housing — Alaska, 2012–2021" (Oct. 14, 2024) ("Alaska's climate poses considerable risk for cold-induced injuries. Hypothermia, resulting from prolonged cold exposure, can lead to systemic dysfunction and death.. . . People without housing (PWH) are particularly vulnerable to cold exposure injuries and associated complications.") [Appx. 28].

[26] Memorandum from Farina Brown and Thea Agnew Bemben, Mayor's Office, to the Anchorage Assembly, *Update to Assembly Work Session on Winter Homelessness Strategy and Shelter* (Oct. 4, 2024). [Appx. 24].

outdoors overnight with or without a tent or bedding, or during a full 24-hour period." [Appx. 4, AR No. 2023-188(S-1), As Amended, Approved June 6, 2023].

Consequently, to conform their behavior to the law, Appellants' only option would be to leave Anchorage. That is, as written, the Anchorage Municipal Code would banish Appellants from the city. By defying their banishment and instead remaining, Appellants and scores like them are subject to ongoing, unconstitutional mistreatment by the Municipality, including arbitrary law enforcement, cruel and unusual punishment, and dispossession of essential, life-sustaining belongings without due process.

Not long ago, Alaska Native land-use practices prevailed and an altogether different regime was in place, making the Municipality's choices all the more worthy of scrutiny. The Municipality itself recognizes its close relationship to pre-existing stewardship of this land: By Code,[27] each Anchorage Assembly meeting begins by "acknowledg[ing] that we gather today on the traditional lands of the Dena'ina Athabascans," who "[f]or more than a thousand years . . . have been and continue to be the stewards of this land."[28] This land acknowledgement goes so far as to indicate that some of Anchorage's choices have proven unjust, as it is made as part of Anchorage's "collective movement towards decolonization and equity."[29] The land acknowledgment is meant to be more than mere virtue-

[27] AMC 2.30.035.A.3.
[28] AMC 1.70.010.
[29] AMC 1.70.010.

signaling, but instead is "an actionable statement."[30] This is relevant to the present appeals not least given that, as one Alaska Native advocate recently observed, "[T]here were no homeless people before Dena'ina Ełnena was stolen. The American legal code concerning private property and public spaces is a construct, suited to benefit the colonizer."[31]

I. The U.S. Supreme Court's narrow decision in *Grants Pass, Oregon v. Johnson* does not dispose of these appeals.

At the time the appeals were filed, the parties agreed that the Court of Appeals for the Ninth Circuit' decision in *Johnson v. Grants Pass*[32] constrained the Municipality of Anchorage's options as to abatement of "prohibited campsites" when low-barrier shelters were full. Of central importance was the that opinion's holding that it was cruel and unusual punishment to for the city "to enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements . . . when there is no other place in the City for them to go."[33] In June 2024, however, the United States Supreme Court overturned the Ninth Circuit on narrow grounds, reversing

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[30] AMC 1.70.010.
[31] Denile Ault (Eagle/Killer Whale, Dorsal Fin House), CIRI shareholder, Central Council of Tlingit and Haida Indian Tribes of Alaska member, *Opinion: We Can't Go Back–We Belong Here*, Anchorage Daily News (July 28, 2023), https://www.adn.com/opinions/2023/07/28/opinion-we-cant-go-back-we-belong-here/.
[32] *Johnson v. Grants Pass*, 72 F.4th 868 (9th Cir. 2023), *rev'd and remanded sub nom. Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024).
[33] *Id.* at 869.

and remanding the case.[34] Although the decision disagreed that that the federal Cruel and Unusual Punishment Clause restricted a city's abatement prohibited campsites as the Ninth Circuit had held, it explicitly recognized that "many substantive legal protections and provisions of the Constitution may have important roles to play when States and cities seek to enforce their laws against the homeless."[35] Chief among the remaining protections the Supreme Court cited was an individual's right to due process[36] and state law.[37] Below, Appellants take up those protections, under Alaska Constitutional jurisprudence, as to due process violations, cruel and unusual punishment, and unreasonable searches and seizures.

II. Anchorage's "prohibited campsite" prohibitions are properly analyzed by applying criminal law constitutional protections.

The Alaska Supreme Court employs a broad understanding of what constitutes a criminal offense under the Alaska Constitution. Notwithstanding that the enforcement mechanism wielded against Appellants is codified among civil offenses, it is property analyzed by applying constitutional protections rooted in criminal law.[38] This is required both because of Alaska's capacious recognition of

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[34] *Grants Pass v. Johnson*, 144 S. Ct. 2202, 2226 (2024).
[35] *Id.* at 2224.
[36] *See id.* at 2215 (discussing the limits the Due Process Clause imposes "on what governments in this country may declare to be criminal behavior and how they may go about enforcing their criminal laws").
[37] *See id.* at 2220 ("States and cities are free as well to add additional substantive protections.").
[38] The common law roots of the state's authority to regulate public nuisances are found in circumstances where "interference with [a] public right was so unreasonable that it was held to constitute a *criminal offense*." RESTATEMENT (SECOND) OF TORTS § 821B (1979) (emphasis added).

constitutional rights and because Anchorage's "prohibited campsite" prohibition turns on elements of criminal law enforcement.

A. The Alaska Constitution affords broad criminal law enforcement protections.

In *Baker v. City of Fairbanks*, the Alaska Supreme Court recognized that criminal offenses "include offenses which, even if incarceration is not a possible punishment, *still connote criminal conduct* in the traditional sense of the term."[39] It explicitly acknowledged that the Alaska Constitution provides greater protections than the United States Constitution.[40] Even an offence punishable by a heavy fine can qualify as criminal, because "[a] heavy enough fine might also indicate criminality because it can be taken as a gauge of the ethical and social judgments of the community."[41] The Supreme Court has applied this more expansive understanding of criminal law protections under the Alaska Constitution

[39] 471 P.2d 386, 402 (Alaska 1970) (concerning the right to a jury trial) (emphasis added).
[40] *Id.* at 401-02 ("While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court . . . we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.") (citing *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969)).
[41] *Id.* at 402 n.29.

to the right to assistance of counsel[42] and to the remainder of the Declaration of Rights enumerated in Article I of the Alaska Constitution.[43]

This recognition of the Alaska Constitution's broad protections has also been applied in civil law enforcement contexts. For example, "vagueness" challenges to civil statutes that prohibit conduct and involve "a civil enforcement action where a litigant may be at risk of losing an important right" are analyzed under a heightened, criminal-law standard.[44] Loss of precisely such important rights are at issue here. Accordingly, any claims the Municipality might make that its campsite abatement actions are strictly *civil* law enforcement—which, as explained below, would be inaccurate—would nevertheless be properly analyzed using the higher standards of criminal law constitutional protections.

B. Anchorage's "prohibited campsite" regime relies explicitly on the criminal code to determine whether a nuisance exists.

Before the Municipality notices an alleged campsite for abatement, it needs to determine that the site constitutes a public nuisance. The Code defines public nuisance to include "an area where one or more persons are camping on public land in violation of section 8.45.010 [Penal Code: Trespass], chapter 25.70 [Prohibited Conduct: Penalties], or any other provision of this Code."[45] That is, in

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[42] *Alexander v. City of Anchorage*, 490 P.2d 910, 913 (Alaska 1971).
[43] *Resek v. State*, 706 P.2d 288, 291 (Alaska 1985) (referencing the *Baker* definition of "criminal" as applying to all of Article I of the Alaska Constitution).
[44] *Dep't of Revenue v. Nabors Int'l Fin., Inc.*, 514 P.3d 893, 900 (Alaska 2022) (quoting *Williams v. State, Dep't of Revenue*, 895 P.2d 99, 105 (Alaska 1995)).
[45] AMC 15.20.020.B.15.

addition to determining that the location is one where one or more persons are "camping," the Municipality needs to determine persons are either: (1) committing the Class A misdemeanor crime of trespass; (2) engaging in any of the conduct subject to fines described in AMC 25.70; or (3) violating some other provision of the Code. As described further below, the latter two conditions are constitutionally infirm for their vagueness. Where the conditions defining a prohibited campsite are specific, they directly tie creation of a public nuisance to violation of the criminal code. In this case, the sparce administrative records do not even specify on which basis the Municipality determined that a nuisance existed. [Exc. 1, 17-18, 69-70]. But each possibility is tied to criminal law enforcement.

The first possible Municipal finding that could support abatement would be under the Code's provision that "[a] person commits the crime of criminal trespass if the person . . . [k]nowingly enters or remains on public premises or property, or in a public vehicle . . . when the premises, property, or vehicle is not open to the public."[46] The fundamental challenge this presents to Appellants is that—as established above and as conceded by the Municipality—there is no public land that is open to them where they can shelter themselves.

As to the second possible condition that could have underlaid the abatement notices here—committing a fineable offence as described in AMC 25.70—it is above all else too vague to have put Appellants on sufficient notice or protect them

[46] AMC 8.45.010.A.3.a.

from arbitrary enforcement, making it constitutionally infirm as explained further below. To the extent this condition can be read with sufficient specificity to be alleged against Appellants, it may be for camping on public land that is not "specifically designated for such use"[47] or camping in a park "in such areas and at such times" outside of what has been "designated by the director in a daily use permit."[48] In the instance of either possibly relevant violation, the alleged violation turns on persons being present somewhere not designated for their presence or their being somewhere without a suitable permit. In other words, the violation turns on criminal trespass.

The third possible condition—"violating any other provision of the Code"—is so sweeping as to be void for vagueness, as described further below.

In sum, the Municipality defines "prohibited camping" in such a way that, where it is not so vague as to be constitutionally unenforceable, it is inescapably based on criminal trespass allegations. This is true for any of the three bases on which the Municipality could have concluded that Appellants were engaged in prohibited camping.

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[47] AMC 25.70.040.A.1 [Prohibited activities generally] ("Except in areas specifically designated for such use in accordance with law, no person may engage in any of the following activities on municipal land: Camping.").

[48] AMC 25.70.060.J [Activities prohibited in parks] ("No person shall camp in a park except in such areas and at such times as designated by the director in a daily use permit issued pursuant to AMCR 25.10.007.").

C. Anchorage's "prohibited campsite" regime relies explicitly on the criminal code when abating noticed locations.

Not only does the Municipality rely on the criminal code when determining whether a "prohibited campsite" nuisance has been *created*, criminal sanctions are also built into abatement *enforcement*. The Code provides that at "the time removal is to begin, if any individuals are present . . . [t]he individuals shall be given at least 20 minutes to gather their personal property and disperse from the area."[49] Failure to abide by an order to disperse would constitute the crime of "disobey[ing] the lawful orders of any public officer."[50] It would also constitute the crime of trespass for "[k]nowingly enter[ing] or remain[ing] on public premises or property . . . after the person has been requested to leave by someone with the apparent authority to do so."[51] The threat built into abatement notices cannot be clearer: Either remove yourself and the belongings you require to sustain your life—notwithstanding that there is no legal alternative place to go—or your belongings will be seized and you will be subject to criminal sanction. Otherwise, the abatement notices would carry no force at all and could be readily ignored. This threat is in keeping with Appellants' experiences. [Exc. 24 ("If I do not abate my site, I am concerned that the Municipality will cite me for trespassing, arrest me, or take some other action to punish me.")].

[49] AMC 15.20.020.B.15.g.i.
[50] AMC 8.30.010.A.6.
[51] AMC 8.45.010.A.3.b.

D. The Municipality explicitly views abatement of campsites as an appropriate response to suspicions of criminal behavior.

Appellants need not speculate or argue in the abstract that the Municipality considers abatement of prohibited campsites a form of criminal law enforcement. The Municipality explicitly and repeatedly uses allegations of criminal activity as a justification for noticing locations for abatement—illustrating the city's pervasive use of abatements as a criminal sanction. The city's conflation of abatement with criminal law enforcement motivated the abatements at issue in this appeal, and remains unchanged.

For example, on July 24, 2024, the Mayor's Chief of Staff testified before the Anchorage Assembly that "we know that abatement is not a solution to the experience of homelessness. It's a tool that moves people around and it's, sort of, a tool in the public safety toolbox."[52] She described a particular location as "a top priority as we look at potential upcoming abatements, that's an area that has reached a level of public safety threat that we feel needs to be addressed. You know, high numbers and high levels of criminal activity."[53] Less than a week later, the Mayor herself reported that the city was using abatement as a tool to fight crime in a troubled area:

> The area had received numerous reports of criminal activity, including a shooting that resulted in a death and injury. And local businesses had reported increasing rates of theft and vandalism. We recognize

[52] Municipality of Anchorage Meetings, *Assembly Housing and Homelessness Committee*, YouTube (July 24, 2024), https://youtu.be/6PlCJz03bE4, at 01:01:33.
[53] *Id.* at 01:03:40.

> that abatement itself doesn't solve the problem of unsheltered homelessness. But it is a tool to break up dangerous areas . . . .[54]

The Mayor then described a recent, separate, multi-agency crime suppression effort that led to dozens of arrests and warrants served, including at the same location.[55] That the Municipality saw the need to "break up" the location *after* employing traditional law enforcement techniques indicates the extent to which it uses campsite abatements as a sweeping crime suppression tool, undifferentiating the presumed innocent from the alleged guilty. And on December 3, 2024, the Mayor explained that "we continue to use abatement as a tool to protect public safety when appropriate. For those who are breaking the law, we continue to be strongly committed to an appropriate law enforcement response."[56]

In short, the Municipality is committed to using campsite abatement as a tool to "break up" spaces that—even after employing traditional policing techniques—appear to the Municipality to present criminal law enforcement challenges. In so doing, the Municipality uses its abatement enforcement regime to criminally target and punish unhoused persons without the benefit of criminal proceedings, violating the principle that the government should not punish anyone who has not been found guilty beyond reasonable doubt. The Municipality's inability to marshal constitutionally permissible criminal investigation,

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[54] Municipality of Anchorage Meetings, *Assembly Regular - July 30, 2024*, YouTube (July 30, 2024), https://youtu.be/guEG0zKpDmE, at 00:37:53.
[55] *Id.*
[56] Municipality of Anchorage Meetings, *Assembly Regular - December 3, 2024*, YouTube (Dec. 3, 2024), https://youtu.be/ZwrG_ue3t78, at 00:30:28.

suppression, and enforcement techniques does not allow it to use nominally civil law enforcement tools without adhering to appropriate constitutional standards.

In sum, the Municipality grounds determinations that a "prohibited campsite" nuisance exists in unsupported assertions that criminal offenses have been committed. It invokes criminal law enforcement tools in abating locations of "prohibited campsites"—that is, when the pending threat of arrest hasn't caused people to move or abandon their property ahead of time. And the Municipality explicitly views campsite abatement as a criminal law enforcement tool.

III. The Municipality has codified an unconstitutional banishment regime.

The Municipality's bundle of laws governing "prohibited campsites" creates a *de facto* banishment regime, in which unhoused people are forced to choose between leaving the Municipality entirely or risking criminal punishment. This banishment regime is unconstitutional in three significant ways. First, it seeks to reestablish twentieth-century vagrancy laws, which have already been voided for vagueness. Second, it amounts to cruel and unusual punishment, as banishment is neither an accepted nor a proportionate form of punishment. Lastly, it infringes upon Appellants' fundamental liberty interests without furthering a compelling government interest using the least restrictive means.

A. The Municipality's banishment regime is unconstitutional for reestablishing anti-vagrancy laws already struck for vagueness.

Historically, vagrancy laws were used to "banish[] unwanted persons from the community."[57] These laws' indefinite terms functioned as "a convenient dumping ground for perceived social ills thought to have no other immediate solution,"[58] much as Anchorage appears to use its "prohibited campsite" code to respond to conditions it otherwise finds itself at a loss to respond to. In the landmark decision *Papachristou v. City of Jacksonville*, the United States Supreme Court found that Jacksonville, Florida, was using its anti-vagrancy law to suppress crime—just like Anchorage does—and held such laws void for vagueness in violation of people's right to due process.[59] The Court observed that "[t]he implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police."[60] Here, Anchorage's prohibited campsite code serves the same ends. By defining "sleeping or establishing a temporary place to

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[57] *Marks v. City of Anchorage*, 500 P.2d 644, 651 (Alaska 1972) (citing Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603, 613-37 (1956)).

[58] *Marks*, 500 P.2d at 652 (citing Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603, 631 (1956)).

[59] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

[60] The Court continued: "Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together." *Id.* at 170.

live" on public land as a punishable act of criminal trespass, the Code criminalizes the fundamental existence of unhoused, self-sheltering people in Anchorage.[61] Furthermore, as described above, the administration turns to these code provisions in an attempted end-run around traditional criminal law enforcement methods.

A criminal statute is so vague that it constitutes a violation of plaintiffs' procedural due process rights when it (1) fails to provide adequate notice of what conduct is prohibited and (2) encourages arbitrary or discriminatory enforcement.[62] As explained above, Anchorage's "prohibited campsite" code is properly analyzed through a criminal statute lens. Applying this two-part standard to the Code's prohibition against a certain form of "camping," it is unconstitutionally vague because it fails to put unhoused people on notice of what conduct is unlawful and it opens the door to arbitrary enforcement.

1. The Municipality's banishment regime fails to provide notice of how to conform one's conduct with the law.

Fair notice is an essential component of due process. The "purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her

[61] AMC 15.20.010; AMC 15.20.020.B.15.

[62] *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (holding that a loitering ordinance was impermissibly vague when it failed to clearly denote "what loitering is covered by the ordinance and what is not."); *Marks v. City of Anchorage*, 500 P.2d 644, 646 (Alaska 1972) ("A vague statute violates the due process clause both because it fails to give adequate notice to the ordinary citizen of what is prohibited and because its indefinite contours confer unbridled discretion on government officials and thereby raise the possibility of uneven and discriminatory enforcement.").

conduct to the law."[63] Thus, failing to clearly distinguish between "innocent conduct" and "conduct threatening harm" is sufficient grounds to void a law due to vagueness.[64] In *Desertrain v. City of Los Angeles*, the Ninth Circuit overturned a vehicle habitation ordinance when "there appear[ed] to be nothing [Plaintiffs] can do to avoid violating the statute short of discarding all of their possessions or their vehicles, or leaving Los Angeles entirely."[65] The same is true here.

The Municipal Code defines "camping" as "the use of space for the purpose of sleeping or establishing a temporary place to live."[66] As described above, this conduct becomes "*prohibited* camping" when it is done "on public land in violation of section 8.45.010, chapter 25.70, or any other provision of this Code."[67] As written, this provision broadly empowers the Municipality to dispossess self-sheltering persons of their property and to forcibly remove them from a targeted space, without communicating what they *can* do to "conform his or her conduct to the law."[68] As was held unconstitutional in *Desertrain*, there

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[63] *Morales*, 527 U.S. at 58; *see also R.C. v. State, Dep't of Health & Soc. Servs.*, 760 P.2d 501, 506 (Alaska 1988) ("[A] statute must give adequate notice of the conduct that is prohibited[.]") (quoting *Summers v. Anchorage*, 589 P.2d 863, 867 (Alaska 1979)).
[64] *Morales*, 527 U.S. at 57.
[65] *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1156 (9th Cir. 2014) (voiding an ordinance stating that no person shall use a vehicle "as living quarters either overnight, day-by-day, or otherwise").
[66] AMC 15.20.010.
[67] AMC 15.20.020.B.15.
[68] *Desertrain*, 754 F.3d at 1156.

appears to be nothing self-sheltering people in Anchorage can do to comply the law short of leaving Anchorage entirely.[69]

The Municipal Code's claim of authority to notice a campsite for abatement for violating either a sweeping table of finable offenses or "any other provision of this Code" is so broad as to fail to put persons on notice. While legislatures need not "delineate every single possible behavior" that may amount to a violation,[70] a statute must nonetheless give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited."[71] Here, the Code does not reasonably communicate to self-sheltering people what is prohibited.[72] Instead, it requires that they scour the entirety of the Municipal Code for possible code violations that might exist in the context of self-sheltering, notwithstanding that the Code has a section expressly dedicated to that very context—a section that, in its complexity, stands in sharp contrast to those regulating every other public nuisance.

The zone abatement notices in this case failed to indicate the precise reason for abatement. Instead, they cited the entire "prohibited campsite" Code

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[69] *Accord id.* at 1155-56 (voiding a vehicle habitation ordinance when the only ways plaintiffs could come into compliance with the law was to either "discard[] all their possessions" or "leave Los Angeles entirely.").
[70] *R.C. v. State, Dep't of Health & Soc. Servs.*, 760 P.2d 501, 506 (Alaska 1988).
[71] *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).
[72] The *Papachristou* was explicitly sensitive to the difficulty familiarizing oneself with every aspect of the law can be to the least advantaged in society: "The poor among us, the minorities, the average householder are . . . not alerted to the regulatory schemes of vagrancy laws; and . . . would have no understanding of their meaning and impact if they read them." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-63 (1972).

provision,[73] without indicating whether Appellants were deemed "in violation of section 8.45.010, chapter 25.70, any other provision of this Code,"[74] or any specific subsection of the above. Consequently, Appellants were never informed how their conduct was unlawful or how they could have brought themselves into conformity with the law: "Because the Municipality has not told me what I could have done to prevent the abatement, *I do not know what I could do to prevent any future abatements at any other sites*." [Ex. 23 (emphasis added)].

2. Because the law fails to communicate to unhoused people, in general, how they can "conform [their] conduct to the law,"[75] and because, as a consequence, the law was deployed against Appellants without informing them how they were in violation of, and what they could have done to comply with, the law—illustrating the infirmity—it is void for vagueness. The Municipality's banishment regime is prone to arbitrary or discriminatory enforcement against unhoused persons.

When statutes encourage "arbitrary or discriminatory enforcement," they are unconstitutionally vague.[76] The void-for-vagueness doctrine requires the "legislature to set reasonably clear guidelines for law enforcement officials and

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[73] Exc. 1 ("This zoned area is closed to camping . . . AMC 15.20.020.B.15.b.v."); Exc. 17, 18 ("This is not a legal area for storage of shelter . . . AMC 15.20.020B.15.").
[74] AMC 15.20.020.B.15.
[75] *Morales*, 527 U.S. at 58; *see also R.C.*, 760 P.2d at 506 (Alaska 1988) ("[A] statute must give adequate notice of the conduct that is prohibited.") (quoting *Summers v. Anchorage*, 589 P.2d 863, 867 (Alaska 1979)).
[76] *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1156 (9th Cir. 2014) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)); *Marks v. City of Anchorage*, 500 P.2d 644, 646 (Alaska 1972).

triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'"[77] The absence of such guidelines can establish that a law encourages arbitrary enforcement. As written, the Municipal Code provisions banning "prohibited camping" provide insufficient safeguards to protect against arbitrary or discriminatory enforcement against unhoused people.

At the time the challenged abatement notices were posted, the Code's "prohibited campsites" provisions included no guidance on what protections were in place to prevent arbitrarily enforcement. Indeed, at and around the same time that the challenged notices were posted, the Municipality also posted notices stating that long stretches of the Chester Creek Trail were "Closed to the Public – No camping!" [Exc. 19]. The Municipality appeared to believe that it had been delegated broad discretion to arbitrarily coax unhoused, self-sheltering people away from some areas of town, without stating why those locations were chosen or what authority it had to close the city's public lands.

Since then, the Municipality has articulated two sets of enforcement priorities, but they are insufficiently clear—or even consistent—enough to provide an adequate safeguard against arbitrary or discriminatory enforcement.[78] On April

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[77] *Anderson v. State*, 562 P.2d 351, 355 (Alaska 1977) (quoting *Smith v. Goguen*, 415 U.S. 566, 572-573 (1974)); *see also Lester v. Falk*, 934 F.2d 324 at *1 (9th Cir. 1991) ("The void-for-vagueness doctrine is concerned both with providing actual notice to individuals and with establishing minimal guidelines for law enforcement.").

[78] *Cf. Prado v. City of Berkeley*, No. 23-CV-04537-EMC, 2024 WL 3697037, at *18-19 (N.D. Cal. Aug. 6, 2024) (finding that the city failed to provide adequate notice where its notice of abatement was "internally contradictory").

29, 2024, the Municipality' executive branch adopted Operating Policy and Procedure 36-1. [Appx. 14-19]. Its broad enforcement criteria include conditions "in no particular order" such as: "moving vehicles and steep slopes;" "[q]uantities of garbage, debris, or waste;" and "[o]ther active health, ecological, or safety hazards." [Appx. 18-19]. It also singles out all of downtown Anchorage as an area subject to higher enforcement attention. [Appx. 18]. These criteria could conceivably be used to justify prioritizing any location where Appellants might endeavor to shelter themselves.

Muddying the waters, on May 21, 2024, the Assembly amended the relevant portion of Code itself to reflect *its* enforcement priorities—which differed substantively from the executive branch priorities. [Appx. 20-23]. It enumerated four priority conditions, in apparent order of priority: certain protected land uses; locations with over twenty-five structures; those proximate to a licensed shelter; and those proximate to other "prohibited campsites." [Appx. 20-21].

Together, these priorities are so broad that they could conceivably be interpreted to justify noticing any encampment in Anchorage. In doing so, they fail to provide substantive protection from arbitrary enforcement. For this reason, and because the Code fails to put people on notice as to how to conform their behavior to the law, the Municipality's "prohibited campsite" code is void for being so vague as to have violated Appellants' constitutional right to due process.

B. Banishment is cruel and unusual because it inhuman and barbarous, as well as disproportionate to the alleged offense.

Banishing the unhoused from the Municipality under threat of "criminal trespass" law enforcement amounts to cruel and unusual punishment under the Alaska Constitution.[79] Alaska's protections against such punishment are broader than their federal analog.[80] The U.S. Supreme Court's narrow holding in *Grants Pass* thus cannot dispose of the question presented here.[81] Alaska prohibits "punishments which are cruel and unusual in the sense that they are inhuman and barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice."[82] The Code's "prohibited campsite"

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[79] ALASKA CONST. Art. I, § 12. In contrast, tribal courts are free and independent sovereigns, with the independence to impose remedies and punishments appropriate to their circumstances (including the size of their communities and the relative (un)availability of law enforcement). *See* Halley Petersen, *Banishment of Non-Natives by Alaska Native Tribes: A Response to Alcoholism and Drug Addiction*, 35 Alaska L. Rev. 267, 269–71. These circumstances distinguish sovereign tribes from Anchorage, a home rule municipality of over 280,000 people with an established law enforcement agency.

[80] *See Fletcher v. State*, 532 P.3d 286, 308 (Alaska App. 2023) (addressing whether Alaska's Cruel and Unusual Punishment provision "requires greater procedural protections" than its federal analog and concluding that it does).

[81] The U.S. Supreme Court's decision in *City of Grants Pass, Oregon v. Johnson* was confined to whether "limited fines" or brief jail sentences were permitted. 144 S. Ct. 2202, 2204 (2024). The opinion did not directly reach the issue of banishment. *See id.* at 2243 (Sotomayor, J., dissenting) (identifying banishment as one of the "other legal issues" that could be implicated by ordinances like the one at issue in *Grants Pass*).

[82] *Green v. State*, 390 P.2d 433, 435 (Alaska 1964). There is little case law giving shape to what constitutes "inhuman and barbarous" punishment. However, Chief Justice Nesbett once observed in a dissent that "[c]ruelty implies something inhuman and barbarous." *Faulkner v. State*, 445 P.2d 815, 828 (Alaska 1968) (Nesbett, C.J., dissenting) (citing *Ex parte Kemmler*, 136 U.S. 436, 447 (1880)).

provisions—and the *de facto* banishment regime they create—constitute cruel and unusual punishment in both ways.

First, this banishment regime amounts to inhuman and barbarous treatment.[83] Punishments are "inhuman and barbarous" when they involve "torture or a lingering death."[84] Both forms of cruelty arise here, where the survival of unhoused people is at stake. The Municipality's current banishment regime results in the loss of the possessions that unhoused persons need to physically survive. [Exc. 24 ("I rely on my personal belongings—such as a tent, warm clothing, and pallets—to protect me from the elements and to provide a much safety and privacy as possible.")]. Moreover, the act of abating camps destroys the very social connections and relationships that individuals living outdoors need for their physical and mental wellbeing. [Exc. 24 ("I choose to live among other people who also have nowhere else to go for safety reasons and for community.")]. The Municipality itself has conceded that "living unsheltered requires a person to enter survival mode, [which] dramatically restricts a person's ability to meet their physical and mental needs." [Appx. 4 (AR No. 2023-188(S-1), As Amended, Approved June 6, 2023)].

Second, the Municipality's banishment regime is so disproportionate as to be "shocking to the sense of justice," because it punishes people for not having

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[83] *Green*, 390 P.2d at 435 (Alaska 1964); *Faulkner*, 445 P.2d at 828 (citing *Kemmler*, 136 U.S. at 447).
[84] *Kemmler*, 136 U.S. at 447.

housing or access to an indoor shelter bed. The Municipality neither provides sufficient alternatives to self-sheltering for people experiencing homelessness nor designates locations where people can shelter themselves without committing the crime of trespass or otherwise violating the Code. Any punishment is disproportionate when the person cannot avoid such behavior.[85]

Indeed, the Alaska Court of Appeals has held that complete banishment from a municipality is an "unnecessarily severe and restrictive" punishment in the context of probation.[86] Area restrictions on probationers must be defined "with specificity" and limited "so that it is not unnecessarily broad."[87] In *Edison v. State*, the Court of Appeals overturned a probation condition that banned the probationer from the town of Marshall. The Court reasoned that this condition was unduly restrictive because it lacked a clear nexus with his offense: namely, there was no "nexus between driving while intoxicated and the entire town of Marshall."[88] Here, the Municipality's banishment regime parallels that of *Edison*, as it operates to ban the Appellants from the entire Municipality of Anchorage without any clear connection to their alleged wrongdoing.

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[85] *Cf. Huff v. State*, 568 P.2d 1014, 1020 (Alaska 1977) (weighing the involuntary nature of the defendant's offense (namely, selling drugs in order to "feed his habit") when determining whether his punishment was "excessive").
[86] *Edison v. State*, 709 P.2d 510, 512 (Alaska App. 1985).
[87] *Oyoghok v. Municipality of Anchorage*, 641 P.2d 1267, 1270 (Alaska App. 1982).
[88] *Edison*, 709 P.2d at 511-12.

C. The Municipality's banishment regime unconstitutionally abridges Appellants' fundamental liberty interests.

By making it a crime of trespass for unhoused people to camp on any public land—including when they cannot secure indoor shelter suitable to their needs—the Municipality violates their fundamental liberty interests. Because Appellants' interests are fundamental, this Court should apply strict scrutiny and hold that the Municipality's banishment regime constitutes a facial violation of Appellants' constitutional rights.[89]

1. The Municipality's banishment regime violates Appellants' fundamental right to move about within, remain in, or dwell in Anchorage.

The fundamental concept of liberty includes constitutionally protected rights to travel, to move about, and to even to remain in public places.[90] It also

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[89] *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 125 (Alaska 2019) ("We have employed three standards under which claims of substantive due process violations may be reviewed: strict scrutiny, intermediate scrutiny, and rational basis review. Under strict scrutiny, when a law substantially burdens a fundamental right, the State must articulate a compelling state interest that justifies infringing the right and must demonstrate that no less restrictive means of advancing the state interest exists.").

[90] *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 264-65 (Alaska 2004) ("There is no question that . . . the right[] to move about . . . [is] fundamental. . . . [A]n individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a part of our heritage. Like the federal courts, we have also recognized a right both to interstate and intrastate travel. Accordingly, we assume that the right to intrastate travel is fundamental." (Alaska 2004) (citations and quotations omitted). While federal jurisprudence recognizes three bases for the right to travel, *see* Duane W. Schroeder, *The Right to Travel: In Search of a Constitutional Source*, 55 NEB. L. REV. 117 (1976) (collecting federal caselaw on the right to travel as implicit in the Privileges & Immunities Clause, Due Process Clause, and the Commerce Clause),

includes a constitutional right to dwell within one's state, and to move about within it.[91] This fundamental right is inescapably violated when a municipality's laws make it criminal trespass to shelter oneself on public land when insufficient housing and indoor shelter are available, or make it a public nuisance to take even modest steps to shelter oneself as protection from the elements. Because the Municipality's banishment regime infringes a fundamental right, it is appropriately analyzed by applying strict scrutiny.

As explained above, the Municipal Code defines "camping" and "prohibited camping" in such a manner that unhoused persons cannot establish even a modest "temporary place to live" within the Municipality's boundaries without fear of being charged with criminal trespass or being repeatedly threatened with the dispossession of the belongings they rely on to shelter and protect themselves. The Municipality violated the homeless Appellants' fundamental liberty interests by making it a crime for them to "move about,"[92] "remain"[93] or "peacefully . . . dwell"[94] anywhere in the Municipality when there were no suitable indoor spaces available to them.

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the Alaska Supreme Court recognizes this right as "an attribute of personal liberty," *Treacy*, 91 P.3d at 264.

[91] *United States v. Wheeler*, 254 U.S. 281, 293 (1920) (recognizing the fundamental freedom "peacefully *to dwell* within the limits of their respective states, [and] to move at will from place to place therein[.]") (emphasis added).

[92] *Treacy*, 91 P.3d at 264.

[93] *Id.* at 264.

[94] *Williams v. Fears*, 179 U.S. 270, 274 (1900).

2. The Municipality cannot meet its burden to establish that its banishment regime advances a compelling government interest and is the least restrictive means to further any such interest.

Because the Municipal Code's "prohibited campsite" provisions violate Appellants' fundamental rights, the Municipality must demonstrate that its policy satisfies strict scrutiny.[95] To do so, the Municipality must "articulate a compelling state interest that justifies infringing the right and [to] demonstrate that no less restrictive means of advancing the state interest exist."[96] It has not and cannot meet this burden. Accordingly, this Court should find that the Municipality's abatement regime—both facially and as applied—is unconstitutional.[97]

First, the Municipality cannot demonstrate a compelling interest in imposing criminal trespass proscriptions on every parcel of public land where Appellants might seek to reside, notwithstanding that the Municipality—its elected officials and its employees—are fully aware that Anchorage has suffered from a homelessness crisis for years. Not only has the Municipality failed to meet this burden, but it is inconceivable that it could: Again, its land-use decisions would banish Appellants from Anchorage, but banishment is thoroughly discredited.

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[95] *Doe*, 444 P.3d at 125.
[96] *Id.*
[97] Because the Municipality produced a such minimal administrative records, Appellants' arguments here are largely—but not exclusively—presented as facial challenges.

There is no "convenient dumping ground for perceived social ills thought to have no other immediate solution" available to the Municipality.[98]

Examining the reasons given in the administrative record for the specific abatement notices challenged here amply illustrates that the Municipality does not have compelling justifications for its actions. The Municipality cited a concert and an undisclosed lease provision as grounds for abatement. [Exc. 69, 70]. Such property interests cannot be considered sufficiently compelling as to justify this infringement upon the Appellants' fundamental liberty interests.[99]

Even if the Municipality could meet its burden to establish that it has a compelling interest in maintaining its banishment regime, or in enforcing its "prohibited campsite" provisions against Appellants specifically, it would then need to meet its burden to establish that noticing the relevant sites for abatement were the least restrictive means of furthering those interests. To the Appellants' knowledge, the Municipality has not considered, evaluated, and dismissed alternative, less-restrictive means to accomplish its asserted interests. The paltry administrative record does not reflect any such reasoning or determinations.

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[98] *Marks v. City of Anchorage*, 500 P.2d 644, 652 (Alaska 1972) (citing Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603, 631 (1956)).
[99] *Cf. Zaatari v. City of Austin*, 615 S.W.3d 172, 202 (Tex. App. 2019) ("The regulation of property use is not, in and of itself, a compelling interest.").

IV. The Municipality's abatement policy is unconstitutional for depriving people of their property without due process.

The constitutional infirmities of the Municipality's "prohibited campsite" public nuisance provisions are not limited to the banishment regime they establish. They also include lack of a pre-deprivation hearing and of adequate notice, violating due process. The *Grants Pass* majority noted that essential constitutional protections continue to exist for people experiencing homelessness, including in the context of "campsite" abatements.[100] Here, the Anchorage Municipal Code is unconstitutional because it permits the confiscation and destruction of unhoused people's property without providing an opportunity to be heard prior to the deprivation and without sufficient notice.[101]

A. The Municipality denied Appellants an opportunity to be heard by failing to provide a hearing prior to abatement.

Due process requires a "meaningful opportunity to be heard."[102] At a minimum, "[t]he government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to

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[100] "[M]any substantive legal protections and provisions of the Constitution may have important roles to play when States and cities seek to enforce their laws against the homeless." *Grants Pass v. Johnson*, 144 S. Ct. 2202, 2224 (2024); *see also id.* at 2215 (discussing the relevant Due Process considerations) and 2242-43 (Sotomayor, J., dissenting).

[101] *See Lavan v. City of Los Angeles*, 693 F.3d 1022, 1033 (9th Cir. 2012) (rejecting the contention that the Constitution creates "an exception to the requirements of due process for the belongings of homeless persons")

[102] *Frontier Saloon, Inc. v. Alcoholic Beverage Control Bd.*, 524 P.2d 657, 661 (Alaska 1974).

argue against the taking."[103] In Alaska, due process generally requires a hearing *before* the government deprives a person of a protected property interest.[104] This reflects the "basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions."[105] The governing presumption is that a pre-deprivation hearing must be provided. The only exception is if the government can prove that an "emergency situation[]" exists or that "public health, safety, or welfare require[s] summary action."[106] Such situations "must be truly unusual."[107] Here, the Municipal Code violates unhoused, self-sheltering people's due process rights by failing, in non-emergency situations, to provide a pre-deprivation hearing before seizing and destroying their property.

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[103] *Lavan*, 693 F.3d at 1032 (quoting *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008)).

[104] ALASKA CONST. Art. I, § 7. Alaska's pre-deprivation hearing requirement predates the U.S. Supreme Court's decision in *Mathews v. Eldridge*. *Compare Frontier Saloon, Inc. v. Alcoholic Beverage Control Bd.*, 524 P.2d 657, 661 (Alaska 1974) (requiring a pre-deprivation hearing absent an "emergency situation"), *with Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (articulating a three-part balancing test to determine what type of hearing is required). Since *Mathews*, Alaska has continued to apply its more protective standard. *See, e.g.*, *Brandner v. Providence Health & Servs.-Washington*, 394 P.3d 581, 589 (Alaska 2017) (noting that Alaska courts "have consistently held that before the state may deprive a person of a protected property interest there must be a hearing") (quoting *Graham v. State*, 633 P.2d 211, 216 (Alaska 1981)).

[105] *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

[106] *Brandner*, 394 P.3d at 589 (citations omitted).

[107] *State, Dep't of Nat. Res. v. Greenpeace, Inc.*, 96 P.3d 1056, 1065 (Alaska 2004) (quoting *Fuentes*, 407 U.S. at 90); s*ee also Shinault v. Hawks*, 782 F.3d 1053, 1058 (9th Cir. 2015) ("In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so." (quoting *Zinermon v. Burch*, 494 U.S. 113, 132 (1990)).

Unhoused people maintain an important, protected interest in their personal property. For example, in 2011, a Superior Court in *Engle v. Anchorage* noted that "[a] person's right to 'life, liberty, and property' is protected in the first section of the first article of the Alaska Constitution. . . . By definition [unhoused persons' interest in their personal property] qualifies as an interest of 'sufficient importance to warrant constitutional protection.'"[108] In keeping, the Alaska Statutes define "personal property" to include a person's money, goods, and chattels.[109] As such, the tents, clothing, food, tarps, mattresses, and other possessions itemized in Appellants' Notices of Intent to Appeal constitute protected property.

Despite this protected property interest, however, the Municipal Code fails to provide a pre-deprivation hearing for unsheltered, unhoused persons like Appellants. Instead, the Code contains convoluted provisions allowing, on the one hand, (a) thirty days to file an appeal once a site is noticed for abatement, after which a hearing can be scheduled,[110] while also allowing, on the other hand, (b) the Municipality to seize and destroy targeted persons' possessions after just ten days.[111] In an apparent—but insufficient—attempt to overcome the paradox this

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[108] *Engle v. Municipality of Anchorage*, No. 3AN-10-7047 Cl at *19 (Alaska Super. Ct. Jan. 4, 2011) (quoting Frontier Saloon, Inc. v. Alcoholic Beverage Control Bd., 524 P.2d 657, 659 (Alaska 1974).

[109] AS 01.10.060 ("'[P]ersonal property' includes money, goods, chattels, things in action, and evidences of debt").

[110] AMC 15.20.020.B.15.e.

[111] AMC 15.20.020.B.15.b.v. ("The municipality may post a zone or campsite area with notice stating *all personal property in or around the posted zone at the end of ten days of the date and time the notice is posted may be removed and disposed of*

creates, the Code also provides (c) a means to obligate the Municipality to store one's property instead of destroying it by informing the Municipality, before the tenth day, of an *intent* to appeal the nuisance determination by the thirtieth day.[112] However, even if an appeal or intent to appeal is timely filed, targeted persons cannot be heard or raise objections prior to the seizure of their property. And some may have their property destroyed instead of stored even while the time to file an appeal continues tolling, because the Code allows the city to remove and destroy property before the 30-day appeal period elapses.[113]

In the present appeals, the Municipality has provided no evidence whatsoever of an emergency or public health, safety, or welfare issue that necessitated summary abatement. Instead, the Municipality's records indicate the existence of conflicting rental and lease agreements for the locations at issue. [Exc. 69, 70]. Neither of these amount to a public health or safety issue, or an emergency.[114] Absent any showing that an exception to the pre-deprivation hearing requirement applies, the Municipality has an obligation to provide a pre-deprivation hearing to unhoused people prior to abating their site. As it stands, the

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as waste, unless sooner claimed or disposal authorized by the owner.") (emphasis added).

[112] AMC 15.20.020.B.15.e.

[113] AMC 15.20.020.B.15.b.v.

[114] *Cf. State, Dep't of Nat. Res. v. Greenpeace, Inc.*, 96 P.3d 1056, 1065 (Alaska 2004*)* (collecting cases in which the US Supreme Court allowed for summary action, such as "to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.").

Municipal Code fails to meet this obligation. The Court should find that the Municipality violated the Appellants' due process rights.

B. Ten days is inadequate notice before depriving people of a significant property interest.

Before the government deprives someone of their property, it must provide sufficient opportunity to challenge the threatened deprivation.[115] The three-part balancing test articulated in *Mathews v. Eldridge* determines whether sufficient time has been afforded to someone accused of creating a nuisance subject to abatement.[116] This fact-specific test weighs (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used, and the value of additional safeguards; and (3) the government's interest, including the burden of additional procedural requirements.[117] Given the significant property interest unhoused Appellants maintain in their personal possessions[118] and the value a longer notice period would afford them, this court should hold that ten days is

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[115] *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that "a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it."); *see also Lavan v. City of Los Angeles*, 693 F.3d 1022, 1032 (9th Cir. 2012) ("[D]ue process requires law enforcement 'to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return.'") (quoting *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999)).

[116] *Heitz v. State, Dep't of Health & Soc. Servs.*, 215 P.3d 302, 307 (Alaska 2009) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

[117] *Id.*

[118] *See* Exc. 24 ("I rely on my personal belongings . . . to protect me from the elements and to provide as much safety and privacy as possible. If I am forced to move from my campsite and the Municipality takes my belongings—even if the Municipality stores instead of destroys my belongings—it will be even more difficult for me to stay warm, dry, and safe.").

inadequate notice. Although further discovery might be useful in demonstrating this point,[119] the inadequacy of the Municipality's notice period is apparent from the existing factual record.

In *Engle*, the Superior Court held that five days was an insufficient notice period.[120] First, the court reasoned that "the private interest and risk of harm are both high," given that "homeless camps often house all of the worldly belongings of the individuals who live in them."[121] At the time of *Engle*, the Municipality did

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[119] For example, cases in other jurisdictions have considered the adequacy of the storage options provided by the government when determining whether their procedures comported with due process. Further discovery here would be necessary to determine whether the Municipality's notice was sufficient in light of the efficacy of its storage system. *Compare People of City of Los Angeles Who Are Un-Housed v. Garcetti*, No. LACV2106003DOCKES, 2023 WL 8166940, at *16 (C.D. Cal. Nov. 21, 2023) (holding that storage options were insufficient where the storage facility was 17 miles away and unhoused campers could not "feasibly make the trip to retrieve their belongings" without risking their safety by "walk[ing] along unprotected freeways and highways to travel across the city") *with Sullivan v. City of Berkeley*, 383 F. Supp. 3d 976, 983 (N.D. Cal. 2019) (holding that storage option was not facially insufficient where the storage facility was accessible by public transit). Moreover, the only way for unhoused persons to retrieve their items here was "by calling 907-343-4721." [record cite] This method of retrieval has been recognized as being inaccessible to many unhoused persons who do not have consistent access to phones. *Cf. Sullivan*, 383 F. Supp. 3d at 983 (considering whether unhoused campers needed access to a phone in order to recover stored items in order to determine the constitutionality of the storage scheme); *see also People of City of Los Angeles Who Are Un-Housed* at *16 ("The City's failure to ensure that its employees provide an effective way for the unhoused to recover confiscated property creates a significant risk that the homeless are erroneously and permanently deprived of their private property."). Appellants assert that discovery would show that when one Appellant attempted to retrieve her property through the method provided by the Municipality, it proved ineffective until counsel directly intervened on her behalf.

[120] No. 3AN-10-7047 Cl at *19–20 (Alaska Super. Ct. Jan. 4, 2011). The *Engle* court notably "decline[d] to dictate an appropriate time frame." *Id.* at 15.

[121] *Id.* at *19-20.

not offer an option of storing persons' belongings.[122] All abated property was "disposed of as waste." Second, the *Engle* court noted that increasing the notice period would reduce the risk of erroneous deprivation by giving Plaintiffs time to find an alternative place to live, including, potentially, indoors.[123] Finally, third, the *Engle* court noted that an increased notice period would not impose a significant burden on the Municipality, given that other Code sections provided longer periods before seizing or inferring abandonment of property.[124] "[A]ny inconvenience that the Municipality faces in waiting to clear out the homeless camps is outweighed by the danger to Plaintiffs of erroneous deprivation."[125] Here, the *Mathews* factors similarly require finding that ten-days' notice is constitutionally inadequate.

First, unhoused people maintain a significant property interest in their personal possessions. In the years since *Engle*, courts have applied great weight to unhoused people's interest in their personal property,[126] given that an unhoused plaintiff "may not survive without some of the essential property"[127] confiscated

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[122] *Id.* at *15 (describing the abatement notices as stating that "any personal property remaining is abandoned and shall be disposed of as waste").
[123] *Id.* at *20 ("Providing Plaintiffs with a longer notice period would significantly reduce the risk of erroneous deprivation" because "[a] longer notice period would enable Plaintiffs to gather their belongings and find another place to live.").
[124] *Id.*
[125] *Id.*
[126] *See e.g., Davis v. Bissen*, 545 P.3d 557, 572 (Haw. 2024) (recognizing "a 'significant' privacy interest in the plaintiffs' right to maintain control over the tents and vehicles that served as their homes").
[127] *Mitchell v. City of Los Angeles*, No. CV1601750SJOGJSX, 2016 WL 11519288, at *7 (C.D. Cal. Apr. 13, 2016).

by the state and it is "generally all he owns."[128] Appellants here had a significant private interest in their property—including tents, mattresses, and camping gear—that was confiscated or threatened to be confiscated by the Municipality. [Exc. 22-66 (Appellants' affidavits discussing the importance of their personal possessions)]. Although the Municipality now stores abated property in some circumstances, the default presumption of ten-day "zone" abatement like the one at issue in the present appeals is that property will be "disposed of as waste" unless an appeal is filed before the tenth day or the person has filed a notice of intent to appeal with the Municipality.[129] This is inadequate for several reasons. First, ten days may prove inadequate for an unhoused person without ready access to communication technology to contact the Municipality. It may also prove inadequate to secure representation if it is desired. And, with or without counsel, it may simply prove inadequate time to weigh one's options, including to determine whether previously unknown indoor housing or shelter options are available.

Second, ten-days' notice is insufficient to reduce the risk of an erroneous deprivation. For example, ten days proved inadequate time for Appellants to find

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[128] *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1559 (S.D. Fla. 1992); *see also De-Occupy Honolulu v. City & Cnty. of Honolulu*, No. CIV. 12-00668 JMS, 2013 WL 2285100, at *6 (D. Haw. May 21, 2013) ("[A] strong private interest exists in Plaintiffs' continued ownership of their possessions, especially given that the possessions impounded under Article 19 may be everything that a homeless individual owns.").

[129] AMC 15.20.020.B.15.e.

an alternative place to live.[130] As noted above, the Municipality concedes that Anchorage is suffering from a long-standing affordable housing shortage. [Appx. 12 (Assembly Resolution No. 2023-433, approved and adopted Dec. 19, 2023)]. And, as the Municipality concedes, there were no available shelter beds at the time they posted the notices at issue here.[131] Consequently, the Appellants had no choice but to remain outdoors. As affirmed in Appellants' Notices of Intent to Appeal, "I do not have anywhere indoors to sleep, which is why I am camping in the zone abatement area." [Exc. 4].

Lastly, absent evidence to the contrary, there is no reason to believe that an increased notice period in the context of abatement would be detrimental to the Municipality's interests. As the Alaska Supreme Court has noted, "notice requirements impose little fiscal or administrative burden upon government agencies."[132] Indeed, the circumstances for the challenged abatements provided in the agency record were entirely within the Municipality's control. [Exc. 69-70]. The Municipality appears to have voluntarily entered into a contract for the

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[130] Exc. 23 ("The Municipality has not informed me of where I should go after leaving my campsite. I am not aware of any indoor shelter beds that are available right now in the Municipality. No one from the Municipality has offered me any indoor shelter or housing options where I could safely sleep or store my belongings. I am not sure where the Municipality wants me to go.").
[131] Opp. to Mot. for Trial de Novo (dated Nov. 14, 2023) at 4 ("[T]he undersigned concedes adequate shelter space did not exist at the time of either abatement.").
[132] *Paula E. v. State, Dep't of Health & Soc. Servs., Off. of Children's Servs.*, 276 P.3d 422, 433 (Alaska 2012); *see also Engle*, No. 3AN-10-7047 Cl at *20 ("[T]here is no evidence that increasing the notice period would impose a significant administrative burden on the Municipality.").

concert at Cuddy Park, despite knowing that people were self-sheltering in the immediate vicinity. Similarly, the Municipality had knowledge of the communities living at Davis Park and the Snowdump Site, and yet—apparently arbitrarily—waited until June to cite a lease provision as reason to abate. In each instance, the decision of whether and when to post the site for abatement was within the Municipality's control. The Municipality could have easily created a longer notice period in both instances, without impairing its interests, by simply scheduling the notice accordingly.

Mathews thus requires holding that the ten-day notice provided by the Municipal Code is constitutionally inadequate. Unhoused people maintain a significant private interest in their personal property at encampments, which often amounts to "all [their] worldly belongings."[133] This interest—compounded by the risk of an erroneous property deprivation due to a short notice period—outweighs "any inconvenience that the Municipality faces in waiting to clear out the homeless camps."[134]

V. The Municipality's "prohibited campsite" code threatens to seize Appellants' property without a warrant

Determining the reasonableness of the government's interference with unhoused persons' unabandoned property requires a detailed, fact-based

[133] *Engle*, No. 3AN-10-7047 Cl at *19.
[134] *Id.* at 20.

inquiry.[135] This includes weighing the governmental interest at stake against the individual's property interest.[136] As written, the Alaska Constitution is more protective than the federal Constitution as to the reasonableness of a search or seizure. Whereas both documents protect the right of the people to be "secure in their persons, houses, papers, and effects,"[137] Alaska's constitution goes further, specifically expanding the protected category of "houses" to encompass "houses and other property."[138] In the context of "prohibited camping," the government has an especially important responsibility to protect access to personal belongings, as persons are unhoused because of, in part, choices the government itself made that contributed to a housing and homelessness crisis.

A constitutionally protected seizure of a person's property occurs "where there is some meaningful interference with an individual's possessory interest in that property."[139] The Ninth Circuit law holds that protected seizure of property

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[135] Reasonableness is analyzed by evaluating the totality of the circumstances. *See Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure").
[136] *See, e.g., San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005) ("To determine whether the [given seizure] was reasonable, we balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.") (internal quotation marks omitted) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).
[137] U.S. CONST. Amend. V, XIV.
[138] ALASKA CONST. Art. I, §14. The Alaska Statutes define "personal property" to include "money, goods, chattels, things in action, and evidences of debt[.]" AS 01.10.060(a)(9).
[139] *Soldal v. Cook County II.*, 506 U.S. 56, 63 (1992).

includes the *destruction* of property.[140] This applies specifically to the seizure of homeless persons' personal property.[141] In *Lavan v. Los Angeles*, the court reviewed a preliminary injunction prohibiting Los Angeles from seizing, without notice, homeless persons' property, except under certain conditions. The court held that "by seizing and destroying Appellees' unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with Appellees' possessory interests in that property. No more is necessary to trigger the Fourth Amendment's reasonableness requirement."[142] It added that "even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable."[143]

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[140] *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994), *as amended on denial of reh'g and reh'g en banc* (Nov. 23, 1994), and *overruled on other grounds by Robinson v. Solano Cty.*, 278 F.3d 1007 (9th Cir. 2002) ("The destruction of property is 'meaningful interference' constituting a seizure under the Fourth Amendment.") (citing *U.S. v. Jacobsen*, 466 U.S. 109, 124-25 (1984) (holding that destruction of property "unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'"); and, *Bonds v. Cox*, 20 F.3d 697, 701-02 (6th Cir. 1994)).

[141] *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012) ("[B]y seizing and destroying Appellees' unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with Appellees' possessory interest in that property. No more is required to trigger the Fourth Amendment's reasonableness requirement.").

[142] *Id.* at 1030.

[143] *Id.* at 1030 (quoting *U.S. v. Jacobsen*, 466 U.S. 109, 112 (1984) ("[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.")).

Although the complete lack of notice in *Lavan* distinguishes it from noticed zone abatements in Anchorage, the destruction of homeless persons' only remaining earthly possessions is equally egregious and unreasonable here. As the *Lavan* noted, personal possessions are especially important to the unhoused: "For many of us, the loss of our personal effects may pose a minor inconvenience. However, . . . the loss can be devastating for the homeless."[144] Also, while the *Lavan* court contemplated the loss of "effects" for someone experiencing homelessness—applying only federal protections—Anchorage's protections are meaningfully different, given their specific, related application for "houses and other property"—the very type of property that is of vital interest to unhoused persons sheltering themselves for lack of suitable alternatives.

To justify its seizure as reasonable, the Municipality would also have to demonstrate a compelling governmental interest that is furthered by destroying instead of storing "nuisance" creating property altogether. In *Schneider v. County of San Diego*, the Ninth Circuit considered a San Diego practice of dismantling or destroying vehicles determined to constitute a public nuisance.[145] The court determined that "[o]nce the vehicles were removed from the property the nuisance

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[144] *Id.* at 1032-33 (citing *Pottinger v. City of Miami,* 810 F. Supp. 1551, 1559 (S.D. Fla. 1992)). The *Lavan* court recognized that property defined as a "nuisances" was nevertheless subject to constitutional protection: "Violation of a City ordinance does not vitiate the Fourth Amendment's protection of one's property. Were it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment." *Id.* at 1029.

[145] 28 F.3d 89 (9th Cir. 1984).

abatement was complete" while the county code did not "authorize the destruction of vehicles."[146] Although the court's decision on this point turned on the misapplication of the county code covering public nuisances, its determination reflects the principle that each step of the government's action needs to be analyzed for whether its encroachment on a fundamental right is the least restrictive means to further a compelling interest.[147]

Under the broad protections of the Alaska Constitution and under *Lavan*, then, the Appellants' personal property seizure implicated their constitutionally protected right to judicial warrant protection against government seizure and destruction of their property. It is undisputed that the Municipality did not provide those protections, nor does the record reflect that it has shown any compelling governmental interest. Thus, the Court should hold that the Municipality violated the Appellants' Fourth Amendment rights.

CONCLUSION

As Appellants have demonstrated, the Municipality of Anchorage's "prohibited campsite" regime is unconstitutional, both facially and as applied to Appellants in summer 2023. It violates their right to Due Process—specifically for being void for vagueness, for failing to provide an opportunity to be heard prior to

[146] *Id.* at 93, *as amended on denial of reh'g and reh'g en banc* (Oct. 11, 1994).
[147] *See, e.g., San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 977-78 (9th Cir. 2005) (holding the destruction of property impermissible "when that destruction is unnecessary—*i.e.,* when less intrusive, or less destructive, alternatives exist.").

depriving them of their property, and for depriving them of their liberty without satisfying strict scrutiny. It violates their right to be free from Cruel and Unusual Punishment, specifically by punishing them in an inhuman and barbarous manner, and disproportionately to their alleged offenses. And it violates their right to be free from Unreasonable Searches and Seizures. Given the sweep of the "prohibited campsite" regime and its effects on Appellants' very existence in Anchorage, any one constitutional infirmity in the Municipality's "prohibited campsite" regime renders it invalid. For this reason, this Court should side with Appellants and declare that the Municipality of Anchorage's "prohibited campsite" regime is unconstitutional and unenforceable.

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