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NEW HAMPSHIRE LEGAL ASSISTANCE

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July 1, 2024

Manchester Board of Mayor and Aldermen
City of Manchester
Office of the City Clerk
One City Hall Plaza
Manchester, NH 03101

Re: Section 130.13(B) of Manchester's City Ordinances, and Response to *City of Grants Pass v. Johnson*

Dear Mayor Ruais and the members of the Manchester Board of Mayor and Aldermen:

We write on behalf of the ACLU of New Hampshire ("ACLU-NH")—a non-profit organization working to protect civil liberties throughout New Hampshire for over fifty years—and New Hampshire Legal Assistance—a nonprofit law firm working to make justice a reality for and with people who experience economic hardship that threatens their basic human needs.

In this weekend's *Union Leader*, it was reported that Mayor Jay Ruais stated that "he will ask aldermen at their meeting Tuesday [July 2, 2024] to amend the city ordinance to ban camping and 'make our streets safe, clean and passable.'"[1] Similarly, according to *WMUR*, Mayor Ruais said that he "will be requesting the board [to] vote to strike Section (B) from City Ordinance 130.13 to ban camping and otherwise make our streets safe, clean and passable."[2] These statements are in response to the United States Supreme Court's recent decision holding that an Oregon city's ordinances restricting camping in public spaces did not violate the Eighth Amendment's Cruel and Unusual Punishments Clause. *See City of Grants Pass v. Johnson*, No. 23-175, 2024 U.S. LEXIS 2881 (U.S. June 28, 2024).

For the reasons below, we strongly encourage the Board to ***not*** make any changes to Section 130.13(B) of Manchester's City Ordinances in response to this decision and, instead, to invest in community solutions like low-barrier shelter space—not civil and criminal enforcement—to address the needs of the unhoused.

[1] *See* Roberta Baker, "Manchester, state officials react to Supreme Court decisions allowing local bans on homeless encampments," *Union Leader* (June 29, 2024), https://www.unionleader.com/news/safety/manchester-state-officials-react-to-supreme-court-decisions-allowing-local-bans-on-homeless-encampments/article_58f9d984-3579-11ef-a8f6-bb0aab393cff.html.

[2] *See* Imani Fleming, "New Hampshire homelessness advocates decry Supreme Court ruling," *WMUR* (June 28, 2024), https://www.wmur.com/article/new-hampshire-homelessness-supreme-court-62824/61456776.

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Indeed, cities and towns have a basic duty to provide local welfare. As RSA 165:1, I states: "Whenever a person in any town is poor and unable to support himself, he shall be relieved and maintained by the overseers of public welfare of such town, whether or not he has a residence there." This is a broad mandate, and Manchester has taken many positive steps towards this obligation—including the establishment of the 39 Beech Street Shelter—that would be undone by the removal of Section 130.13(B).

First, Section 130.13(B) of Manchester's City Ordinances entitled "camping in public places" contains vital protections for Manchester's unhoused community. In 2021, Manchester commendably enacted Section 130.13(B). Under Section (A) of the ordinance, "[i]t shall be unlawful for any person to use or cause to be used any of the streets, sidewalks, square or any other public place, excepting parks as governed by Chapter 96, as a camping place absent prior written permission from the Board of Mayor and Aldermen or its designee." However, Section (B) of the ordinance states the following:

> The Manchester Police shall enforce this camping section only when the individual is on public property and there is an *available overnight shelter*. The term AVAILABLE OVERNIGHT SHELTER shall mean that the person can, at the time of citation, go to *a local homeless shelter*, that said shelter has an available overnight space for the individual at no charge to the person, that said available overnight space will be available to that person upon their arrival and that the person is not barred for any reason including but not limited to bail conditions, protective orders, trespass orders, rules of the shelter, policies of the shelter, intoxication or impairment from going to the local homeless shelter. No person shall be cited unless and until a police officer receives confirmation of available overnight shelter as defined above, and the person has been advised that overnight shelter is available, warned that they will be cited should they not go to the available overnight shelter and continue to camp, and they have been given a reasonable opportunity to comply with the request ….

(emphasis added).

In other words, Section (B) of this ordinance recognizes the humanity of unhoused individuals and provides important protections by barring enforcement of its anti-camping provisions unless there is an "available overnight shelter." The Board should be proud of this language. However, were the Board to remove these protections in Section (B), the Board would be sanctioning the eviction and criminalization of unhoused individuals where there is no adequate shelter space available. To do so in the absence of adequate shelter space would be cruel.

Second, independent of the United States Supreme Court's Eighth Amendment analysis in *Grants Pass*, the City should be aware that any local efforts to criminalize the unhoused may still violate the New Hampshire Constitution. It should be noted that, in *Higgins et al v. City of Manchester*, the plaintiffs there sought to end a proposed eviction of unhoused individuals at Pine and Manchester Streets and specifically raised a claim under Part I, Article 33 of the New Hampshire Constitution that bans "cruel or unusual punishment." The Superior Court made clear that it, "*[i]f there were no safe alternatives available*, the Court would agree

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that *forced removal of the encampment would likely violate* ***the State*** and federal *constitutional rights of the people residing in the encampment*."[3] Put another way, while the Superior Court declined to issue an injunction because there were "safe alternatives available"—namely, the overnight Cashin Center—the Superior Court was clear that Part I, Article 33 likely prevented the removal of unhoused individuals absent "safe alternatives available." These "safe alternatives available" exist in Section 130.13(B) as a safe harbor and provide another basis for the Board to leave this Section intact.

Indeed, while the New Hampshire Supreme Court has not yet determined whether Part I, Article 33 affords greater protection than the Eighth Amendment, it has assumed, without deciding, that Article 33 is broader than the Eighth Amendment.[4] There is, in fact, reason to believe that Article 33 provides greater protections than what is afforded under the Eighth Amendment. Courts in multiple jurisdictions have attributed significance to language analogous to Article 33, including its use of the disjunctive which indicates a prohibition on two types of punishments: those that are cruel and those that are unusual. The Eighth Amendment's use of the conjunctive indicates that it prohibits only one category of punishment: those that are cruel and unusual. *See People v. Carmony*, 127 Cal. App. 4th 1066, 1085 (Ct. App. 2005) (describing difference between "or" and "and" as "purposeful and substantive, rather than merely semantic"); *Armstrong v. Harris*, 773 So. 2d 7, 17 (Fla. 2000) ("used of the word 'or' instead of 'and' in the Clause indicates that the framers [of the Florida Constitution] intended that both alternatives (i.e. 'cruel' and 'unusual') were to be embraced individually and disjunctively within the Clause's proscription"); *State v. Mitchell*, 577 N.W.2d 481, 488, 490 (Minn. 1998) (describing difference in wording as "not trivial"); People v. Bullock, 485 N.W.2d 866, 872 (Mich. 1992) ("[T]he Michigan provision prohibits 'cruel or unusual' punishments, while the Eighth Amendment bars only punishments that are both 'cruel and unusual.' This textual difference does not appear to be accidental or inadvertent."). As a matter of plain English, as well as the New Hampshire Supreme Court's prior precedents,[5] there can be little question that the disjunctive "or" is distinct from the conjunctive "and"; this distinction matters and must be given meaning. *See Hale v. Everett*, 53 N.H. 9, 125 (1868) ("In written constitutions, the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated.") (internal quotations omitted). This linguistic distinction, without more, would provide a basis for the New Hampshire Supreme Court to depart from analogous United States Supreme Court decisions

[3] *See Higgins v. City of Manchester*, No. 216-2023-cv-31, at *3-4 (Hillsborough Cty. Super. Ct. Jan. 17, 2023) (Kissinger, J.) (emphasis added), *available at* https://www.aclu-nh.org/sites/default/files/field_documents/court_order_1-17-2023_10.31.29_7541904_0d8bae69-d35a-4917-b097-6588b6ae8785.pdf.

[4] *See State v. Addison*, 165 N.H. 381, 565 (2013) ("The defendant argues that because Article 33 prohibits punishments that are 'cruel or unusual,' we ought to interpret it as affording greater protection than the Eighth Amendment's prohibition against punishments that are 'cruel and unusual' …. We need not decide this issue because, even assuming Part I, Article 33 affords greater protection than does the Eighth Amendment, application of settled principles for construing our State Constitution leads us to reject the defendant's facial challenge under Part I, Article 33.").

[5] *See, e.g.*, *In re Hoyt*, 143 N.H. 533, 536 (1999) ("The statute's use of the disjunctive term 'or' manifests an intent that either provision be available as a basis for license qualification."); *Unit Owners Ass'n of Summit Vista Lot 8 Condo. v. Miller*, 141 N.H. 39, 45 (1996) ("We find that the use of the disjunctive 'or' manifests a clear intent to award multiple damages for either knowing or willful acts."); *State v. Wong*, 125 N.H. 610, 618 (1984) ("The legislature's use of the disjunctive 'or' in the body of the negligent homicide statute to distinguish section I and section II of the statute, RSA 630:3, evinces a clear intent to require proof of either section I or section II of the statute in order to sustain a conviction of negligent homicide.")

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interpreting the Eighth Amendment. And since the Federal Constitution, including much of the Bill of Rights, was modeled on the Massachusetts Constitution (which, itself, was a model for the New Hampshire Constitution)—*see, e.g.*, *Commonwealth v. Upton*, 476 N.E.2d 548, 555 (Mass. 1985); *Opinion of the Justices (Tax Plan Referendum)*, 143 N.H. 429, 437 (1999)—we may infer that "or" was changed to "and" in the Eighth Amendment based on a conscious choice to require a greater showing before a punishment could be found unconstitutional at the federal level.

Lastly, as the City considers any future actions with respect to the unhoused, it should be mindful that we cannot arrest our way out of homelessness and poverty. Responding to homelessness with police and jails does nothing to solve the homelessness crisis and rather only fuels mass incarceration, keeping people in an endless cycle of poverty, and institutionalization. Rather than evicting people from public places, there should be—consistent with RSA 165:1, I—a renewed focus on affordable housing and low-barrier shelters and access to healthcare, and other services, instead of using criminal punishment to try to push people out of sight. The unfortunate truth is that so many of us are just one bad circumstance away from losing our homes and finding ourselves in a very similar position to the hundreds of thousands of people forced to sleep outside each night. Housing costs in Manchester have skyrocketed while wages have not kept pace.[6] We are also facing extreme housing shortages.[7] As a result, protecting unhoused people's rights and adopting effective approaches to reducing and preventing homelessness is something we should all be invested in.

Whatever the United States Supreme Court may say about the Eighth Amendment, elected officials have always had a choice. They can decide to invest in solutions—like safe, long-term housing and low-barrier shelters, as well as wrap-around services and voluntary mental health and substance use treatment—which will increase people's chances of obtaining employment and housing. And the *Grants Pass* decision also does not strip unhoused people of other constitutional protections. For example, cities are still constitutionally prohibited from seizing and destroying unhoused people's property without adequate due process or charging excessive fines.

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[6] "In May 2024, the median listing home price in Manchester, NH was $425K, *trending up 14.1% year-over-year*. The median listing home price per square foot was $260. The median home sold price was $400K." *See* https://www.realtor.com/realestateandhomes-search/Manchester_NH/overview (emphasis added). Meanwhile, average household income in Manchester has only risen *6.7% since last year*. *See* https://www.point2homes.com/US/Neighborhood/NH/Manchester-Demographics.html (emphasis added).

[7] *See* Fred Kocher, "NH Business: Will a boatload of housing proposals in NH Legislature help fix NH's affordable housing crisis?" *WMUR* (Feb. 25, 2024), https://www.wmur.com/article/nh-business-will-a-boatload-of-housing-proposals-in-nh-legislature-help-fix-nh-s-affordable-housing-shortage-crisis/46955705# ("As to fix the state's housing shortage, which has now turned into a crisis, it will take 23,670 new, affordable homes necessary to meet economic needs and 90,000 new housing units are needed by 2040.").

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Thank you for your consideration.

Best,

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