KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Yeager v. City of Seattle, W.D.Wash., December 17, 2020

920 F.3d 584
United States Court of Appeals, Ninth Circuit.

Robert MARTIN; Lawrence Lee Smith; Robert Anderson; Janet F. Bell; Pamela S. Hawkes; and Basil E. Humphrey, Plaintiffs-Appellants,
v.
CITY OF BOISE, Defendant-Appellee.

No. 15-35845
|
Argued and Submitted July 13, 2017 Portland, Oregon
|
Filed April 1, 2019

**Synopsis**

**Background:** Homeless persons brought § 1983 action challenging city's public camping ordinance on Eighth Amendment grounds. The United States District Court for the District of Idaho, Ronald E. Bush, United States Magistrate Judge, 834 F.Supp.2d 1103, entered summary judgment in defendants' favor, and plaintiffs appealed. The Court of Appeals, 709 F.3d 890, reversed and remanded. On remand, defendants moved for summary judgment, and the District Court, Bush, United States Magistrate Judge, 993 F.Supp.2d 1237, granted motion in part and denied it in part. Appeal was taken.

**Holdings:** On denial of panel rehearing and rehearing en banc, the Court of Appeals, Berzon, Circuit Judge, held that:

[1] homeless persons had standing to pursue their claims even after city adopted protocol not to enforce its public camping ordinance when available shelters were full;

[2] plaintiffs were generally barred by *Heck* doctrine from commencing § 1983 action to obtain retrospective relief based on alleged unconstitutionality of their convictions;

[3] *Heck* doctrine had no application to homeless persons whose citations under city's public camping ordinance were dismissed before the state obtained a conviction;

[4] *Heck* doctrine did not apply to prevent homeless persons allegedly lacking alternative types of shelter from pursuing § 1983 action to obtain prospective relief preventing enforcement of city's ordinance; and

[5] Eighth Amendment prohibited the imposition of criminal penalties for sitting, sleeping, or lying outside on public property on homeless individuals who could not obtain shelter.

Reversed and remanded.

Opinion, 902 F.3d 1031, superseded.

Owens, Circuit Judge, filed opinion concurring in part and dissenting in part.

Berzon, Circuit Judge, filed opinion concurring in the denial of rehearing en banc.

M. Smith, Circuit Judge, filed opinion dissenting from the denial of rehearing en banc, in which Callahan, Bea, Ikuta, Bennett, and R. Nelson, Circuit Judges, joined.

Bennett, Circuit Judge, filed opinion dissenting from the denial of rehearing en banc, in which Bea, Ikuta, and R. Nelson, Circuit Judges, joined, and in which M. Smith, Circuit Judge, joined in part.

West Headnotes (24)

**[1] Federal Courts** Summary judgment

On appeal from grant of summary judgment for city on § 1983 claims against it, the Court of Appeals would review the record in light most favorable to plaintiffs. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

**[2] Federal Civil Procedure** In general; injury or interest

**Federal Civil Procedure** Causation; redressability

For plaintiff to have Article III standing, he must demonstrate an injury that is concrete, particularized, and actual or imminent, fairly traceable to the challenged action, and redressable by a favorable ruling. U.S. Const. art. 3, § 1 et seq.

1 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest

While concept of "imminent" injury, such as plaintiff must demonstrate to establish his Article III standing, is concededly somewhat elastic, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes, i.e., that the injury is certainly impending. U.S. Const. art. 3, § 1 et seq.

[4] **Constitutional Law** Criminal Law

Plaintiff need not await an arrest or prosecution to have constitutional standing to challenge the constitutionality of criminal statute. U.S. Const. art. 3, § 1 et seq.

[5] **Constitutional Law** Criminal Law

Plaintiff should not be required to await and undergo a criminal prosecution as the sole means of challenging the constitutionality of statute, but will have standing to seek immediate determination on that issue, where plaintiff has alleged an intention to engage in course of conduct arguably affected with a constitutional interest but proscribed by statute, and where there exists a credible threat of prosecution thereunder. U.S. Const. art. 3, § 1 et seq.

[6] **Federal Civil Procedure** Want of proper parties

To defeat a motion for summary judgment premised on alleged lack of standing, plaintiffs need not establish that they in fact have standing, but only that there is genuine question of material fact as to the standing elements. U.S. Const. art. 3, § 1 et seq.

2 Cases that cite this headnote

[7] **Federal Civil Procedure** Civil rights cases in general

Even assuming that homeless shelters within city accurately self-reported when they were full, genuine issues of material fact as to whether, due to limits on number of consecutive days on which homeless people could obtain housing at shelters, or due to deadlines by which people had to request accommodation at shelters, people might be without any available housing in city even on nights when not all shelters reported as being full, precluded entry of summary judgment for city on § 1983 claim that its public camping ordinance violated homeless persons' Eighth Amendment rights, on theory that homeless persons no longer had standing to pursue their claims once city adopted protocol not to enforce ordinance when available shelters were full. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[8] **Constitutional Law** Government Property

**Vagrancy** Prevention or suppression of vagrancy

Consistent with the Establishment Clause of the First Amendment, city could not, via the threat of prosecution under its public camping ordinance, coerce homeless individuals into participating in religion-based programs at city shelters. U.S. Const. Amend. 1.

[9] **Civil Rights** Criminal prosecutions

Under *Heck* doctrine, in order to recover damages for allegedly unconstitutional conviction or imprisonment or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal,

  

expunged by executive order, declared invalid by state tribunal authorized to make such determination, or called into question by federal court's issuance of writ of habeas corpus. 42 U.S.C.A. § 1983.

[10] **Civil Rights** Criminal law enforcement; prisons

**Declaratory Judgment** Criminal laws

*Heck* doctrine bars § 1983 suits even when the relief sought is prospective, injunctive or declaratory relief, if success in that action would necessarily demonstrate the invalidity of plaintiff's confinement or its duration. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[11] **Civil Rights** Criminal prosecutions

Homeless persons who not only failed to file direct appeal challenging, on Eighth Amendment grounds, their convictions under city's public camping ordinance, but also expressly waived right to do so as condition of their guilty pleas, were barred by *Heck* doctrine from later commencing § 1983 action to obtain retrospective relief based on alleged unconstitutionality of their convictions. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983.

[12] **Civil Rights** Criminal prosecutions

*Heck* doctrine had no application to homeless persons whose citations under city's public camping ordinance were dismissed before the state obtained a conviction, as the pre-conviction dismissal of citations meant that there was no conviction or sentence that could be undermined by grant of relief to these persons on their § 1983 claim that city's criminalization of sleeping in public parks or on public sidewalks by persons, like them, who allegedly had no available shelter violated their Eighth Amendment rights. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[13] **Sentencing and Punishment** Scope of Prohibition

**Sentencing and Punishment** Declaring Act Criminal

**Sentencing and Punishment** Proportionality

Cruel and Unusual Punishments Clause of the Eighth Amendment limits not only the types of punishment that may be imposed and prohibits the imposition of punishment grossly disproportionate to severity of crime, but also imposes substantive limits on what can be made criminal and punished as such. U.S. Const. Amend. 8.

4 Cases that cite this headnote

[14] **Sentencing and Punishment** Declaring Act Criminal

Cruel and Unusual Punishments Clause of the Eighth Amendment, by imposing substantive limits on what can be made criminal and punished as such, governs the criminal law process as whole, and not only the imposition of punishment postconviction. U.S. Const. Amend. 8.

4 Cases that cite this headnote

[15] **Sentencing and Punishment** Particular offenses

**Vagrancy** Prevention or suppression of vagrancy

In order for homeless persons to mount an Eighth Amendment challenge to city's public camping ordinance, on theory that it was cruel and unusual for city to criminalize the sleeping in public parks and on public sidewalks by those who had no alternative shelter, homeless persons needed to demonstrate only initiation of criminal process against them, not convictions. U.S. Const. Amend. 8.

21 Cases that cite this headnote

  

[16] **Civil Rights** Criminal law enforcement; prisons

*Heck* doctrine did not apply to prevent homeless persons allegedly lacking alternative types of shelter from pursuing § 1983 action to obtain prospective relief preventing enforcement of city's public camping ordinance against them on Eighth Amendment grounds. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[17] **Civil Rights** Criminal law enforcement; prisons

*Heck* doctrine serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge.

1 Cases that cite this headnote

[18] **Civil Rights** Criminal prosecutions

Claims for future relief, which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration, are distant from the "core" of habeas corpus with which *Heck* doctrine is concerned, and are not precluded by *Heck* doctrine.

1 Cases that cite this headnote

[19] **Sentencing and Punishment** Scope of Prohibition

Cruel and Unusual Punishments Clause of the Eighth Amendment circumscribes the criminal process in three ways: (1) by limiting the type of punishment that government may impose; (2) by proscribing punishment that is grossly disproportionate to severity of crime; and (3) by placing substantive limits on what government may criminalize. U.S. Const. Amend. 8.

4 Cases that cite this headnote

[20] **Sentencing and Punishment** Declaring Act Criminal

Even one day in prison would be cruel and unusual punishment for the "crime" of having a common cold. U.S. Const. Amend. 8.

[21] **Sentencing and Punishment** Declaring Act Criminal

While the Cruel and Unusual Punishments Clause places substantive limits on what the government may criminalize, such limits are applied only sparingly. U.S. Const. Amend. 8.

2 Cases that cite this headnote

[22] **Sentencing and Punishment** Declaring Act Criminal

Under the Cruel and Unusual Punishment Clause of the Eighth Amendment, criminal penalties may be inflicted only if accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. U.S. Const. Amend. 8.

[23] **Sentencing and Punishment** Declaring Act Criminal

Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being. U.S. Const. Amend. 8.

8 Cases that cite this headnote

[24] **Sentencing and Punishment** Particular offenses

**Vagrancy** Prevention or suppression of vagrancy

Eighth Amendment prohibited the imposition of criminal penalties for sitting, sleeping, or lying outside on public property on homeless individuals who could not obtain shelter; while this was not to say that city had to provide sufficient shelter for the homeless, as long as there were a greater number of homeless individuals in city than the number of available beds in shelters, city could not prosecute

  

homeless individuals for involuntarily sitting, lying, and sleeping in public on the false premise they had some choice in the matter. U.S. Const. Amend. 8.

28 Cases that cite this headnote

**Attorneys and Law Firms**

***587** Michael E. Bern (argued) and Kimberly Leefatt, Latham & Watkins LLP, Washington, D.C.; Howard A. Belodoff, Idaho Legal Aid Services Inc., Boise, Idaho; Eric Tars, National Law Center on Homelessness & Poverty, Washington, D.C.; Plaintiffs-Appellants.

Brady J. Hall (argued), Michael W. Moore, and Steven R. Kraft, Moore Elia Kraft & Hall LLP, Boise, Idaho; Scott B. Muir, Deputy City Attorney; Robert B. Luce, City Attorney; City Attorney's Office, Boise, Idaho; for Defendant-Appellee.

Appeal from the United States District Court for the District of Idaho, Ronald E. Bush, Chief Magistrate Judge, Presiding, D.C. No. 1:09-cv-00540-REB

Before: Marsha S. Berzon, Paul J. Watford, and John B. Owens, Circuit Judges.

Concurrence in Order by Judge Berzon;

Dissent to Order by Judge Milan D. Smith, Jr.;

Dissent to Order by Judge Bennett;

Partial Concurrence and Partial Dissent by Judge Owens

***588 ORDER**

The Opinion filed September 4, 2018, and reported at 902 F.3d 1031, is hereby amended. The amended opinion will be filed concurrently with this order.

The panel has unanimously voted to deny the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

Future petitions for rehearing or rehearing en banc will not be entertained in this case.

BERZON, Circuit Judge, concurring in the denial of rehearing en banc:

I strongly disfavor this circuit's innovation in en banc procedure—ubiquitous dissents in the denial of rehearing en banc, sometimes accompanied by concurrences in the denial of rehearing en banc. As I have previously explained, dissents in the denial of rehearing en banc, in particular, often engage in a "distorted presentation of the issues in the case, creating the impression of rampant error in the original panel opinion although a majority—often a decisive majority—of the active members of the court ... perceived no error." *Defs. of Wildlife Ctr. for Biological Diversity v. EPA*, 450 F.3d 394, 402 (9th Cir. 2006) (Berzon, J., concurring in denial of rehearing en banc); *see also* Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 Calif. L. Rev. 1479 (2012). Often times, the dramatic tone of these dissents leads them to read more like petitions for writ of certiorari on steroids, rather than reasoned judicial opinions.

Despite my distaste for these separate writings, I have, on occasion, written concurrences in the denial of rehearing en banc. On those rare occasions, I have addressed arguments raised for the first time during the en banc process, corrected misrepresentations, or highlighted important facets of the case that had yet to be discussed.

This case serves as one of the few occasions in which I feel compelled to write a brief concurrence. I will not address the dissents' challenges to the *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), and Eighth Amendment rulings of *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), as the opinion sufficiently rebuts those erroneous arguments. I write only to raise two points.

First, the City of Boise did not initially seek en banc reconsideration of the Eighth Amendment holding. When this court solicited the parties' positions as to whether the Eighth Amendment holding merits en banc review, the City's initial submission, before mildly supporting en banc reconsideration, was that the opinion is quite "narrow" and its "interpretation of the [C]onstitution raises little actual conflict with Boise's Ordinances or [their] enforcement." And the City noted that it viewed ***589** prosecution of homeless individuals for sleeping outside as a "last resort," not as a

principal weapon in reducing homelessness and its impact on the City.

The City is quite right about the limited nature of the opinion. On the merits, the opinion holds only that municipal ordinances that criminalize sleeping, sitting, or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment. *Martin*, 902 F.3d at 1035. Nothing in the opinion reaches beyond criminalizing the biologically essential need to sleep when there is no available shelter.

Second, Judge M. Smith's dissent features an unattributed color photograph of "a Los Angeles public sidewalk." The photograph depicts several tents lining a street and is presumably designed to demonstrate the purported negative impact of *Martin*. But the photograph fails to fulfill its intended purpose for several reasons.

For starters, the picture is not in the record of this case and is thus inappropriately included in the dissent. It is not the practice of this circuit to include outside-the-record photographs in judicial opinions, especially when such photographs are entirely unrelated to the case. And in this instance, the photograph is entirely unrelated. It depicts a sidewalk in Los Angeles, not a location in the City of Boise, the actual municipality at issue. Nor can the photograph be said to illuminate the impact of *Martin* within this circuit, as it predates our decision and was likely taken in 2017.[1]

But even putting aside the use of a pre-*Martin*, outside-the-record photograph from another municipality, the photograph does not serve to illustrate a concrete effect of *Martin*'s holding. The opinion clearly states that it is not outlawing ordinances "barring the obstruction of public rights of way or the erection of certain structures," such as tents, *id.* at 1048 n.8, and that the holding "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place," *id.* at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)).

What the pre-*Martin* photograph *does* demonstrate is that the ordinances criminalizing sleeping in public places were never a viable solution to the homelessness problem. People with no place to live will sleep outside if they have no alternative. Taking them to jail for a few days is both unconstitutional, for the reasons discussed in the opinion, and, in all likelihood, pointless.

The distressing homelessness problem—distressing to the people with nowhere to live as well as to the rest of society—has grown into a crisis for many reasons, among them the cost of housing, the drying up of affordable care for people with mental illness, and the failure to provide adequate treatment for drug addiction. *See, e.g.*, U.S. Interagency Council on Homelessness, *Homelessness in America: Focus on Individual Adults* 5–8 (2018), https://www.usich.gov/resources/?uploads/asset_library/HIA_Individual_Adults.pdf. The crisis continued to burgeon while ordinances ***590** forbidding sleeping in public were on the books and sometimes enforced. There is no reason to believe that it has grown, and is likely to grow larger, because *Martin* held it unconstitutional to criminalize simply sleeping *somewhere* in public if one has nowhere else to do so.

For the foregoing reasons, I concur in the denial of rehearing en banc.

M. SMITH, Circuit Judge, with whom CALLAHAN, BEA, IKUTA, BENNETT, and R. NELSON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

In one misguided ruling, a three-judge panel of our court badly misconstrued not one or two, but three areas of binding Supreme Court precedent, and crafted a holding that has begun wreaking havoc on local governments, residents, and businesses throughout our circuit. Under the panel's decision, local governments are forbidden from enforcing laws restricting public sleeping and camping unless they provide shelter for every homeless individual within their jurisdictions. Moreover, the panel's reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination. Perhaps most unfortunately, the panel's opinion shackles the hands of public officials trying to redress the serious societal concern of homelessness.[1]

I respectfully dissent from our court's refusal to correct this holding by rehearing the case en banc.

**I.**

The most harmful aspect of the panel's opinion is its misreading of Eighth Amendment precedent. My colleagues

cobble together disparate portions of a fragmented Supreme Court opinion to hold that "an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them." *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018). That holding is legally and practically ill-conceived, and conflicts with the reasoning of every other appellate court[2] that has considered the issue.

**A.**

The panel struggles to paint its holding as a faithful interpretation of the Supreme Court's fragmented opinion in *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). It fails.

To understand *Powell*, we must begin with the Court's decision in *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). There, the Court addressed a statute that made it a "criminal offense for a person to 'be addicted to the use of narcotics.' " *Robinson*, 370 U.S. at 660, 82 S.Ct. 1417 (quoting Cal. Health & Safety Code § 11721). The statute allowed defendants to be convicted so long as they were drug addicts, regardless of whether they actually used or possessed drugs. *Id.* at 665, 82 S.Ct. 1417. The Court struck ***591** down the statute under the Eighth Amendment, reasoning that because "narcotic addiction is an illness ... which may be contracted innocently or involuntarily ... a state law which imprisons a person thus afflicted as criminal, even though he has never touched any narcotic drug" violates the Eighth Amendment. *Id.* at 667, 82 S.Ct. 1417.

A few years later, in *Powell*, the Court addressed the scope of its holding in *Robinson*. *Powell* concerned the constitutionality of a Texas law that criminalized public drunkenness. *Powell*, 392 U.S. at 516, 88 S.Ct. 2145. As the panel's opinion acknowledges, there was no majority in *Powell*. The four Justices in the plurality interpreted the decision in *Robinson* as standing for the limited proposition that the government could not criminalize one's status. *Id.* at 534, 88 S.Ct. 2145. They held that because the Texas statute criminalized conduct rather than alcoholism, the law was constitutional. *Powell*, 392 U.S. at 532, 88 S.Ct. 2145.

The four dissenting Justices in *Powell* read *Robinson* more broadly: They believed that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). Although the statute in *Powell* differed from that in *Robinson* by covering involuntary conduct, the dissent found the same constitutional defect present in both cases. *Id.* at 567–68, 88 S.Ct. 2145.

Justice White concurred in the judgment. He upheld the defendant's conviction because Powell had not made a showing that he was unable to stay off the streets on the night he was arrested. *Id.* at 552–53, 88 S.Ct. 2145 (White, J., concurring in the result). He wrote that it was "unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place." *Id.* at 553, 88 S.Ct. 2145.

The panel contends that because Justice White concurred in the judgment alone, the views of the dissenting Justices constitute the holding of *Powell*. *Martin*, 902 F.3d at 1048. That tenuous reasoning—which metamorphosizes the *Powell* dissent into the majority opinion—defies logic.

Because *Powell* was a 4–1–4 decision, the Supreme Court's decision in *Marks v. United States* guides our analysis. 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). There, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who *concurred* in the judgments on the narrowest grounds.' " *Id.* at 193, 97 S.Ct. 990 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion)) (emphasis added). When *Marks* is applied to *Powell*, the holding is clear: The defendant's conviction was constitutional because it involved the commission of an act. Nothing more, nothing less.

This is hardly a radical proposition. I am not alone in recognizing that "there is definitely no Supreme Court holding" prohibiting the criminalization of involuntary conduct. *United States v. Moore*, 486 F.2d 1139, 1150 (D.C. Cir. 1973) (en banc). Indeed, in the years since *Powell* was decided, courts—including our own—have routinely upheld state laws that criminalized acts that were allegedly compelled or involuntary. *See, e.g.*, *United States v. Stenson*, 475 F. App'x 630, 631 (7th Cir. 2012) (holding that it was constitutional for the defendant to be punished for violating the terms of his parole by consuming alcohol because he "was not punished for his status as an alcoholic but for his

conduct"); ***592** *Joshua v. Adams*, 231 F. App'x 592, 594 (9th Cir. 2007) ("Joshua also contends that the state court ignored his mental illness [schizophrenia], which rendered him unable to control his behavior, and his sentence was actually a penalty for his illness .... This contention is without merit because, in contrast to *Robinson*, where a statute specifically criminalized addiction, Joshua was convicted of a criminal offense separate and distinct from his 'status' as a schizophrenic."); *United States v. Benefield*, 889 F.2d 1061, 1064 (11th Cir. 1989) ("The considerations that make any incarceration unconstitutional when a statute punishes a defendant for his status are not applicable when the government seeks to punish a person's actions.").[3]

To be sure, *Marks* is controversial. Last term, the Court agreed to consider whether to abandon the rule *Marks* established (but ultimately resolved the case on other grounds and found it "unnecessary to consider ... the proper application of *Marks*"). *Hughes v. United States*, —— U.S. ——, 138 S.Ct. 1765, 1772, 201 L.Ed.2d 72 (2018). At oral argument, the Justices criticized the logical subset rule established by *Marks* for elevating the outlier views of concurring Justices to precedential status.[4] The Court also acknowledged that lower courts have inconsistently interpreted the holdings of fractured decisions under *Marks*.[5]

Those criticisms, however, were based on the assumption that *Marks* means what it says and says what it means: Only the views of the Justices concurring in the judgment may be considered in construing the Court's holding. *Marks*, 430 U.S. at 193, 97 S.Ct. 990. The Justices did not even think to consider that *Marks* allows dissenting Justices to create the Court's holding. As a *Marks* scholar has observed, such a method of vote counting "would paradoxically create a precedent that contradicted the judgment in that very case."[6] And yet the panel's opinion flouts that common sense rule to extract from *Powell* a holding that does not exist.

What the panel really does is engage in a predictive model of precedent. The panel opinion implies that if a case like *Powell* were to arise again, a majority of the Court would hold that the criminalization of involuntary conduct violates the Eighth Amendment. Utilizing such reasoning, the panel borrows the Justices' robes and adopts that holding on their behalf.

But the Court has repeatedly discouraged us from making such predictions when construing precedent. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). And, for good reason. Predictions about how Justices will rule rest on unwarranted speculation about what goes on in their minds. Such amateur fortunetelling also precludes us from considering new insights on the issues—difficult as they may be in the case of 4–1–4 decisions like *Powell*—that have arisen since the Court's fragmented opinion. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977) (noting "the wisdom of allowing difficult issues to mature through ***593** full consideration by the courts of appeals").

In short, predictions about how the Justices will rule ought not to create precedent. The panel's Eighth Amendment holding lacks any support in *Robinson* or *Powell*.

**B.**

Our panel's opinion also conflicts with the reasoning underlying the decisions of other appellate courts.

The California Supreme Court, in *Tobe v. City of Santa Ana*, rejected the plaintiffs' Eighth Amendment challenge to a city ordinance that banned public camping. 892 P.2d 1145 (1995). The court reached that conclusion despite evidence that, on any given night, at least 2,500 homeless persons in the city did not have shelter beds available to them. *Id.* at 1152. The court sensibly reasoned that because *Powell* was a fragmented opinion, it did not create precedent on "the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.' " *Id.* at 1166 (quoting *Powell*, 392 U.S. at 533, 88 S.Ct. 2145). Our panel—bound by the same Supreme Court precedent—invalidates identical California ordinances previously upheld by the California Supreme Court. Both courts cannot be correct.

The California Supreme Court acknowledged that homelessness is a serious societal problem. It explained, however, that:

> Many of those issues are the result of legislative policy decisions. The arguments of many amici curiae regarding the apparently intractable problem of homelessness and the impact of the Santa Ana ordinance on various groups of homeless persons (e.g., teenagers, families with children, and the mentally ill) should be addressed to the Legislature and the Orange County Board of Supervisors,

> not the judiciary. Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems, but criminalizing conduct that is a product of those problems is not for that reason constitutionally impermissible.

*Id.* at 1157 n.12. By creating new constitutional rights out of whole cloth, my well-meaning, but unelected, colleagues improperly inject themselves into the role of public policymaking.[7]

The reasoning of our panel decision also conflicts with precedents of the Fourth and Eleventh Circuits. In *Manning v. Caldwell*, the Fourth Circuit held that a Virginia statute that criminalized the possession of alcohol did not violate the Eighth Amendment when it punished the involuntary actions of homeless alcoholics. 900 F.3d 139, 153 (4th Cir. 2018), *reh'g en banc granted* 741 F. App'x 937 (4th Cir. 2018).[8] ***594** The court rejected the argument that Justice White's opinion in *Powell* "requires this court to hold that Virginia's statutory scheme imposes cruel and unusual punishment because it criminalizes [plaintiffs'] status as homeless alcoholics." *Id.* at 145. The court found that the statute passed constitutional muster because "it is the act of possessing alcohol—not the status of being an alcoholic—that gives rise to criminal sanctions." *Id.* at 147.

Boise's Ordinances at issue in this case are no different: They do not criminalize the status of homelessness, but only the act of camping on public land or occupying public places without permission. *Martin*, 902 F.3d at 1035. The Fourth Circuit correctly recognized that these kinds of laws do not run afoul of *Robinson* and *Powell*.

The Eleventh Circuit has agreed. In *Joel v. City of Orlando*, the court held that a city ordinance prohibiting sleeping on public property was constitutional. 232 F.3d 1353, 1362 (11th Cir. 2000). The court rejected the plaintiffs' Eighth Amendment challenge because the ordinance "targets conduct, and does not provide criminal punishment based on a person's status." *Id.* The court prudently concluded that "[t]he City is constitutionally allowed to regulate where 'camping' occurs." *Id.*

We ought to have adopted the sound reasoning of these other courts. By holding that Boise's enforcement of its Ordinances violates the Eighth Amendment, our panel has needlessly created a split in authority on this straightforward issue.

**C.**

One would think our panel's legally incorrect decision would at least foster the common good. Nothing could be further from the truth. The panel's decision generates dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein.

The panel opinion masquerades its decision as a narrow one by representing that it "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place." *Martin*, 902 F.3d at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)).

That excerpt, however, glosses over the decision's actual holding: "We hold only that ... as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property." *Id.* Such a holding leaves cities with a Hobson's choice: They must either undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety. The Constitution has no such requirement.

* * *

Under the panel's decision, local governments can enforce certain of their public health and safety laws only when homeless individuals have the choice to sleep indoors. That inevitably leads to the question of how local officials ought to know whether that option exists.

The number of homeless individuals within a municipality on any given night is not automatically reported and updated in real time. Instead, volunteers or government employees must painstakingly tally the number of homeless individuals block by block, alley by alley, doorway by doorway. Given the daily fluctuations in the homeless population, the panel's opinion would require this labor-intensive task be done every single day. Yet in massive cities ***595** such as Los Angeles, that is simply impossible. Even when thousands of volunteers devote dozens of hours to such "a herculean task," it takes three days to finish counting—and even then "not everybody really gets counted."[9] Lest one think Los Angeles

is unique, our circuit is home to many of the largest homeless populations nationwide.[10]

If cities do manage to cobble together the resources for such a system, what happens if officials (much less volunteers) miss a homeless individual during their daily count and police issue citations under the false impression that the number of shelter beds exceeds the number of homeless people that night? According to the panel's opinion, that city has violated the Eighth Amendment, thereby potentially leading to lawsuits for significant monetary damages and other relief.

And what if local governments (understandably) lack the resources necessary for such a monumental task?[11] They have no choice but to stop enforcing laws that prohibit public sleeping and camping.[12] Accordingly, ***596** our panel's decision effectively allows homeless individuals to sleep and live wherever they wish on most public property. Without an absolute confidence that they can house every homeless individual, city officials will be powerless to assist residents lodging valid complaints about the health and safety of their neighborhoods.[13]

As if the panel's actual holding wasn't concerning enough, the logic of the panel's opinion reaches even further in scope. The opinion reasons that because "resisting the need to ... engage in [ ] life-sustaining activities is impossible," punishing the homeless for engaging in those actions in public violates the Eighth Amendment. *Martin*, 902 F.3d at 1048. What else is a life-sustaining activity? Surely bodily functions. By holding that the Eighth Amendment proscribes the criminalization of involuntary conduct, the panel's decision will inevitably result in the striking down of laws that prohibit public defecation and urination.[14] The panel's reasoning also casts doubt on public safety laws restricting drug paraphernalia, for the use of hypodermic needles and the like is no less involuntary for the homeless suffering from the scourge of addiction than is their sleeping in public.

It is a timeless adage that states have a "universally acknowledged power and duty to enact and enforce all such laws ... as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people." *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20, 22 S.Ct. 1, 46 L.Ed. 55 (1901) (internal quotations omitted). I fear that the panel's decision will prohibit local governments from fulfilling their duty to enforce an array of public health and safety laws. Halting enforcement of such laws will potentially wreak havoc on our communities.[15] As we have already begun to witness, our neighborhoods will soon feature "[t]ents ... equipped with mini refrigerators, cupboards, televisions, and heaters, [that] vie with pedestrian traffic" and "human waste appearing on sidewalks and at local playgrounds." ***597** [16]


*A Los Angeles Public Sidewalk*

**II.**

The panel's fanciful merits-determination is accompanied by a no-less-inventive series of procedural rulings. The panel's opinion also misconstrues two other areas of Supreme Court precedent concerning limits on the parties who can bring § 1983 challenges for violations of the Eighth Amendment.

**A.**

The panel erred in holding that Robert Martin and Robert Anderson could obtain prospective relief under *Heck v. Humphrey* and its progeny. 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). As recognized by Judge Owens's dissent, that conclusion cuts against binding precedent on the issue.

The Supreme Court has stated that *Heck* bars § 1983 claims if success on that claim would "necessarily demonstrate the invalidity of [the plaintiff's] confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005); *see also Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) (stating that *Heck* applies to claims for declaratory relief). Martin and Anderson's prospective claims did just that. Those plaintiffs sought a declaration that the Ordinances under which they were convicted are unconstitutional and an

injunction against their future enforcement on the grounds of unconstitutionality. It is clear that *Heck* bars these claims because Martin and Anderson necessarily seek to demonstrate the invalidity of their previous convictions.

The panel opinion relies on *Edwards* to argue that *Heck* does not bar plaintiffs' requested relief, but *Edwards* cannot bear the weight the panel puts on it. In ***598** *Edwards*, the plaintiff sought an injunction that would require prison officials to date-stamp witness statements at the time received. 520 U.S. at 643, 117 S.Ct. 1584. The Court concluded that requiring prison officials to date-stamp witness statements did not necessarily imply the invalidity of previous determinations that the prisoner was not entitled to good-time credits, and that *Heck*, therefore, did not bar prospective injunctive relief. *Id.* at 648, 117 S.Ct. 1584.

Here, in contrast, a declaration that the Ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions. According to data from the U.S. Department of Housing and Urban Development, the number of homeless individuals in Boise exceeded the number of available shelter beds during each of the years that the plaintiffs were cited.[17] Under the panel's holding that "the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property" "as long as there is no option of sleeping indoors," that data necessarily demonstrates the invalidity of the plaintiffs' prior convictions. *Martin*, 902 F.3d at 1048.

**B.**

The panel also erred in holding that Robert Martin and Pamela Hawkes, who were cited but not convicted of violating the Ordinances, had standing to sue under the Eighth Amendment. In so doing, the panel created a circuit split with the Fifth Circuit.

The panel relied on *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), to find that a plaintiff "need demonstrate only the initiation of the criminal process against him, not a conviction," to bring an Eighth Amendment challenge. *Martin*, 902 F.3d at 1045. The panel cites *Ingraham*'s observation that the Cruel and Unusual Punishments Clause circumscribes the criminal process in that "it imposes substantive limits on what can be made criminal and punished as such." *Id.* at 1046 (citing *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401). This reading of *Ingraham*, however, cherry picks isolated statements from the decision without considering them in their accurate context. The *Ingraham* Court plainly held that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." 430 U.S. at 671 n.40, 97 S.Ct. 1401. And, "the State does not acquire the power to punish with which the Eighth Amendment is concerned until *after* it has secured a formal adjudication of guilt." *Id.* (emphasis added). As the *Ingraham* Court recognized, "[T]he decisions of [the Supreme] Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those *convicted* of crimes." *Id.* at 664, 97 S.Ct. 1401 (emphasis added). Clearly, then, *Ingraham* stands for the proposition that to challenge a criminal statute as violative of the Eighth Amendment, the individual must be convicted of that relevant crime.

The Fifth Circuit recognized this limitation on standing in *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995). There, the court confronted a similar action brought by homeless individuals challenging a sleeping in public ordinance. ***599** *Johnson*, 61 F.3d at 443. The court held that the plaintiffs did not have standing to raise an Eighth Amendment challenge to the ordinance because although "numerous tickets ha[d] been issued ... [there was] no indication that any Appellees ha[d] been convicted" of violating the sleeping in public ordinance. *Id.* at 445. The Fifth Circuit explained that *Ingraham* clearly required a plaintiff be convicted under a criminal statute before challenging that statute's validity. *Id.* at 444–45 (citing *Robinson*, 370 U.S. at 663, 82 S.Ct. 1417; *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401).

By permitting Martin and Hawkes to maintain their Eighth Amendment challenge, the panel's decision created a circuit split with the Fifth Circuit and took our circuit far afield from "[t]he primary purpose of (the Cruel and Unusual Punishments Clause) ... [which is] the method or kind of punishment imposed for the violation of criminal statutes." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401 (quoting *Powell*, 392 U.S. at 531–32, 88 S.Ct. 2145).

**III.**

None of us is blind to the undeniable suffering that the homeless endure, and I understand the panel's impulse to help such a vulnerable population. But the Eighth Amendment is

  

not a vehicle through which to critique public policy choices or to hamstring a local government's enforcement of its criminal code. The panel's decision, which effectively strikes down the anti-camping and anti-sleeping Ordinances of Boise and that of countless, if not all, cities within our jurisdiction, has no legitimate basis in current law.

I am deeply concerned about the consequences of our panel's unfortunate opinion, and I regret that we did not vote to reconsider this case en banc. I respectfully dissent.

BENNETT, Circuit Judge, with whom BEA, IKUTA, and R. NELSON, Circuit Judges, join, and with whom M. SMITH, Circuit Judge, joins as to Part II, dissenting from the denial of rehearing en banc:

I fully join Judge M. Smith's opinion dissenting from the denial of rehearing en banc. I write separately to explain that except in extraordinary circumstances not present in this case, and based on its text, tradition, and original public meaning, the Cruel and Unusual Punishments Clause of the Eighth Amendment does not impose substantive limits on what conduct a state may criminalize.

I recognize that we are, of course, bound by Supreme Court precedent holding that the Eighth Amendment encompasses a limitation "on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (citing *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)). However, the *Ingraham* Court specifically "recognized [this] limitation as one to be applied sparingly." *Id.* As Judge M. Smith's dissent ably points out, the panel ignored *Ingraham*'s clear direction that Eighth Amendment scrutiny attaches only after a criminal conviction. Because the panel's decision, which allows pre-conviction Eighth Amendment challenges, is wholly inconsistent with the text and tradition of the Eighth Amendment, I respectfully dissent from our decision not to rehear this case en banc.

**I.**

The text of the Cruel and Unusual Punishments Clause is virtually identical to Section 10 of the English Declaration of ***600** Rights of 1689,[1] and there is no question that the drafters of the Eighth Amendment were influenced by the prevailing interpretation of Section 10. *See Solem v. Helm*, 463 U.S. 277, 286, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (observing that one of the themes of the founding era "was that Americans had all the rights of English subjects" and the Framers' "use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection"); *Timbs v. Indiana*, 586 U.S. ——, 139 S.Ct. 682, —— L.Ed.2d —— (2019) (Thomas, J., concurring) ("[T]he text of the Eighth Amendment was 'based directly on ... the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.' " (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989))). Thus, "not only is the original meaning of the 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular 'rights of English subjects' it was designed to vindicate." *Harmelin v. Michigan*, 501 U.S. 957, 967, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Scalia, J., concurring).

Justice Scalia's concurrence in *Harmelin* provides a thorough and well-researched discussion of the original public meaning of the Cruel and Unusual Punishments Clause, including a detailed overview of the history of Section 10 of the English Declaration of Rights. *See id.* at 966–85, 111 S.Ct. 2680 (Scalia, J., concurring). Rather than reciting Justice Scalia's *Harmelin* discussion in its entirety, I provide only a broad description of its historical analysis. Although the issue Justice Scalia confronted in *Harmelin* was whether the Framers intended to graft a proportionality requirement on the Eighth Amendment, *see id.* at 976, 111 S.Ct. 2680, his opinion's historical exposition is instructive to the issue of what the Eighth Amendment meant when it was written.

The English Declaration of Rights's prohibition on "cruell and unusuall Punishments" is attributed to the arbitrary punishments imposed by the King's Bench following the Monmouth Rebellion in the late 17th century. *Id.* at 967, 111 S.Ct. 2680 (Scalia, J., concurring). "Historians have viewed the English provision as a reaction either to the 'Bloody Assize,' the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth, or to the perjury prosecution of Titus Oates in the same year." *Ingraham*, 430 U.S. at 664, 97 S.Ct. 1401 (footnote omitted).

Presiding over a special commission in the wake of the Monmouth Rebellion, Chief Justice Jeffreys imposed "vicious punishments for treason," including "drawing and quartering, burning of women felons, beheading, [and] disemboweling." *Harmelin*, 501 U.S. at 968, 111 S.Ct. 2680.

  

In the view of some historians, "the story of The Bloody Assizes ... helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual Punishments." *Furman v. Georgia*, 408 U.S. 238, 254, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring).

More recent scholarship suggests that Section 10 of the Declaration of Rights was motivated more by Jeffreys's treatment of Titus Oates, a Protestant cleric and convicted perjurer. In addition to the pillory, the scourge, and life imprisonment, Jeffreys sentenced Oates to be "stript of [his] Canonical Habits." ***601** *Harmelin*, 501 U.S. at 970, 111 S.Ct. 2680 (Scalia, J., concurring) (quoting Second Trial of Titus Oates, 10 How. St. Tr. 1227, 1316 (K.B. 1685)). Years after the sentence was carried out, and months after the passage of the Declaration of Rights, the House of Commons passed a bill to annul Oates's sentence. Though the House of Lords never agreed, the Commons issued a report asserting that Oates's sentence was the sort of "cruel and unusual Punishment" that Parliament complained of in the Declaration of Rights. *Harmelin*, 501 U.S. at 972, 111 S.Ct. 2680 (citing 10 Journal of the House of Commons 247 (Aug. 2, 1689)). In the view of the Commons and the dissenting Lords, Oates's punishment was " 'out of the Judges' Power,' 'contrary to Law and ancient practice,' without 'Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' or imposed by 'Pretence to a discretionary Power.' " *Id.* at 973, 111 S.Ct. 2680 (quoting 1 Journals of the House of Lords 367 (May 31, 1689); 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

Thus, Justice Scalia concluded that the prohibition on "cruell and unusuall punishments" as used in the English Declaration, "was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition." *Harmelin*, 501 U.S. at 974, 111 S.Ct. 2680 (Scalia, J., concurring) (citing *Ingraham*, 430 U.S. at 665, 97 S.Ct. 1401; 1 J. Chitty, Criminal Law 710–12 (5th Am. ed. 1847); Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Calif. L. Rev. 839, 859 (1969)).

But Justice Scalia was careful not to impute the English meaning of "cruell and unusuall" directly to the Framers of our Bill of Rights: "the ultimate question is not what 'cruell and unusuall punishments' meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment." *Id.* at 975, 111 S.Ct. 2680. "Wrenched out of its common-law context, and applied to the actions of a legislature ... the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment —specifically, cruel methods of punishment that are not regularly or customarily employed." *Id.* at 976, 111 S.Ct. 2680.

As support for his conclusion that the Framers of the Bill of Rights intended for the Eighth Amendment to reach only certain punishment methods, Justice Scalia looked to "the state ratifying conventions that prompted the Bill of Rights." *Id.* at 979, 111 S.Ct. 2680. Patrick Henry, speaking at the Virginia Ratifying convention, "decried the absence of a bill of rights," arguing that "Congress will loose the restriction of not ... inflicting cruel and unusual punishments. ... What has distinguished our ancestors?—They would not admit of tortures, or cruel and barbarous punishment." *Id.* at 980, 111 S.Ct. 2680 (quoting 3 J. Elliot, Debates on the Federal Constitution 447 (2d ed. 1854)). The Massachusetts Convention likewise heard the objection that, in the absence of a ban on cruel and unusual punishments, "racks and gibbets may be amongst the most mild instruments of [Congress's] discipline." *Id.* at 979, 111 S.Ct. 2680 (internal quotation marks omitted) (quoting 2 J. Debates on the Federal Constitution, at 111). These historical sources "confirm[ ] the view that the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment." *Id.* (internal quotation marks omitted) (quoting Granucci, 57 Calif. L. Rev. at 842) (emphasis in *Harmelin*).

In addition, early state court decisions "interpreting state constitutional provisions with identical or more expansive wording (i.e., 'cruel or unusual') concluded that these provisions ... proscribe[d] ... only certain modes of punishment." *Id.* at 983, 111 S.Ct. 2680; *see also* ***602** *id.* at 982, 111 S.Ct. 2680 ("Many other Americans apparently agreed that the Clause only outlawed certain *modes* of punishment.").

In short, when the Framers drafted and the several states ratified the Eighth Amendment, the original public meaning of the Cruel and Unusual Punishments Clause was "to proscribe ... methods of punishment." *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). There is simply no indication in the history of the Eighth Amendment that the Cruel and Unusual Punishments Clause was intended to reach the substantive authority of Congress to criminalize acts or status, and certainly not before conviction. Incorporation, of course, extended the reach of the Clause to the States, but worked no change in its meaning.

  

**II.**

The panel here held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018). In so holding, the panel allows challenges asserting this prohibition to be brought in advance of any conviction. That holding, however, has nothing to do with the punishment that the City of Boise imposes for those offenses, and thus nothing to do with the text and tradition of the Eighth Amendment.

The panel pays only the barest attention to the Supreme Court's admonition that the application of the Eighth Amendment to substantive criminal law be "sparing[ ]," *Martin*, 902 F.3d at 1047 (quoting *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401), and its holding here is dramatic in scope and completely unfaithful to the proper interpretation of the Cruel and Unusual Punishments Clause.

"The primary purpose of (the Cruel and Unusual Punishments Clause) has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401 (internal quotation marks omitted) (quoting *Powell v. Texas*, 392 U.S. 514, 531–32, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968)). It should, therefore, be the "rare case" where a court invokes the Eighth Amendment's criminalization component. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1146 (9th Cir. 2006) (Rymer, J., dissenting), *vacated*, 505 F.3d 1006 (9th Cir. 2007).[2] And permitting a pre-conviction challenge to a local ordinance, as the panel does here, is flatly inconsistent with the Cruel and Unusual Punishments Clause's core constitutional function: regulating the *methods* of punishment that may be inflicted upon one convicted of an offense. *Harmelin*, 501 U.S. at 977, 979, 111 S.Ct. 2680 (Scalia, J., concurring). As Judge Rymer, dissenting in *Jones*, observed, "the Eighth Amendment's 'protections do not attach until after conviction and sentence.' "[3] 444 F.3d at 1147 (Rymer, J., dissenting) ***603** (internal alterations omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 392 n.6, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).[4]

The panel's holding thus permits plaintiffs who have never been convicted of any offense to avail themselves of a constitutional protection that, historically, has been concerned with prohibition of "only certain modes of punishment." *Harmelin*, 501 U.S. at 983, 111 S.Ct. 2680; *see also United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir. 1997) (citing *Harmelin* for the proposition that a "plurality of the Supreme Court ... has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed").

Extending the Cruel and Unusual Punishments Clause to encompass pre-conviction challenges to substantive criminal law stretches the Eighth Amendment past its breaking point. I doubt that the drafters of our Bill of Rights, the legislators of the states that ratified it, or the public at the time would ever have imagined that a ban on "cruel and unusual punishments" would permit a plaintiff to challenge a substantive criminal statute or ordinance that he or she had not even been convicted of violating. We should have taken this case en banc to confirm that an Eighth Amendment challenge does not lie in the absence of a punishment following conviction for an offense.

* * *

At common law and at the founding, a prohibition on "cruel and unusual punishments" was simply that: a limit on the types of punishments that government could inflict following a criminal conviction. The panel strayed far from the text and history of the Cruel and Unusual Punishments Clause in imposing the substantive limits it has on the City of Boise, particularly as to plaintiffs who have not yet even been convicted of an offense. We should have reheard this case en banc, and I respectfully dissent.

**Opinion**

BERZON, Circuit Judge:

> "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."
>
> — Anatole France, *The Red Lily*

We consider whether the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to. We conclude that it does.

The plaintiffs-appellants are six current or former residents of the City of Boise ("the City"), who are homeless or have recently been homeless. Each plaintiff alleges that, between 2007 and 2009, he or she was cited by Boise police for violating one or both of two city ordinances. The first, Boise City Code § 9-10-02 (the "Camping Ordinance"), makes it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time." The Camping Ordinance defines "camping" as "the use of public property as a temporary or permanent ***604** place of dwelling, lodging, or residence." *Id*. The second, Boise City Code § 6-01-05 (the "Disorderly Conduct Ordinance"), bans "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private ... without the permission of the owner or person entitled to possession or in control thereof."

All plaintiffs seek retrospective relief for their previous citations under the ordinances. Two of the plaintiffs, Robert Anderson and Robert Martin, allege that they expect to be cited under the ordinances again in the future and seek declaratory and injunctive relief against future prosecution.

In *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007), a panel of this court concluded that "so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]" for the homeless, Los Angeles could not enforce a similar ordinance against homeless individuals "for involuntarily sitting, lying, and sleeping in public." *Jones* is not binding on us, as there was an underlying settlement between the parties and our opinion was vacated as a result. We agree with *Jones*'s reasoning and central conclusion, however, and so hold that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them. Two of the plaintiffs, we further hold, may be entitled to retrospective and prospective relief for violation of that Eighth Amendment right.

## I. Background

**[1]** The district court granted summary judgment to the City on all claims. We therefore review the record in the light most favorable to the plaintiffs. *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014).

Boise has a significant and increasing homeless population. According to the Point-in-Time Count ("PIT Count") conducted by the Idaho Housing and Finance Association, there were 753 homeless individuals in Ada County — the county of which Boise is the seat — in January 2014, 46 of whom were "unsheltered," or living in places unsuited to human habitation such as parks or sidewalks. In 2016, the last year for which data is available, there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered.[1] The PIT Count likely underestimates the number of homeless individuals in Ada County. It is "widely recognized that a one-night point in time count will undercount the homeless population," as many homeless individuals may have access to temporary housing on a given night, and as weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.

***605** There are currently three homeless shelters in the City of Boise offering emergency shelter services, all run by private, nonprofit organizations. As far as the record reveals, these three shelters are the only shelters in Ada County.

One shelter — "Sanctuary" — is operated by Interfaith Sanctuary Housing Services, Inc. The shelter is open to men, women, and children of all faiths, and does not impose any religious requirements on its residents. Sanctuary has 96 beds reserved for individual men and women, with several additional beds reserved for families. The shelter uses floor mats when it reaches capacity with beds.

Because of its limited capacity, Sanctuary frequently has to turn away homeless people seeking shelter. In 2010, Sanctuary reached full capacity in the men's area "at least half of every month," and the women's area reached capacity "almost every night of the week." In 2014, the shelter reported that it was full for men, women, or both on 38% of nights. Sanctuary provides beds first to people who spent the previous night at Sanctuary. At 9:00 pm each night, it allots any remaining beds to those who added their names to the shelter's waiting list.

The other two shelters in Boise are both operated by the Boise Rescue Mission ("BRM"), a Christian nonprofit organization. One of those shelters, the River of Life Rescue Mission ("River of Life"), is open exclusively to men; the other, the City Light Home for Women and Children ("City Light"), shelters women and children only.

  

BRM's facilities provide two primary "programs" for the homeless, the Emergency Services Program and the New Life Discipleship Program.[2] The Emergency Services Program provides temporary shelter, food, and clothing to anyone in need. Christian religious services are offered to those seeking shelter through the Emergency Services Program. The shelters display messages and iconography on the walls, and the intake form for emergency shelter guests includes a religious message.[3]

Homeless individuals may check in to either BRM facility between 4:00 and 5:30 pm. Those who arrive at BRM facilities between 5:30 and 8:00 pm may be denied shelter, depending on the reason for their late arrival; generally, anyone arriving after 8:00 pm is denied shelter.

Except in winter, male guests in the Emergency Services Program may stay at River of Life for up to 17 consecutive nights; women and children in the Emergency Services Program may stay at City Light for up to 30 consecutive nights. After the time limit is reached, homeless individuals who do not join the Discipleship Program may not return to a BRM shelter for at least 30 days.[4] Participants in the Emergency Services Program must return to the shelter every night during the applicable 17-day or 30-day period; if a resident fails to check in to a BRM shelter each night, that resident is prohibited from staying overnight at that shelter for 30 ***606** days. BRM's rules on the length of a person's stay in the Emergency Services Program are suspended during the winter.

The Discipleship Program is an "intensive, Christ-based residential recovery program" of which "[r]eligious study is the very essence." The record does not indicate any limit to how long a member of the Discipleship Program may stay at a BRM shelter.

The River of Life shelter contains 148 beds for emergency use, along with 40 floor mats for overflow; 78 additional beds serve those in non-emergency shelter programs such as the Discipleship Program. The City Light shelter has 110 beds for emergency services, as well as 40 floor mats to handle overflow and 38 beds for women in non-emergency shelter programs. All told, Boise's three homeless shelters contain 354 beds and 92 overflow mats for homeless individuals.

**A. The Plaintiffs**

Plaintiffs Robert Martin, Robert Anderson, Lawrence Lee Smith, Basil E. Humphrey, Pamela S. Hawkes, and Janet F. Bell are all homeless individuals who have lived in or around Boise since at least 2007. Between 2007 and 2009, each plaintiff was convicted at least once of violating the Camping Ordinance, the Disorderly Conduct Ordinance, or both. With one exception, all plaintiffs were sentenced to time served for all convictions; on two occasions, Hawkes was sentenced to one additional day in jail. During the same period, Hawkes was cited, but not convicted, under the Camping Ordinance, and Martin was cited, but not convicted, under the Disorderly Conduct Ordinance.

Plaintiff Robert Anderson currently lives in Boise; he is homeless and has often relied on Boise's shelters for housing. In the summer of 2007, Anderson stayed at River of Life as part of the Emergency Services Program until he reached the shelter's 17-day limit for male guests. Anderson testified that during his 2007 stay at River of Life, he was required to attend chapel services before he was permitted to eat dinner. At the conclusion of his 17-day stay, Anderson declined to enter the Discipleship Program because of his religious beliefs. As Anderson was barred by the shelter's policies from returning to River of Life for 30 days, he slept outside for the next several weeks. On September 1, 2007, Anderson was cited under the Camping Ordinance. He pled guilty to violating the Camping Ordinance and paid a $25 fine; he did not appeal his conviction.

Plaintiff Robert Martin is a former resident of Boise who currently lives in Post Falls, Idaho. Martin returns frequently to Boise to visit his minor son. In March of 2009, Martin was cited under the Camping Ordinance for sleeping outside; he was cited again in 2012 under the same ordinance.

**B. Procedural History**

The plaintiffs filed this action in the United States District Court for the District of Idaho in October of 2009. All plaintiffs alleged that their previous citations under the Camping Ordinance and the Disorderly Conduct Ordinance violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, and sought damages for those alleged violations under 42 U.S.C. § 1983. *Cf. Jones*, 444 F.3d at 1138. Anderson and Martin also sought prospective declaratory and injunctive relief precluding future enforcement of the ordinances under the same statute and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

  

After this litigation began, the Boise Police Department promulgated a new ***607** "Special Order," effective as of January 1, 2010, that prohibited enforcement of either the Camping Ordinance or the Disorderly Conduct Ordinance against any homeless person on public property on any night when no shelter had "an available overnight space." City police implemented the Special Order through a two-step procedure known as the "Shelter Protocol."

Under the Shelter Protocol, if any shelter in Boise reaches capacity on a given night, that shelter will so notify the police at roughly 11:00 pm. Each shelter has discretion to determine whether it is full, and Boise police have no other mechanism or criteria for gauging whether a shelter is full. Since the Shelter Protocol was adopted, Sanctuary has reported that it was full on almost 40% of nights. Although BRM agreed to the Shelter Protocol, its internal policy is never to turn any person away because of a lack of space, and neither BRM shelter has ever reported that it was full.

If all shelters are full on the same night, police are to refrain from enforcing either ordinance. Presumably because the BRM shelters have not reported full, Boise police continue to issue citations regularly under both ordinances.

In July 2011, the district court granted summary judgment to the City. It held that the plaintiffs' claims for retrospective relief were barred under the *Rooker-Feldman* doctrine and that their claims for prospective relief were mooted by the Special Order and the Shelter Protocol. *Bell v. City of Boise*, 834 F.Supp.2d 1103 (D. Idaho 2011). On appeal, we reversed and remanded. *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013). We held that the district court erred in dismissing the plaintiffs' claims under the *Rooker-Feldman* doctrine. *Id*. at 897. In so holding, we expressly declined to consider whether the favorable-termination requirement from *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), applied to the plaintiffs' claims for retrospective relief. Instead, we left the issue for the district court on remand. *Bell*, 709 F.3d at 897 n.11.

*Bell* further held that the plaintiffs' claims for prospective relief were not moot. The City had not met its "heavy burden" of demonstrating that the challenged conduct — enforcement of the two ordinances against homeless individuals with no access to shelter — "could not reasonably be expected to recur." *Id*. at 898, 901 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). We emphasized that the Special Order was a statement of administrative policy and so could be amended or reversed at any time by the Boise Chief of Police. *Id*. at 899–900.

Finally, *Bell* rejected the City's argument that the plaintiffs lacked standing to seek prospective relief because they were no longer homeless. *Id*. at 901 & n.12. We noted that, on summary judgment, the plaintiffs "need not establish that they in fact have standing, but only that there is a genuine issue of material fact as to the standing elements." *Id.* (citation omitted).

On remand, the district court again granted summary judgment to the City on the plaintiffs' § 1983 claims. The court observed that *Heck* requires a § 1983 plaintiff seeking damages for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid" to demonstrate that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal ... or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. at 486–87, 114 S.Ct. 2364. According to the district court, "a judgment finding the Ordinances unconstitutional ***608** ... necessarily would imply the invalidity of Plaintiffs' [previous] convictions under those ordinances," and the plaintiffs therefore were required to demonstrate that their convictions or sentences had already been invalidated. As none of the plaintiffs had raised an Eighth Amendment challenge as a defense to criminal prosecution, nor had any plaintiff successfully appealed their conviction, the district court held that all of the plaintiffs' claims for retrospective relief were barred by *Heck*. The district court also rejected as barred by *Heck* the plaintiffs' claim for prospective injunctive relief under § 1983, reasoning that "a ruling in favor of Plaintiffs on even a prospective § 1983 claim would demonstrate the invalidity of any confinement stemming from those convictions."

Finally, the district court determined that, although *Heck* did not bar relief under the Declaratory Judgment Act, Martin and Anderson now lack standing to pursue such relief. The linchpin of this holding was that the Camping Ordinance and the Disorderly Conduct Ordinance were both amended in 2014 to codify the Special Order's mandate that "[l]aw enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter." Boise City Code §§ 6-01-05, 9-10-02. Because the ordinances, as amended, permitted camping or sleeping in a public place when no shelter space was

  

available, the court held that there was no "credible threat" of future prosecution. "If the Ordinances are not to be enforced when the shelters are full, those Ordinances do not inflict a constitutional injury upon these particular plaintiffs ...." The court emphasized that the record "suggests there is no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity" and that "there has not been a single night when all three shelters in Boise called in to report they were simultaneously full for men, women or families."

This appeal followed.

## II. Discussion

### A. Standing

We first consider whether any of the plaintiffs has standing to pursue prospective relief.[5] We conclude that there are sufficient opposing facts in the record to create a genuine issue of material fact as to whether Martin and Anderson face a credible threat of prosecution under one or both ordinances in the future at a time when they are unable to stay at any Boise homeless shelter.[6]

**[2]** **[3]** **[4]** **[5]** **[6]** "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264 (2013) (citation omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury ***609** is not too speculative for Article III purposes — that the injury is *certainly* impending." *Id.* (citation omitted). A plaintiff need not, however, await an arrest or prosecution to have standing to challenge the constitutionality of a criminal statute. "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (citation and internal quotation marks omitted). To defeat a motion for summary judgment premised on an alleged lack of standing, plaintiffs " need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

**[7]** In dismissing Martin and Anderson's claims for declaratory relief for lack of standing, the district court emphasized that Boise's ordinances, as amended in 2014, preclude the City from issuing a citation when there is no available space at a shelter, and there is consequently no risk that either Martin or Anderson will be cited under such circumstances in the future. Viewing the record in the light most favorable to the plaintiffs, we cannot agree.

Although the 2014 amendments preclude the City from enforcing the ordinances when there is no room available at any shelter, the record demonstrates that the City is wholly reliant on the shelters to self-report when they are full. It is undisputed that Sanctuary is full as to men on a substantial percentage of nights, perhaps as high as 50%. The City nevertheless emphasizes that since the adoption of the Shelter Protocol in 2010, the BRM facilities, River of Life and City Light, have never reported that they are full, and BRM states that it will never turn people away due to lack space.

The plaintiffs have pointed to substantial evidence in the record, however, indicating that whether or not the BRM facilities are ever full or turn homeless individuals away *for lack of space*, they *do* refuse to shelter homeless people who exhaust the number of days allotted by the facilities. Specifically, the plaintiffs allege, and the City does not dispute, that it is BRM's policy to limit men to 17 consecutive days in the Emergency Services Program, after which they cannot return to River of Life for 30 days; City Light has a similar 30-day limit for women and children. Anderson testified that BRM has enforced this policy against him in the past, forcing him to sleep outdoors.

**[8]** The plaintiffs have adduced further evidence indicating that River of Life permits individuals to remain at the shelter after 17 days in the Emergency Services Program only on the condition that they become part of the New Life Discipleship program, which has a mandatory religious focus. For example, there is evidence that participants in the New Life Program are not allowed to spend days at Corpus Christi, a local Catholic program, "because it's ... a different sect." There are also facts in dispute concerning whether the Emergency Services Program itself has a religious component. Although the City argues strenuously that the Emergency Services Program is secular, Anderson testified to the contrary; he stated that he was once required to attend

  

chapel before being permitted to eat dinner at the River of Life shelter. Both Martin and Anderson have objected to the overall religious atmosphere ***610** of the River of Life shelter, including the Christian messaging on the shelter's intake form and the Christian iconography on the shelter walls. A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment. *Inouye v. Kemna*, 504 F.3d 705, 712–13 (9th Cir. 2007). Yet at the conclusion of a 17-day stay at River of Life, or a 30-day stay at City Light, an individual may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances), or enrolling in BRM programming that is antithetical to his or her religious beliefs.

The 17-day and 30-day limits are not the only BRM policies which functionally limit access to BRM facilities even when space is nominally available. River of Life also turns individuals away if they voluntarily leave the shelter before the 17-day limit and then attempt to return within 30 days. An individual who voluntarily leaves a BRM facility for any reason — perhaps because temporary shelter is available at Sanctuary, or with friends or family, or in a hotel — cannot immediately return to the shelter if circumstances change. Moreover, BRM's facilities may deny shelter to any individual who arrives after 5:30 pm, and generally will deny shelter to anyone arriving after 8:00 pm. Sanctuary, however, does not assign beds to persons on its waiting list until 9:00 pm. Thus, by the time a homeless individual on the Sanctuary waiting list discovers that the shelter has no room available, it may be too late to seek shelter at either BRM facility.

So, even if we credit the City's evidence that BRM's facilities have never been "full," and that the City has never cited any person under the ordinances who could not obtain shelter "due to a lack of shelter capacity," there remains a genuine issue of material fact as to whether homeless individuals in Boise run a credible risk of being issued a citation on a night when Sanctuary is full and they have been denied entry to a BRM facility for reasons other than shelter capacity. If so, then as a practical matter, no shelter is available. We note that despite the Shelter Protocol and the amendments to both ordinances, the City continues regularly to issue citations for violating both ordinances; during the first three months of 2015, the Boise Police Department issued over 175 such citations.

The City argues that Martin faces little risk of prosecution under either ordinance because he has not lived in Boise since 2013. Martin states, however, that he is still homeless and still visits Boise several times a year to visit his minor son, and that he has continued to seek shelter at Sanctuary and River of Life. Although Martin may no longer spend enough time in Boise to risk running afoul of BRM's 17-day limit, he testified that he has unsuccessfully sought shelter at River of Life after being placed on Sanctuary's waiting list, only to discover later in the evening that Sanctuary had no available beds. Should Martin return to Boise to visit his son, there is a reasonable possibility that he might again seek shelter at Sanctuary, only to discover (after BRM has closed for the night) that Sanctuary has no space for him. Anderson, for his part, continues to live in Boise and states that he remains homeless.

We conclude that both Martin and Anderson have demonstrated a genuine issue of material fact regarding whether they face a credible risk of prosecution under the ordinances in the future on a night when they have been denied access to Boise's homeless shelters; both plaintiffs therefore have standing to seek prospective relief.

### ***611 B. *Heck v. Humphrey***

We turn next to the impact of *Heck v. Humphrey* and its progeny on this case. With regard to retrospective relief, the plaintiffs maintain that *Heck* should not bar their claims because, with one exception, all of the plaintiffs were sentenced to time served.[7] It would therefore have been impossible for the plaintiffs to obtain federal habeas relief, as any petition for a writ of habeas corpus must be filed while the petitioner is "in custody pursuant to the judgment of a State court." *See* 28 U.S.C. § 2254(a); *Spencer v. Kemna*, 523 U.S. 1, 7, 17–18, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). With regard to prospective relief, the plaintiffs emphasize that they seek only equitable protection against *future* enforcement of an allegedly unconstitutional statute, and not to invalidate any prior conviction under the same statute. We hold that although the *Heck* line of cases precludes most — but not all — of the plaintiffs' requests for retrospective relief, that doctrine has no application to the plaintiffs' request for an injunction enjoining prospective enforcement of the ordinances.

#### 1. The *Heck* Doctrine

A long line of Supreme Court case law, beginning with *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), holds that a prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of his or her confinement, but must instead seek federal habeas

corpus relief or analogous state relief. *Id.* at 477, 500. *Preiser* considered whether a prison inmate could bring a § 1983 action seeking an injunction to remedy an unconstitutional deprivation of good-time conduct credits. Observing that habeas corpus is the traditional instrument to obtain release from unlawful confinement, *Preiser* recognized an implicit exception from § 1983's broad scope for actions that lie "within the core of habeas corpus" — specifically, challenges to the "fact or duration" of confinement. *Id.* at 487, 500, 93 S.Ct. 1827. The Supreme Court subsequently held, however, that although *Preiser* barred inmates from obtaining an injunction to restore good-time credits via a § 1983 action, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the *prospective* enforcement of invalid prison regulations." *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (emphasis added).

**[9]** *Heck* addressed a § 1983 action brought by an inmate seeking compensatory and punitive damages. The inmate alleged that state and county officials had engaged in unlawful investigations and knowing destruction of exculpatory evidence. *Heck*, 512 U.S. at 479, 114 S.Ct. 2364. The Court in *Heck* analogized a § 1983 action of this type, which called into question the validity of an underlying conviction, to a cause of action for malicious prosecution, *id.* at 483–84, 114 S.Ct. 2364, and went on to hold that, as with a malicious prosecution claim, a plaintiff in such an action must demonstrate a favorable termination of the criminal proceedings before seeking tort relief, *id.* at 486–87, 114 S.Ct. 2364. "[T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared ***612** invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.*

*Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) extended *Heck*'s holding to claims for declaratory relief. *Id.* at 648, 117 S.Ct. 1584. The plaintiff in *Edwards* alleged that he had been deprived of earned good-time credits without due process of law, because the decisionmaker in disciplinary proceedings had concealed exculpatory evidence. Because the plaintiff's claim for declaratory relief was "based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed," *Edwards* held, it was "not cognizable under § 1983." *Id. Edwards* went on to hold, however, that a requested injunction requiring prison officials to date-stamp witness statements was not *Heck*-barred, reasoning that a "prayer for such *prospective* relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983." *Id.* (emphasis added).

**[10]** Most recently, *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), stated that *Heck* bars § 1983 suits even when the relief sought is prospective injunctive or declaratory relief, "if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 81–82, 125 S.Ct. 1242 (emphasis omitted). But *Wilkinson* held that the plaintiffs in that case *could* seek a prospective injunction compelling the state to comply with constitutional requirements in parole proceedings in the future. The Court observed that the prisoners' claims for future relief, "if successful, will not necessarily imply the invalidity of confinement or shorten its duration." *Id.* at 82, 125 S.Ct. 1242.

The Supreme Court did not, in these cases or any other, conclusively determine whether *Heck*'s favorable-termination requirement applies to convicts who have no practical opportunity to challenge their conviction or sentence via a petition for habeas corpus. *See Muhammad v. Close*, 540 U.S. 749, 752 & n.2, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004). But in *Spencer*, five Justices suggested that *Heck* may not apply in such circumstances. *Spencer*, 523 U.S. at 3, 118 S.Ct. 978.

The petitioner in *Spencer* had filed a federal habeas petition seeking to invalidate an order revoking his parole. While the habeas petition was pending, the petitioner's term of imprisonment expired, and his habeas petition was consequently dismissed as moot. Justice Souter wrote a concurring opinion in which three other Justices joined, addressing the petitioner's argument that if his habeas petition were mooted by his release, any § 1983 action would be barred under *Heck*, yet he would no longer have access to a federal habeas forum to challenge the validity of his parole revocation. *Id.* at 18–19, 118 S.Ct. 978 (Souter, J., concurring). Justice Souter stated that in his view "*Heck* has no such effect," and that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement

  

that it would be impossible as a matter of law for him to satisfy." *Id.* at 21, 118 S.Ct. 978. Justice Stevens, dissenting, stated that he would have held the habeas petition in *Spencer* not moot, but agreed that "[g]iven the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear ... that he may bring an action under 42 U.S.C. § 1983." *Id.* at 25, 118 S.Ct. 978 n.8 (Stevens, J., dissenting).

***613** Relying on the concurring and dissenting opinions in *Spencer*, we have held that the "unavailability of a remedy in habeas corpus because of mootness" permitted a plaintiff released from custody to maintain a § 1983 action for damages, "even though success in that action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits." *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002). But we have limited *Nonnette* in recent years. Most notably, we held in *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), that even where a plaintiff had no practical opportunity to pursue federal habeas relief while detained because of the short duration of his confinement, *Heck* bars a § 1983 action that would imply the invalidity of a prior conviction if the plaintiff could have sought invalidation of the underlying conviction via direct appeal or state post-conviction relief, but did not do so. *Id.* at 1192 & n.12.

**2. Retrospective Relief**

**[11]** Here, the majority of the plaintiffs' claims for *retrospective* relief are governed squarely by *Lyall.* It is undisputed that all the plaintiffs not only failed to challenge their convictions on direct appeal but expressly waived the right to do so as a condition of their guilty pleas. The plaintiffs have made no showing that any of their convictions were invalidated via state post-conviction relief. We therefore hold that all but two of the plaintiffs' claims for damages are foreclosed under *Lyall.*

**[12]** Two of the plaintiffs, however, Robert Martin and Pamela Hawkes, also received citations under the ordinances that were dismissed before the state obtained a conviction. Hawkes was cited for violating the Camping Ordinance on July 8, 2007; that violation was dismissed on August 28, 2007. Martin was cited for violating the Disorderly Conduct Ordinance on April 24, 2009; those charges were dismissed on September 9, 2009. The complaint alleges two injuries stemming from these dismissed citations: (1) the continued inclusion of the citations on plaintiffs' criminal records; and (2) the accumulation of a host of criminal fines and incarceration costs. Plaintiffs seek orders compelling the City to "expunge[ ] ... the records of any homeless individuals unlawfully cited or arrested and charged under [the Ordinances]" and "reimburse[ ] ... any criminal fines paid ... [or] costs of incarceration billed."

With respect to these two incidents, the district court erred in finding that the plaintiffs' Eighth Amendment challenge was barred by *Heck*. Where there is no "conviction or sentence" that may be undermined by a grant of relief to the plaintiffs, the *Heck* doctrine has no application. 512 U.S. at 486–87, 114 S.Ct. 2364; *see also Wallace v. Kato*, 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007).

**[13]** **[14]** Relying on *Ingraham v. Wright*, 430 U.S. 651, 664, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), the City argues that the Eighth Amendment, and the Cruel and Unusual Punishments Clause in particular, have no application where there has been no conviction. The City's reliance on *Ingraham* is misplaced. As the Supreme Court observed in *Ingraham*, the Cruel and Unusual Punishments Clause not only limits the types of punishment that may be imposed and prohibits the imposition of punishment grossly disproportionate to the severity of the crime, but also "imposes substantive limits on what can be made criminal and punished as such." *Id.* at 667, 97 S.Ct. 1401. "This [latter] protection governs the criminal law process as a whole, not only the imposition of punishment postconviction." *Jones*, 444 F.3d at 1128.

***614** **[15]** *Ingraham* concerned only whether "impositions outside the criminal process" — in that case, the paddling of schoolchildren — "constituted cruel and unusual punishment." 430 U.S. at 667, 97 S.Ct. 1401. *Ingraham* did not hold that a plaintiff challenging the state's power to criminalize a particular status or conduct in the first instance, as the plaintiffs in this case do, must first be convicted. If conviction were a prerequisite for such a challenge, "the state could in effect punish individuals in the preconviction stages of the criminal law enforcement process for being or doing things that under the [Cruel and Unusual Punishments Clause] cannot be subject to the criminal process." *Jones*, 444 F.3d at 1129. For those rare Eighth Amendment challenges concerning the state's very power to criminalize particular behavior or status, then, a plaintiff need demonstrate only the initiation of the criminal process against him, not a conviction.

**3. Prospective Relief**

  

**[16]** The district court also erred in concluding that the plaintiffs' requests for prospective injunctive relief were barred by *Heck*. The district court relied entirely on language in *Wilkinson* stating that "a state prisoner's § 1983 action is barred (absent prior invalidation) ... no matter the relief sought (damages or equitable relief) ... *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson*, 544 U.S. at 81–82, 125 S.Ct. 1242. The district court concluded from this language in *Wilkinson* that a person convicted under an allegedly unconstitutional statute may never challenge the validity or application of that statute after the initial criminal proceeding is complete, even when the relief sought is prospective only and independent of the prior conviction. The logical extension of the district court's interpretation is that an individual who does not successfully invalidate a first conviction under an unconstitutional statute will have no opportunity to challenge that statute prospectively so as to avoid arrest and conviction for violating that same statute in the future.

Neither *Wilkinson* nor any other case in the *Heck* line supports such a result. Rather, *Wolff*, *Edwards*, and *Wilkinson* compel the opposite conclusion.

*Wolff* held that although *Preiser* barred a § 1983 action seeking restoration of good-time credits absent a successful challenge in federal habeas proceedings, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid ... regulations." *Wolff*, 418 U.S. at 555, 94 S.Ct. 2963. Although *Wolff* was decided before *Heck*, the Court subsequently made clear that *Heck* effected no change in the law in this regard, observing in *Edwards* that "[o]rdinarily, a prayer for ... prospective [injunctive] relief will not 'necessarily imply' the invalidity of a *previous* loss of good-time credits, and so may properly be brought under § 1983." *Edwards*, 520 U.S. at 648, 117 S.Ct. 1584 (emphasis added). Importantly, the Court held in *Edwards* that although the plaintiff could not, consistently with *Heck*, seek a declaratory judgment stating that the procedures employed by state officials that deprived him of good-time credits were unconstitutional, he *could* seek an injunction barring such allegedly unconstitutional procedures in the future. *Id.* Finally, the Court noted in *Wilkinson* that the *Heck* line of cases "has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies *when they seek to invalidate the duration of their confinement*," *Wilkinson*, 544 U.S. at 81, 125 S.Ct. 1242 (emphasis added), alluding ***615** to an existing confinement, not one yet to come.

**[17]** **[18]** The *Heck* doctrine, in other words, serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge. In context, it is clear that *Wilkinson*'s holding that the *Heck* doctrine bars a § 1983 action "no matter the relief sought (damages or equitable relief) ... if success in that action would necessarily demonstrate the invalidity of confinement or its duration" applies to equitable relief concerning an existing confinement, not to suits seeking to preclude an unconstitutional confinement in the future, arising from incidents occurring after any prior conviction and stemming from a possible later prosecution and conviction. *Id.* at 81–82, 125 S.Ct. 1242 (emphasis added). As *Wilkinson* held, "claims for *future* relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration)" are distant from the "core" of habeas corpus with which the *Heck* line of cases is concerned, and are not precluded by the *Heck* doctrine. *Id.* at 82, 125 S.Ct. 1242.

In sum, we hold that the majority of the plaintiffs' claims for retrospective relief are barred by *Heck*, but both Martin and Hawkes stated claims for damages to which *Heck* has no application. We further hold that *Heck* has no application to the plaintiffs' requests for prospective injunctive relief.

### C. The Eighth Amendment

At last, we turn to the merits — does the Cruel and Unusual Punishments Clause of the Eighth Amendment preclude the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter? We hold that it does, for essentially the same reasons articulated in the now-vacated *Jones* opinion.

**[19]** The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401. First, it limits the type of punishment the government may impose; second, it proscribes punishment "grossly disproportionate" to the severity of the crime; and third, it places substantive limits on what the government may criminalize. *Id.* It is the third limitation that is pertinent here.

**[20]** **[21]** "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common

cold." *Robinson v. California*, 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Cases construing substantive limits as to what the government may criminalize are rare, however, and for good reason — the Cruel and Unusual Punishments Clause's third limitation is "one to be applied sparingly." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401.

*Robinson*, the seminal case in this branch of Eighth Amendment jurisprudence, held a California statute that "ma[de] the 'status' of narcotic addiction a criminal offense" invalid under the Cruel and Unusual Punishments Clause. 370 U.S. at 666, 82 S.Ct. 1417. The California law at issue in *Robinson* was "not one which punishe[d] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration"; it punished addiction itself. *Id.* Recognizing narcotics addiction as an illness or disease — "apparently an illness which may be contracted innocently or involuntarily" — and observing that a "law which made a criminal offense of ... a disease would doubtless be universally thought to be an infliction of ***616** cruel and unusual punishment," *Robinson* held the challenged statute a violation of the Eighth Amendment. *Id.* at 666–67, 82 S.Ct. 1417.

As *Jones* observed, *Robinson* did not explain at length the principles underpinning its holding. *See Jones*, 444 F.3d at 1133. In *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), however, the Court elaborated on the principle first articulated in *Robinson*.

*Powell* concerned the constitutionality of a Texas law making public drunkenness a criminal offense. Justice Marshall, writing for a plurality of the Court, distinguished the Texas statute from the law at issue in *Robinson* on the ground that the Texas statute made criminal not alcoholism but *conduct* — appearing in public while intoxicated. "[A]ppellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home." *Id.* at 532, 88 S.Ct. 2145 (plurality opinion).

**[22]** The *Powell* plurality opinion went on to interpret *Robinson* as precluding only the criminalization of "status," not of "involuntary" conduct. "The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' ...." *Id.* at 533, 88 S.Ct. 2145.

Four Justices dissented from the Court's holding in *Powell*; Justice White concurred in the result alone. Notably, Justice White noted that many chronic alcoholics are also homeless, and that for those individuals, public drunkenness may be unavoidable as a practical matter. "For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. ... For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment — the act of getting drunk." *Id.* at 551, 88 S.Ct. 2145 (White, J., concurring in the judgment).

**[23]** The four dissenting Justices adopted a position consistent with that taken by Justice White: that under *Robinson*, "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change," and that the defendant, "once intoxicated, ... could not prevent himself from appearing in public places." *Id.* at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). Thus, five Justices gleaned from *Robinson* the principle that "that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Jones*, 444 F.3d at 1135; *see also United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017).

**[24]** This principle compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. As *Jones* reasoned, "[w]hether sitting, lying, and sleeping are ***617** defined as acts or conditions, they are universal and unavoidable consequences of being human." *Jones*, 444 F.3d at 1136. Moreover, any "conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." *Id.* As a result, just as the state may not criminalize the state of being "homeless in public places," the state may not "criminalize conduct that

  

is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets." *Id.* at 1137.

Our holding is a narrow one. Like the *Jones* panel, "we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place." *Id.* at 1138. We hold only that "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]," the jurisdiction cannot prosecute homeless individuals for "involuntarily sitting, lying, and sleeping in public." *Id.* That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.[8]

We are not alone in reaching this conclusion. As one court has observed, "resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible. ... As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment — sleeping, eating and other innocent conduct." *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1565 (S.D. Fla. 1992); *see also Johnson v. City of Dallas*, 860 F.Supp. 344, 350 (N.D. Tex. 1994) (holding that a "sleeping in public ordinance as applied against the homeless is unconstitutional"), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995).[9]

Here, the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with a blanket or other basic bedding. The Disorderly ***618** Conduct Ordinance, on its face, criminalizes "[o]ccupying, lodging, or sleeping in *any* building, structure or place, whether public or private" without permission. Boise City Code § 6-01-05. Its scope is just as sweeping as the Los Angeles ordinance at issue in *Jones*, which mandated that "[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way." 444 F.3d at 1123.

The Camping Ordinance criminalizes using "any of the streets, sidewalks, parks or public places as a camping place at any time." Boise City Code § 9-10-02. The ordinance defines "camping" broadly:

> The term "camp" or "camping" shall mean the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at anytime between sunset and sunrise, or as a sojourn. Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).

*Id.* It appears from the record that the Camping Ordinance is frequently enforced against homeless individuals with some elementary bedding, whether or not any of the other listed indicia of "camping" — the erection of temporary structures, the activity of cooking or making fire, or the storage of personal property — are present. For example, a Boise police officer testified that he cited plaintiff Pamela Hawkes under the Camping Ordinance for sleeping outside "wrapped in a blanket with her sandals off and next to her," for sleeping in a public restroom "with blankets," and for sleeping in a park "on a blanket, wrapped in blankets on the ground." The Camping Ordinance therefore can be, and allegedly is, enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements. We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.

## III. Conclusion

For the foregoing reasons, we **AFFIRM** the judgment of the district court as to the plaintiffs' requests for retrospective relief, except as such claims relate to Hawkes's July 2007 citation under the Camping Ordinance and Martin's April 2009 citation under the Disorderly Conduct Ordinance. We **REVERSE** and **REMAND** with respect to the plaintiffs' requests for prospective relief, both declaratory and injunctive, and to the plaintiffs' claims for retrospective relief insofar as they relate to Hawkes' July 2007 citation or Martin's April 2009 citation.[10]

OWENS, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), bars the plaintiffs' 42 U.S.C. § 1983 claims for damages that are based on convictions that have not been challenged on direct appeal or invalidated in state post-conviction relief. *See Lyall v. City of Los Angeles*, 807 F.3d 1178, 1192 n.12 (9th Cir. 2015).

I also agree that *Heck* and its progeny have no application where there is no "conviction ***619** or sentence" that would be undermined by granting a plaintiff's request for relief under § 1983. *Heck*, 512 U.S. at 486–87, 114 S.Ct. 2364; *see also Wallace v. Kato*, 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). I therefore concur in the majority's conclusion that *Heck* does not bar plaintiffs Robert Martin and Pamela Hawkes from seeking retrospective relief for the two instances in which they received citations, but not convictions. I also concur in the majority's Eighth Amendment analysis as to those two claims for retrospective relief.

Where I part ways with the majority is in my understanding of *Heck*'s application to the plaintiffs' claims for declaratory and injunctive relief. In *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), the Supreme Court explained where the *Heck* doctrine stands today:

> [A] state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

*Id.* at 81–82. Here, the majority acknowledges this language in *Wilkinson*, but concludes that *Heck*'s bar on any type of relief that "would necessarily demonstrate the invalidity of confinement" does not preclude the prospective claims at issue. The majority reasons that the purpose of *Heck* is "to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge," and so concludes that the plaintiffs' prospective claims may proceed. I respectfully disagree.

A declaration that the city ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions. Indeed, any time an individual challenges the constitutionality of a substantive criminal statute under which he has been convicted, he asks for a judgment that would necessarily demonstrate the invalidity of his conviction. And though neither the Supreme Court nor this court has squarely addressed *Heck*'s application to § 1983 claims challenging the constitutionality of a substantive criminal statute, I believe *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), makes clear that *Heck* prohibits such challenges. In *Edwards*, the Supreme Court explained that although our court had recognized that *Heck* barred § 1983 claims challenging the validity of a prisoner's confinement "as a substantive matter," it improperly distinguished as not *Heck*-barred *all* claims alleging only procedural violations. 520 U.S. at 645, 117 S.Ct. 1584. In holding that *Heck* also barred those procedural claims that would necessarily imply the invalidity of a conviction, the Court did not question our conclusion that claims challenging a conviction "as a substantive matter" are barred by *Heck*. *Id.*; *see also Wilkinson*, 544 U.S. at 82, 125 S.Ct. 1242 (holding that the plaintiffs' claims could proceed because the relief requested would only "render invalid the state *procedures*" and "a favorable judgment [would] not 'necessarily imply the invalidity of [their] conviction[s] or sentence[s]' " (emphasis added) (quoting *Heck*, 512 U.S. at 487, 114 S.Ct. 2364)).

*Edwards* thus leads me to conclude that an individual who was convicted under a criminal statute, but who did not challenge the constitutionality of the statute at the time of his conviction through direct appeal or post-conviction relief, cannot do so in the first instance by seeking declaratory or injunctive relief under § 1983. *See* ***620** *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 405 F.3d 1298, 1316 n.9 (11th Cir. 2005) (assuming that a § 1983 claim challenging "the constitutionality of the ordinance under which [the petitioner was convicted]" would be *Heck*-barred). I therefore would hold that *Heck* bars the plaintiffs' claims for declaratory and injunctive relief.

We are not the first court to struggle applying *Heck* to "real life examples," nor will we be the last. *See, e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 21, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (Ginsburg, J., concurring) (alterations and internal quotation marks omitted) (explaining that her thoughts on *Heck* had changed since she joined the majority opinion in that case). If the slate were blank, I would agree that the majority's holding as to prospective relief makes good sense. But because I read *Heck* and its progeny differently, I dissent as to that section of the majority's opinion. I otherwise join the majority in full.

  

**All Citations**

920 F.3d 584, 19 Cal. Daily Op. Serv. 2944, 2019 Daily Journal D.A.R. 2762

Footnotes

1 Although Judge M. Smith does not credit the photograph to any source, an internet search suggests that the original photograph is attributable to Los Angeles County. *See Implementing the Los Angeles County Homelessness Initiative*, L.A. County, http://homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/ [https://web.archive.org/web/?20170405225036/homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/#]; *see also* Los Angeles County (@CountyofLA), Twitter (Nov. 29, 2017, 3:23 PM), https://twitter.com/CountyofLA/status/936012841533894657.

1 With almost 553,000 people who experienced homelessness nationwide on a single night in January 2018, this issue affects communities across our country. U.S. Dep't of Hous. & Urban Dev., Office of Cmty. Planning & Dev., The 2018 Annual Homeless Assessment Report (AHAR) to Congress 1 (Dec. 2018), https://www.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf.

2 Our court previously adopted the same Eighth Amendment holding as the panel in *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), but that decision was later vacated. 505 F.3d 1006 (9th Cir. 2007).

3 That most of these opinions were unpublished only buttresses my point: It is uncontroversial that *Powell* does not prohibit the criminalization of involuntary conduct.

4 Transcript of Oral Argument at 14, *Hughes v. United States*, —— U.S. ——, 138 S.Ct. 1765, 201 L.Ed.2d 72 (2018) (No. 17-155).

5 *Id.* at 49.

6 Richard M. Re, *Beyond the* Marks *Rule*, 132 Harv. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620.

7 Justice Black has also observed that solutions for challenging social issues should be left to the policymakers:

> I cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem .... [I]t seems to me that the present use of criminal sanctions might possibly be unwise, but I am by no means convinced that any use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise.

*Powell*, 392 U.S. at 539–40, 88 S.Ct. 2145 (Black, J., concurring).

8 Pursuant to Fourth Circuit Local Rule 35(c), "[g]ranting of rehearing en banc vacates the previous panel judgment and opinion." I mention *Manning*, however, as an illustration of other courts' reasoning on the Eighth Amendment issue.

9 Matt Tinoco, *LA Counts Its Homeless, But Counting Everybody Is Virtually Impossible*, LAist (Jan. 22, 2019, 2:08 PM), https://laist.com/2019/01/22/los_angeles_homeless_count_2019_how_volunteer.php. The panel conceded the imprecision of such counts in its opinion. *See Martin*, 902 F.3d at 1036 n.1 (acknowledging that the count of homeless individuals "is not always precise"). But it went on to disregard that fact when tying a city's ability to enforce its laws to these counts.

10 The U.S. Department of Housing and Urban Development's 2018 Annual Homeless Assessment Report to Congress reveals that municipalities within our circuit have among the highest homeless populations in the country. In Los Angeles City and County alone, 49,955 people experienced homelessness in 2018. The number was 12,112 people in Seattle and King County, Washington, and 8,576 people in San Diego City and County, California. *See supra* note 1, at 18, 20. In 2016, Las Vegas had an estimated homeless population of 7,509 individuals, and California's Santa Clara County had 6,556. Joaquin Palomino, *How Many People Live On Our Streets*?, S.F. Chronicle (June 28, 2016), https://projects.sfchronicle.com/sf-homeless/numbers.

11 Cities can instead provide sufficient housing for every homeless individual, but the cost would be prohibitively expensive for most local governments. Los Angeles, for example, would need to spend $403.4 million to house every homeless individual not living in a vehicle. *See* Los Angeles Homeless Services Authority, Report on Emergency Framework to Homelessness Plan 13 (June 2018), https://assets.documentcloud.org/documents/4550980/LAHSA-ShelteringReport.pdf. In San Francisco, building new centers to provide a mere 400 additional shelter spaces was estimated to cost between $10 million and $20 million, and would require $20 million to $30 million to operate each year. *See* Heather Knight, *A Better Model, A Better Result?*, S.F. Chronicle (June 29, 2016), https://projects.sfchronicle.com/

  

sfhomeless/shelters. Perhaps these staggering sums are why the panel went out of its way to state that it "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless." *Martin*, 902 F.3d at 1048.

12 Indeed, in the few short months since the panel's decision, several cities have thrown up their hands and abandoned any attempt to enforce such laws. *See, e.g.*, Cynthia Hubert, *Sacramento County Cleared Homeless Camps All Year. Now It Has Stopped Citing Campers*, Sacramento Bee (Sept. 18, 2019, 4:27 PM), https://www.sacbee.com/news/local/homeless/article218605025.html ("Sacramento County park rangers have suddenly stopped issuing citations altogether after a federal court ruling this month."); Michael Ellis Langley, *Policing Homelessness*, Golden State Newspapers (Feb. 22, 2019), http://www.goldenstatenewspapers.com/tracy_press/news/policing-homelessness/article_5fe6a9ca-3642-11e9-9b25-37610ef2dbae.html (Sheriff Pat Withrow stating that, "[a]s far as camping ordinances and things like that, we're probably holding off on [issuing citations] for a while" in light of *Martin v. City of Boise*); Kelsie Morgan, *Moses Lake Sees Spike in Homeless Activity Following 9th Circuit Court Decision*, KXLY (Oct. 2, 2018, 12:50 PM), https://www.kxly.com/news/moses-lake-sees-spike-in-homeless-activityfollowing-9th-circuit-court-decision/801772571 ("Because the City of Moses Lake does not currently have a homeless shelter, city officials can no longer penalize people for sleeping in public areas."); Brandon Pho, *Buena Park Residents Express Opposition to Possible Homeless Shelter*, Voice of OC (Feb. 14, 2019), https://voiceofoc.org/2019/02/buena-park-residents-express-opposition-to-possible-homeless-shelter/ (stating that Judge David Carter of the U.S. District Court for the Central District of California has "warn[ed] Orange County cities to get more shelters online or risk the inability the enforce their anti-camping ordinances"); Nick Welsh, *Court Rules to Protect Sleeping in Public: Santa Barbara City Parks Subject of Ongoing Debate*, Santa Barbara Indep. (Oct. 31, 2018), http://www.independent.com/news/2018/oct/31/court-rules-protect-sleeping-public/?jqm ("In the wake of what's known as 'the Boise decision,' Santa Barbara city police found themselves scratching their heads over what they could and could not issue citations for.").

13 In 2017, for example, San Francisco received 32,272 complaints about homeless encampments to its 311-line. Kevin Fagan, *The Situation On The Streets*, S.F. Chronicle (June 28, 2018), https://projects.sfchronicle.com/sf-homeless/2018-state-of-homelessness.

14 *See* Heater Knight, *It's No Laughing Matter—SF Forming Poop Patrol to Keep Sidewalks Clean*, S.F. Chronicle (Aug. 14, 2018), https://www.sfchronicle.com/bayarea/heatherknight/article/It-s-nolaughing-matter-SF-forming-Poop-13153517.php.

15 *See* Anna Gorman and Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless*, The Atlantic (Mar. 8, 2019), https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosismedieval-diseases-spreading-homeless/584380/ (describing the recent outbreaks of typhus, Hepatitis A, and shigellosis as "disaster[s] and [a] public-health crisis" and noting that such "diseases spread quickly and widely among people living outside or in shelters").

16 Scott Johnson and Peter Kiefer, *LA's Battle for Venice Beach: Homeless Surge Puts Hollywood's Progressive Ideals to the Test*, Hollywood Reporter (Jan. 11, 2019, 6:00 AM), https://www.hollywoodreporter.com/features/las-homeless-surge-puts-hollywoods-progressive-ideals-test-1174599.

17 *See* U.S. Dep't of Hous. & Urban Dev., PIT Data Since 2007, https://www.hudexchange.info/resources/documents/2007-2018-PITCounts-by-CoC.xlsx; U.S. Dep't of Hous. & Urban Dev., HIC Data Since 2007, https://www.hudexchange.info/resources/documents/2007-2018HIC-Counts-by-CoC.xlsx. Boise is within Ada County and listed under CoC code ID-500.

1 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689) (Section 10 of the English Declaration of Rights) ("excessive Baile ought not to be required, nor excessive Fines imposed; nor cruell and unusuall Punishments inflicted.").

2 *Jones*, of course, was vacated and lacks precedential value. 505 F.3d 1006 (9th Cir. 2007). But the panel here resuscitated *Jones*'s errant holding, including, apparently, its application of the Cruel and Unusual Punishments Clause in the absence of a criminal conviction. We should have taken this case en banc to correct this misinterpretation of the Eighth Amendment.

3 We have emphasized the need to proceed cautiously when extending the reach of the Cruel and Unusual Punishments Clause beyond regulation of the methods of punishment that may be inflicted upon conviction for an offense. *See United States v. Ritter*, 752 F.2d 435, 438 (9th Cir. 1985) (repeating *Ingraham*'s direction that "this particular use of the cruel and unusual punishment clause is to be applied sparingly" and noting that *Robinson* represents "the rare type of case in which the clause has been used to limit what may be made criminal"); *see also United States v. Ayala*, 35 F.3d 423, 426 (9th Cir. 1994) (limiting application of *Robinson* to crimes lacking an actus reus). The panel's holding here throws that caution to the wind.

4 Judge Friendly also expressed "considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence." *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973).

1 The United States Department of Housing and Urban Development ("HUD") requires local homeless assistance and prevention networks to conduct an annual count of homeless individuals on one night each January, known as the PIT Count, as a condition of receiving federal funds. State, local, and federal governmental entities, as well as private service providers, rely on the PIT Count as a "critical source of data" on homelessness in the United States. The parties acknowledge that the PIT Count is not always precise. The City's Director of Community Partnerships, Diana Lachiondo, testified that the PIT Count is "not always the ... best resource for numbers," but also stated that "the point-in-time count is our best snapshot" for counting the number of homeless individuals in a particular region, and that she "cannot give ... any other number with any kind of confidence."

2 The record suggests that BRM provides some limited additional non-emergency shelter programming which, like the Discipleship Program, has overtly religious components.

3 The intake form states in relevant part that "We are a Gospel Rescue Mission. Gospel means 'Good News,' and the Good News is that Jesus saves us from sin past, present, and future. We would like to share the Good News with you. Have you heard of Jesus? ... Would you like to know more about him?"

4 The parties dispute the extent to which BRM actually enforces the 17- and 30-day limits.

5 Standing to pursue retrospective relief is not in doubt. The only threshold question affecting the availability of a claim for retrospective relief — a question we address in the next section — is whether such relief is barred by the doctrine established in *Heck*.

6 Although the SAC is somewhat ambiguous regarding which of the plaintiffs seeks prospective relief, counsel for the plaintiffs made clear at oral argument that only two of the plaintiffs, Martin and Anderson, seek such relief, and the district court considered the standing question with respect to Martin and Anderson only.

7 Plaintiff Pamela Hawkes was convicted of violating the Camping Ordinance or Disorderly Conduct Ordinance on twelve occasions; although she was usually sentenced to time served, she was twice sentenced to one additional day in jail.

8 Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible. *See Jones*, 444 F.3d at 1123. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the "universal and unavoidable consequences of being human" in the way the ordinance prescribes. *Id.* at 1136.

9 In *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000), the Eleventh Circuit upheld an anti-camping ordinance similar to Boise's against an Eighth Amendment challenge. In *Joel*, however, the defendants presented unrefuted evidence that the homeless shelters in the City of Orlando had never reached capacity and that the plaintiffs had always enjoyed access to shelter space. *Id*. Those unrefuted facts were critical to the court's holding. *Id*. As discussed below, the plaintiffs here have demonstrated a genuine issue of material fact concerning whether they have been denied access to shelter in the past or expect to be so denied in the future. *Joel* therefore does not provide persuasive guidance for this case.

10 Costs shall be awarded to the plaintiffs.

2020 WL 4209227
Only the Westlaw citation is currently available.
United States District Court, D. Oregon,
Medford Division.

Debra BLAKE, Gloria Johnson, John Logan, individuals, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

CITY OF GRANTS PASS, Defendant.

Case No. 1:18-cv-01823-CL
|
Signed 07/22/2020

**Attorneys and Law Firms**

Edward Johnson, Oregon Law Center, Portland, OR, Eric T. Dahlin, Walter F. Fonseca, Oregon Law Center, Grants Pass, OR, for Plaintiffs.

Gerald L. Warren, Aaron Hisel, Law Office of Gerald L. Warren and Associates, Salem, OR, for Defendant.

OPINION AND ORDER

CLARKE, Magistrate Judge

***1** This case involves a certified class of homeless individuals residing in and around Grants Pass, Oregon. The class members allege that the City of Grants Pass has a web of ordinances, customs, and practices that, in combination, punish people based on their status of being involuntarily homeless. This case comes before the Court on cross-motions for summary judgment. The Court has also considered amicus briefs submitted by League of Oregon Cities and the National Law Center on Homelessness and Poverty. For the reasons below, Plaintiffs' Motion for Summary Judgment (Dkt. No. 62) is GRANTED in part and DENIED in part, and Defendant's Motion for Summary Judgment (Dkt. No. 80) is DENIED.[1]

**STANDARD OF REVIEW**

Summary judgment shall be granted when the record shows that there is no genuine dispute as to any material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). The court cannot weigh the evidence or determine the truth but may only determine whether there is a genuine issue of fact. *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002). An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

When a properly supported motion for summary judgment is made, the burden shifts to the opposing party to set forth specific facts showing that there is a genuine issue for trial. *Id.* at 250. Conclusory allegations unsupported by factual material are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposing party must, by affidavit or as otherwise provided by Rule 56, designate specific facts which show there is a genuine issue for trial. *Devereaux*, 263 F.3d at 1076. In assessing whether a party has met its burden, the court views the evidence in the light most favorable to the non-moving party. *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995).

BACKGROUND

This case is about respecting the dignity of homeless individuals and the City of Grants Pass' ability to protect the safety and welfare of its citizens. Unsheltered homelessness is an ever-growing crisis nationwide, and the overwhelming majority of homeless individuals are not living that way by choice. According to the United States Department of Housing and Urban Development ("HUD"), there were an estimated 533,000 homeless individuals in the United States in 2018; more than a third of whom were "unsheltered homeless," meaning, individuals "whose primary nighttime location [wa]s a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park,... or camping ground."[2] HUD's figures are obtained using what is known as a "point-

in-time" or "PIT" count, which, as its name suggests, is arrived at by counting the number of people in a city or county who are homeless on a particular night.[3] HUD requires local homelessness assistance and prevention networks to conduct a PIT count each year as a condition of federal funding. A 2001 administrative study found that the true size of a homeless population may be anywhere between 2.5 to 10 times larger than what can be estimated by a PIT count.[4] As the Ninth Circuit recognized in *Martin v. City of Boise*, there are many reasons for this undercount:

> ***2** It is widely recognized that a one-night point in time count will undercount the homeless population, as many homeless individuals may have access to temporary housing on a given night, and as weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.

920 F.3d 584, 604 (9th Cir.), *cert. denied sub nom. City of Boise, Idaho v. Martin*, 140 S. Ct. 674, (2019).

To combat the homeless crisis, many local governments have created ordinances—such as the ones challenged by Plaintiffs in this case—that ban "camping" or similar activities in all or parts of a city. These ordinances are often referred to as "quality of life laws."[5] Enforcing quality of life laws is an expensive endeavor nationwide. For example, the City of Los Angeles spends $50 million annually policing criminal and civil quality of life laws.[6] By contrast, the City of Los Angeles spends only $13 million on providing housing and services to the country's largest homeless population.[7] Likewise, a Seattle University study found that the cost to the City of Seattle for enforcing just one of its six quality of life laws was $2.3 million over five years.[8]

The City of Grants Pass, Oregon, the city involved in this case, had a population of 23,000 people according to the 2000 census, and it is now estimated to have more than 38,000 people.[9] The development of affordable housing in Grants Pass has not kept up with the population growth. City Manager Aaron Cubic confirmed in his deposition that Grants Pass has a vacancy rate of 1% and that "essentially means that there's no vacancy." Edward Johnson Decl., Ex. 1, Cubic Depo. at p. 49, lines 1-10 (Dkt. #63-1). Kelly Wessels, the Chief Operating Officer of the Community Action Agency that serves Grants Pass testified that "Grants Pass' stock of affordable housing has dwindled to almost zero. Landlords routinely require an applicant to have an income that is three times the monthly rent. Rental units that cost less than $1,000/month are virtually unheard of in Grants Pass." Kelly Wessels Decl. ¶ 7 (Dkt. #42).

A point-in-time count of homeless individuals was conducted by the United Community Action Network ("UCAN") on January 30, 2019, in Grants Pass. UCAN counted 602 homeless individuals in Grants Pass. Wessels Decl. ¶ 6 (Dkt. #42). Another 1,045 individuals were counted as "precariously housed," meaning that they were sleeping at the home of somebody else, or "couch surfing." *Id.*

***3** In March 2013, the Grants Pass City Council hosted a Community Roundtable, hereinafter referred to as the "2013 Roundtable Meeting," to "identify solutions to current vagrancy problems." Wessels Decl. ¶ 8, Ex. 1 (minutes of public roundtable) (Dkt #65). Minutes from this meeting show that the City Council President stated, "the point is to make it uncomfortable enough for them in our city so they [referring to homeless individuals] will want to move on down the road." Wessels Decl., Ex. 1 at 2 (Dkt. #65-1). At the end of the meeting, a list of "actions to move forward on" was created. These action items included (i) ways to increase police presence downtown; (ii) create an exclusion zone and possibly have a blanket trespassing regulation; (iii) specific amount of misdemeanors leading to prosecution; (iv) not feeding in parks or other specific areas in the city; (v) posting "zero tolerance" signs stating certain ordinances will be strictly enforced; (vi) look into the possibility of creating a "do not serve" or "most unwanted" list; (vii) pass out the trespassing letters and get word out to have them signed; and (viii) provide assistance in constructing safe areas at agencies to protect volunteers from aggressive behavior. *Id.* at 13. City Manager Aaron Cubic confirmed that the action items from the 2013 Roundtable Meeting were copied into the City's strategic plans in the form of an objective to "address the vagrancy issue" starting with the 2013-14 Grants Pass Strategic Plan up to the current 2019 Grants Pass Strategic Plan. Edward Johnson Decl., Ex. 1, Cubic Depo. at p. 29 lines 11-16; p. 46 line 20 to p. 48 line 10. (Dkt. #63-1). The City Manager also confirmed that one of the action items related to this objective was the "targeted enforcement of illegal camping." *Id.* at p. 36 line 16 to p. 37 line 5.

There are no homeless shelters in Grants Pass that qualify as "shelters" under the criteria provided by HUD. The housing option cited by the City that most resembles a shelter is the Gospel Rescue Mission ("GRM"), which operates transitional housing programs in Grants Pass. GRM Director of Resident

  

Services, Brian Bouteller, testified that GRM offers 30-day transitional housing in two facilities: one facility is for women and children with capacity for 60 people and the other for men with 78 spaces. Edward Johnson Decl., Ex. 2, Bouteller Depo. p. 18 lines 10-15 (Dkt. #63-2). There is no program for men with children or unaccompanied minors. *Id.* at Bouteller Depo. p. 19, lines 5-8. Homeless individuals in these programs are required to work six-hour days, six days a week in exchange for a bunk for 30 days. *Id.* at Bouteller Depo. p. 48 line 23-p. 51 line 5. During this 30-day period, people are not permitted to look for outside work. *Id.* at Bouteller Depo. at p. 51 line 25-p. 52 line 4. It is mandatory that GRM residents attend a traditional Christian Chapel twice a day and go to a Christian Church that follows the Nicene and Apostle's Creed every week. *Id.* at Bouteller Depo. at p. 33 line 10-p. 35 line 3. Before a person is considered for admission at GRM, they must agree to comply with a lengthy list of rules. For example, if you have serious or chronic medical or mental health issues that prevent you from participating in daily GRM life, you may not be able to stay at the GRM; you are to remain nicotine free during your stay at GRM; all intimate relationships other than legal/biblical marriage, regardless of gender, either on or off Mission property are strictly forbidden. Edward Johnson Decl., Ex 3 (Dkt. #63-3). GRM has avoided seeking government funding so that it can maintain these restrictive rules. Johnson Decl., Ex 2, Bouteller Depo. p. 15 lines 15-23 (Dkt. #63-2).

The class of involuntarily homeless people living in and around Grants Pass, Oregon was certified by this Court on August 7, 2019. (Dkt. #47). The class is defined as all involuntarily homeless individuals living in Grants Pass, Oregon, including homeless individuals who sometimes sleep outside city limits to avoid harassment and punishment by Defendant City of Grants Pass as addressed in this lawsuit. The class representatives allege that each of their situations fall under the definition of homelessness adopted by HUD. 24 C.F.R § 582.5 (2012). HUD's definition encompasses a variety of living situations, including youth homelessness, *id.* § 582.5(3); individuals fleeing domestic violence, *id.* § 582.5(4); individuals "living in a supervised publicly or privately operated shelter designed to provide temporary living arrangements," *id.* § 582.5(1)(ii); and individuals whose primary nighttime residence "is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, or camping ground, *id.* § 582.5(1)(i).

***4** Class representatives allege that their situations are just three representations of modern homelessness in the United States. Class representative, Debra Blake, lost her job and housing approximately ten years ago and has been involuntarily homeless in Grants Pass ever since. Blake Decl. ¶ 3 (Dkt. #90). At the time of class certification, Ms. Blake was living in temporary transitional housing, but her ninety-day stay expired and she has returned to sleeping outside. As recently as September 11, 2019, Ms. Blake was cited for illegal camping and "prohibited conduct" in Riverside Park in Grants Pass because she was laying in the park in a sleeping bag at 7:30 a.m. *Id.* ¶ 7. Ms. Blake was convicted and fined $590. Later that same morning, the same officer wrote Ms. Blake a citation for "criminal trespass on City property" with an associated fine of $295. *Id.* Ms. Blake was also issued a park exclusion on September 11, 2019. *Id.* ¶ 8. Ms. Blake filed an appeal and the exclusion was lifted without explanation after she had already been excluded from all Grants Pass parks for two weeks. *Id.* Currently, Ms. Blake owes the City over $5,000 in unpaid fines related to enforcement of the ordinances at issue while living outside in Grants Pass. Class representative, John Logan, has been intermittently homeless in Grants Pass for the last ten years. Mr. Logan currently sleeps in his truck at a rest stop north of Grants Pass because he fears being awakened and ticketed if he sleeps in his truck within the City. Logan Decl. ¶ 12 (Dkt. #67). Mr. Logan is a licensed home care provider and his clients have allowed him to sleep on a mattress in a room they use for storage approximately four to five nights a week. *Id.* ¶ 3. However, that job ended in October or November 2019. *Id.* Class representative, Gloria Johnson, has been living out of her van since at least before this litigation began. Johnson Decl. ¶ 12 (Dkt. #91). Ms. Johnson has parked her van to sleep outside of town on both BLM land and county roads. She claims that she has been asked to move along several times. *Id.* ¶¶ 3-5. While their exact circumstances and stories may vary, the three class representatives all share the need to conduct the life sustaining activities of resting, sleeping, and seeking shelter from the elements while living in Grants Pass without a permanent home.

Through their appointed class representatives, Plaintiffs move for summary judgment on each of their claims. Plaintiffs allege that the City of Grants Pass, through a combination of ordinances, customs, and policies, has unconstitutionally punished them for conducting life-sustaining activities and criminalized their existence as homeless individuals. Plaintiffs seek an order from this Court declaring that the City's enforcement of Grants Pass

  

Municipal Codes ("GPMC") 5.61.020 (the "anti-sleeping ordinance"); GPMC 5.61.030 and GPMC 6.46.090 (the "anti-camping ordinances"), GPMC 6.46.350 (the "park exclusion ordinance") and criminal trespass laws stemming from violations of those ordinances are unconstitutional as applied to the plaintiff class. Plaintiffs also seek an injunction prohibiting the City from enforcing those ordinances and related criminal trespass laws against the plaintiff class unless and until members of the class have the opportunity to obtain shelter within the City. The exact language of the ordinances at issue are as follows:

**5.61.010 Definitions**

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

B. "Campsite" means any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed, established, or maintained for the purpose of maintaining a temporary place to live, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.

**5.61.020 Sleeping on Sidewalks, Streets, Alleys, or Within Doorways Prohibited**

A. No person may sleep on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety.

B. No person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk.

C. In addition to any other remedy provided by law, any person found in violation of this section may be immediately removed from the premises.

**5.61.030 Camping Prohibited**

No person may occupy a campsite in or upon any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct, unless (i) otherwise specifically authorized by this Code, (ii) by a formal declaration of the City Manager in emergency circumstances, or (iii) upon Council resolution, the Council may exempt a special event from the prohibitions of this section, if the Council finds such exemption to be in the public interest and consistent with Council goals and notices and in accordance with conditions imposed by the Parks and Community Services Director. Any conditions imposed will include a condition requiring that the applicant provide evidence of adequate insurance coverage and agree to indemnify the City for any liability, damage or expense incurred by the City as a result of activities of the applicant. Any findings by the Counsel shall specify the exact dates and location covered by the exemption.

***5 6.46.090 Camping in Parks**

A. It is unlawful for any person to camp, as defined in GPMC Title 5, within the boundaries of the City parks.

B. Overnight parking of vehicles shall be unlawful. For the purposes of this section, anyone who parks or leaves a vehicle parked for two consecutive hours or who remains within one of the parks as herein defined for purposes of camping as defined in this section for two consecutive hours, without permission from the City Council, between the hours of midnight and 6:00am shall be considered in violation of this Chapter.

**6.46.350 Temporary Exclusion from City Park Properties**

An individual may be issued a written exclusion order by a police officer of the Public Safety Department barring said individual from all City Park properties for a period of 30 days, if within a one-year period the individual:

A. Is issued 2 or more citations for violating regulations related to City Park properties, or

B. Is issued one or more citations for violating any state law(s) while on City Park property.

Plaintiffs also challenge the appeal process for park exclusions as violating their procedural due process rights. The language detailing the appeal procedures are found in GPMC 6.46.355:

**6.46.355 Appeal and Hearing**

If the individual who is issued a written exclusion order files a written objection to the exclusion with the City Manager within 2 business days, the matter shall be placed on the City Council's agenda not earlier than 2 days after receiving the objection. The objection may be heard by the Council at its discretion at a regular meeting, at a Council workshop, or at a special meeting. The exclusion order shall remain in effect pending the hearing and decision of the Council. At the hearing the staff shall provide the

  

> Council with information regarding the exclusion order and the individual shall be allowed to present relevant evidence. The staff shall have the burden of proof by a preponderance of evidence.

The two camping ordinances carry a mandatory fine of $295. The fine for illegal sleeping is $75. GPMC 1.36.010. When unpaid, the fines increase to $537.60 and $160 respectively due to "collection fees." Johnson Decl., Ex. 9 at 5-6 (Dkt. #63-9). Plaintiffs were provided 615 citations and 541 incident reports issued pursuant to three of these ordinances: GPMC 5.61.020 (the anti-sleeping ordinance), GPMC 5.61.030 (the anti-camping ordinance), GPMC 6.46.090 (the anti-camping in parks ordinance). Inessa Wurscher Decl. ¶¶ 4-5 (Dkt. #64). Of the 615 tickets, 313 were for illegal sleeping, 129 were for illegal camping in the parks and 182 were for illegal camping. *Id.* ¶ 5 (some citations were for more than one offense). The number of citations rose from 24 tickets in 2012 to 228 tickets in 2014, a significant increase following the 2013 Roundtable Meeting. *Id.*

## DISCUSSION

### I. Grants Pass' policy and practice of punishing homelessness violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.

#### a. *Martin v. Boise* is controlling precedent.

***6** The United States Constitution prohibits punishing people for engaging in unavoidable human acts, such as sleeping or resting outside when they have no access to shelter. *Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019) *cert. denied* 2019 U.S. LEXIS 7571, 2019 WL 6833408 (Dec. 16, 2019). In *Martin*, the Ninth Circuit held that "so long as there is a greater number of homeless individuals in [a city] than the number of available beds [in shelters]," a city cannot punish homeless individuals for "involuntarily sitting, lying, and sleeping in public." *Id.* at 617. That is, as long as there are no emergency shelter beds available to homeless individuals, "the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." *Id. (quoting Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated on other grounds*, 505 F.3d 1006 (9th Cir. 2007)).

*Martin* is binding precedent on this Court. In *Martin*, six plaintiffs who were or had recently been homeless residents of Boise, Idaho challenged two city ordinances that punished homeless people for sleeping or camping in public spaces. The Boise "camping ordinance" prohibited and punished the "use of 'any streets, sidewalks, parks, or public places as a camping place at any time.' " *Id.* at 603. Camping was defined as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence." *Id.* at 603-604. The Boise "disorderly conduct ordinance" prohibited "occupying, lodging, or sleeping in any building, structure, or public place, whether public or private ... without the permission of the owner or person entitled to possession or in control thereof." *Id.* at 604.

In this case, Grants Pass' two anti-camping ordinances prohibit "occupying a campsite" on "any publicly-owned property" in the City of Grants Pass. GPMC 5.61.030; GPMC 6.46.090. "Campsite" is defined as "any place where bedding, sleeping bag, or other material used for bedding purposes ... is placed ... for the purpose of maintaining a temporary place to live." GPMC 5.61.010(B). The camping ordinances apply to all public spaces in Grants Pass at all times, including parks. The camping ordinances also prohibit anyone from sleeping in their cars for two consecutive hours within any Grants Pass park parking lot between the hours of midnight and 6:00 a.m. GPMC 6.46.090(B). The anti-sleeping ordinance prohibits sleeping "on public sidewalks, streets, or alleyways at any time ...." GPMC 5.61.020. Additionally, "[n]o person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk." *Id.* These ordinances, in combination, prohibit individuals from sleeping in any public space in Grants Pass while using any type of item that falls into the category of "bedding" or is used as "bedding."

Grants Pass takes the position that *Martin* simply confirms that a city cannot criminalize the unavoidable act of sleeping outside when there are not enough shelter beds available. Grants Pass argues that the City amended its anti-camping ordinances to remove the word "sleeping" after *Martin.* On January 2, 2019, the City amended GPMC 6.46.090 by removing the word "sleeping" so that the act of "sleeping" was to be distinguished from the prohibited conduct of "camping" under the City's Camping in the Parks Ordinance. Aaron Hisel Decl. ¶¶ 12, 13, Exs. 11, 12 (Dkt. #81). The City's intent for making this change "was to make it clear that those without shelter *could* engage in the involuntary acts of sleeping or resting in the City's parks

but would still be prohibited from the voluntary conduct of maintaining a 'campsite' in the parks as a 'place to live.' " Defendant's Motion at 35 (Dkt. #80) (emphasis in original). The Court appreciates the City's attempt to comply with *Martin*. However, Grants Pass ignores the basic life sustaining need to keep warm and dry while sleeping in order to survive the elements. Under the Grants Pass ordnances, if a homeless person sleeps on public property with so much as a flattened cardboard box to separate himself from the wet cold ground, he risks being punished under the anti-camping ordinance. Grants Pass cannot credibly argue that its ordinances allow sleeping in public without punishment when, in reality, the only way for homeless people to legally sleep on public property within the City is if they lay on the ground with only the clothing on their backs and without their items near them. That cannot be what *Martin* had in mind. Maintaining a practice where the City allows a person to "sleep" on public property, but punishes him as a "camper" if he so much as uses a bundled up item of clothing as a pillow, is cruel and unusual punishment. Therefore, this Court finds that it is not enough under the Eight Amendment to simply allow sleeping in public spaces; the Eight Amendment also prohibits a City from punishing homeless people for taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.

***7** As was the case in *Martin*, Grants Pass has far more homeless people than "practically available" shelter beds. In *Martin*, the Ninth Circuit's math reflected 867 homeless individuals in Ada County Idaho (an unknown number in Boise) while Boise had 354 emergency shelter beds and 92 overflow mats. *Martin* 920 F.3d at 604, 606. On January 30, 2019, the Point in Time Count[10] in Grants Pass counted 1,673 unduplicated individuals, 602 of whom were "homeless" and the rest of whom were "precariously housed or doubled up." Wessels Decl. ¶¶ 5-6 (Dkt. #42). The mathematical ratio in the record as it currently stands is 602 homeless people (with another 1,071 on the verge of homelessness) in Grants Pass and, on the other side of the ledger, zero emergency shelter beds. The numbers here are clear, overwhelming, and decisive.

The Gospel Rescue Mission ("GRM") is the only entity in Grants Pass that offers any sort of temporary program for some class members year-round. However, GRM cannot be included in the mathematical ratio of homeless people to shelter beds because GRM has lost its designation as a HUD certified emergency shelter. Wessels Decl. ¶ 12 (Dkt. #29). GRM is also considerably less accessible than even the shelters in *Martin* because it does not offer temporary emergency shelter and has substantial religious requirements and other restrictive rules. GRM does not offer "emergency shelter," only a "30-day Residential Program." Bouteller Depo. p. 27 lines 11-18. This program offers extended stays and is more akin to a transitional housing program than a homeless shelter. Bouteller Depo. p. 18 lines 10-15; Wessels Decl. ¶ 12 (Dkt. #29). Additionally, there are several strict rules for residents of GRM, including remaining nicotine free while on or off the premises and mandatory attendance to Christian church and other church affiliated activities. Even without these rules, GRM's 138 beds would not be nearly enough to accommodate the at least 602 homeless individuals in Grants Pass.

Grants Pass argues that Plaintiffs have alternative "realistically available" shelter outside the City on federal BLM land, Josephine County land, or state rest stops. This remarkable argument not only fails under *Martin*, but it also sheds light on the City's attitude towards its homeless citizens. Essentially, Grants Pass argues that it should be permitted to continue to punish its homeless population because Plaintiffs have the option to just leave the City. The City's suggestion that because it is geographically smaller than Boise or other cities, it should be allowed to drive its homeless population onto "nearby" federal, state, or Josephine County land, is not supported by *Martin*. Additionally, the record does not support the suggestion that homeless people are welcome to live without interruption by law enforcement at these locations. BLM land is available for recreational camping, not as a space for emergency shelter. Fed. Reg. Vol. 70, No. 159 (Aug. 18, 2005). The campsites cost money. Aaron Hisel Decl., Ex, 1 at 52 (Dkt. #81-1). Living, establishing occupancy, or using this land for "residential purposes" is specifically prohibited, and there are limits on how long a person can stay. Fed. Reg. Vol. 70, No. 159; *See also* Gloria Johnson Decl. ¶¶ 3-5; Blake Decl. ¶ 15. Homeless people who attempt to live on BLM land are subject to trespass prosecution under 43 C.F.R. 2808.10, fined $330, and summoned to this Court. Likewise, Josephine County does not welcome non-recreational camping in its parks. The County issued a letter from its Parks Director on November 12, 2019, stating that "County Parks are not a good alternative for nonrecreational campers – individuals or families who need a place to sleep, due to not having a permenant [sic] residents [sic]." Wessels Decl., Ex. 1 (Dkt. #89-1). This letter urges homeless services providers not to pay for campsites for homeless individuals in County Parks. Wessels Decl. ¶ 8

  

(Dkt. #89). Similarly, camping, setting up a tent, or remaining in a rest stop for more than 12 hours in a 24-hour period are explicitly prohibited. OAR 734-030-0010(18).

***8** Finally, the City lists three services offered within Grants Pass that similarly do not change the equation under *Martin.* In February 2020, the Umpqua Community Action Network (UCAN) opened a warming center that may hold up to 40 individuals on nights when the temperature is either below 30 degrees or below 32 degrees with snow. Wessels Decl. ¶ 9 (Dkt. #89). From the record, it appears 131 different people have stayed at the warming center since it opened. *Id.* ¶¶ 9-11. As of the filing of Plaintiffs' Reply Brief, the center had been open sixteen nights and reached capacity on every night except the first night it opened, when it had 32 occupants. *Id.* ¶ 11. While the opening of a warming shelter is positive for the City, this emergency warming facility is not a shelter for the purposes of the *Martin* analysis because the facility does not have beds and is not available consistently throughout the year. *Id.* ¶ 9. Even if the warming center did count as a shelter under HUD, the capacity of the warming center is not large enough to accommodate the amount of homeless people in Grants Pass.

The City also referenced a "sobering center" where intoxicated individuals may be temporarily held and a youth shelter. Response Br. at 13 (Dkt. #80). The sobering center is not a shelter. It allows for temporary placement for "highly intoxicated" individuals while they sober up, and for individuals who are creating a nuisance but "do not warrant a trip to jail." Aaron Hisel Decl., Ex. 1 at 33 (Dkt #81-1). Plaintiffs claim that the sobering center has no beds and consists of a chair with restraints and 12 locked rooms with toilets where people can sober up for several hours. Edward Johnson Decl., Ex. 2 (Dkt. #92-2). Hearts with a Mission Youth Shelter runs an 18-bed facility where minors aged 10-17 may stay for 72 hours, unless they have parental consent to stay longer. Edward Johnson Decl. ¶ 4 (Dkt. #92). This shelter does not have enough beds to serve the number of homeless individuals in Grants Pass and is not "practically available" to class members in this case because it is reserved for minors. The record is undisputed that Grants Pass has far more homeless individuals than it has practically available shelter beds.

This case cannot be distinguished from the holding in *Martin.* The alternative shelters suggested by the City do not change the equation set out in *Martin.* Because Grants Pass lacks adequate shelter for its homeless population, its practice of punishing people who have no access to shelter for the act of sleeping or resting outside while having a blanket or other bedding to stay warm and dry constitutes cruel and unusual punishment in violation of the Eighth Amendment.

**b. The Eighth Amendment prohibits cruel and unusual punishment whether the punishment is designated as civil or criminal.**

Grants Pass argues that the Eighth Amendment analysis does not apply to the ordinances at issue in this case because they are designated as violations and, therefore, not criminal matters. To support this assertion, Grants Pass quotes the Oregon Court of Appeals, which found "[a] violation is not a crime." *State v. Dahl*, 185 Or App 149, 152-56 (2002) (analyzing Oregon's statutory distinctions between crimes and civil offenses and holding, among other things, that the Fifth Amendment does not apply to violations precisely because they are not crimes). However, the label of crime or violation is not dispositive where the Eighth Amendment is concerned. The focus, for Eighth Amendment purposes, is the punishment associated with the crime, violation, or civil penalty. Even though Grants Pass labels the ordinances as violations, offenders of these violations are still subject to punishment. As the United States Supreme Court has held,

> The purpose of the Eighth Amendment ... was to limit the government's power to punish. *See Browning-Ferris*, 492 U.S. at 266-267, 275. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. 'The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.' *United States v. Halper*, 490 U.S. 435, 447-448, (1989).
> ***9** *Austin v. United States*, 509 U.S. 602, 609-610 (1993).

Unlike the Fifth Amendment's Self-Incrimination Clause, the Eighth Amendment's prohibition on punishing an involuntary act or condition applies to punishment beyond "criminal" cases. Again, the Supreme Court made clear,

> [The United States] further suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal [citations omitted]. We disagree. Some provisions of the Bill of Rights are expressly limited to criminal cases. The Fifth Amendment's Self-Incrimination Clause, for example, provides: "No person...shall be compelled in any criminal case to be a witness against himself." The protections provided by the Sixth Amendment are

  

> explicitly confined to "criminal prosecutions." [Citation omitted]. The text of the Eighth Amendment includes no similar limitation. Nor does the history of the Eighth Amendment require such a limitation...

*Austin*, 509 U.S. at 608.

The Supreme Court further opined that provisions of civil forfeiture were punitive because "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 610 (emphasis in original). Ultimately, the Supreme Court held that civil forfeiture constitutes "payments to a sovereign as punishment for some offense, and, as such, is subject to the limitations of the Eighth Amendment excessive fines clause." *Id.* at 622.

The Court's reasoning and holding in *Austin* has been affirmed by subsequent decisions. Most recently, in *Timbs v. Indiana*, the Supreme Court declined to overrule *Austin:* "We thus decline the State's invitation to reconsider our unanimous judgment in *Austin* that civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive." *Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019).

Violations of the Boise ordinances analyzed in *Martin* were misdemeanors, 920 F.3d at 603, so the Ninth Circuit at times used the word "criminal" in its analysis. However, a careful reading of *Martin* shows that this language was not a limitation on when the Eighth Amendment's prohibition on cruel and unusual punishment applies. The Ninth Circuit stated the broad question that it was addressing was "[D]oes the Cruel and Unusual Punishments Clause of the Eighth Amendment preclude the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter?" *Id.* at 615. The Ninth Circuit held that it does, quoting *Jones*, "the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Id.* at 616. It is the punishment of a person's unavoidable status that violates the constitution, not whether that punishment is designated civil or criminal. *See id.* The main difference between Grants Pass' punishment scheme and that of Boise's in *Martin* is that Grants Pass first issues fines for violations and then either issues a trespass order or excludes persons from all parks before a person is charged with misdemeanor criminal trespass. This makes no difference for Eight Amendment purposes because the result, in Boise and Grants Pass, is identical: involuntarily homeless people are punished for engaging in the unavoidable acts of sleeping or resting in a public place when they have nowhere else to go.

***10** Additionally, as the Supreme Court noted, "whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." *United States v. Ward*, 448 U.S. 242, 248 (1980). In Oregon, violations are defined as criminal actions and are prosecuted in criminal proceedings. ORS 131.005(6)-(7). The Grants Pass Municipal Code uses the language and procedures of criminal law, discussing those "guilty" of code violations. GPMC 1.36.010(A). The violations are prosecuted in the Josephine County Circuit Court by the Josephine County District Attorney's office. ORS 153.076(6). As in a criminal trial, a defendant may not be compelled to testify and the same pretrial discovery that applies in misdemeanor and felony cases applies. ORS 153.076(3)-(4). The judgment from a camping violation in Grants Pass reads, "[t]he court finds the defendant GUILTY of the charges designated CONVICTED in the section below." Edward Johnson Decl., Ex. 9 at 3-4 (Dkt. #63-9).

Moreover, even if *Martin* and the Eighth Amendment were limited to "criminal" punishments, which they are not, Grants Pass' enforcement scheme involves criminal punishment. Violations for sleeping and "camping" are an element of future Criminal Trespass II arrests and initiate the criminal process in two common circumstances: (1) after a person is "trespassed" from an area for "camping" and either does not leave or returns, or (2) after an officer excludes a person from a park for prohibited camping. In either situation, if that person does not move along or returns to the location, they are subject to arrest and prosecution for Criminal Trespass II. The criminal process is initiated with the original citation and that citation is an element of the subsequent criminal trespass charge once the person is trespassed or excluded under threat of arrest for criminal trespassing.

Therefore, Grants Pass' enforcement scheme is subject to Eighth Amendment analysis. Under such analysis, the ordinances at issue and their enforcement, as applied to plaintiff class members, violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.

**II. Grants Pass' policy and practice of enforcing the ordinances at issue violates the Excessive Fines Clause of the Eight Amendment.**

  

Grants Pass' enforcement of the ordinances at issue also violates the Excessive Fines Clause of the Eighth Amendment. The Supreme Court has found that the phrase "nor excessive fines imposed," in the Eighth Amendment "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.' " *Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019) *citing United States v. Bajakajian*, 524 U.S. 321, 327-328, (1998). There is a two-step inquiry in analyzing an excessive fines claim: (1) is the fine punitive, and if so, (2) is it excessive? *Bajakajian*, 524 U.S. at 334.

To determine when a fine is punitive, courts look to whether the fine is tied to punishment and prohibited conduct. *Bajakajian*, 524 U.S. at 328; *Austin*, 509 U.S. at 619-22; *See also U.S. v. Mackby*, 339 F.3d 1013 (9th Cir. 2003) (assuming a statutory fine under the False Claims Act imposed after a finding of liability in a civil trial was punitive). It does not matter if the fine imposed is characterized as criminal or civil, the salient inquiry is whether the fine at least partially serves the traditional punitive functions of retribution and deterrence. *Austin*, 509 U.S. at 610. For example, in *Wright v. Riveland*, the Ninth Circuit held that a 5% deduction for the Crime Victim's Compensation Fund was punitive because there was no relationship between the deduction and the harm the defendant caused. *Wright v. Riveland*, 219 F.3d 905, 915 (9th Cir. 2000); *see also Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778 (1994) (observing the similarities between civil and criminal punishment, the court held "Criminal fines, civil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior."). The Supreme Court has held that all civil penalties have some deterrent effect. *U.S.* v *Hudson*, 522 U.S. 93, 102(1997).

***11** In this case, the Court finds that the fines imposed for violating the ordinances at issue are punitive. According to the record, the two camping ordinances carry a mandatory fine of $295. The fine for illegal sleeping is $75. When unpaid, the fines increase to $537.60 and $160 respectively because of additional "collection fees." Johnson Decl., Ex. 9 at 5-6 (Dkt. #63-9). Officers have the discretion to issue warnings prior to issuing a citation, but once a citation is issued, officers have no discretion over the amount of the fine, which is "autofilled" into all camping citations. Johnson Decl., Ex. 6, Burge Depo. at 20, lines 15-21 (Dkt. #63-6); Ex. 4, Hamilton Depo at p. 84 line 23 to p. 85 line 5 (Dkt. #63-4). Based on the record and minutes from the 2013 Roundtable Meeting, these statutory fines serve no remedial purpose and were intended to deter homeless individuals from residing in Grants Pass. Moreover, the ordinances themselves describe these fines as punishment. Compare GPMC 1.36.010(c) ("MAXIMUM FINE: except in cases where a different punishment is prescribed by any provision of this Code...") with GPMC 1.36.010(e) (allowing for restitution to any person, or business, including the city, who has been damaged by the defendant's conduct).

Because the fines are punitive, the inquiry turns to whether the fines are excessive. The Supreme Court held that a fine violates the excessiveness standard of the Eighth Amendment if the amount of the fine is "grossly disproportionate to the gravity of the offense." *Bajakajian*, 524 U.S. at 324, 334 ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."); *see also Wright v. Riveland*, 219 F.3d 905, 916 (9th Cir. 2000) (following *Bajakajian)*. In applying this standard, courts have looked to a non-exhaustive list of several factors, including the nature of the offense, whether the violation was related to other illegal activity, and other penalties that may be imposed.[11] *See generally U.S. v. Mackby*, 339 F.3d 1013 (9th Cir. 2003).

Here, the decisive consideration is that Plaintiffs are being punished for engaging in the unavoidable, biological, life-sustaining acts of sleeping and resting while also trying to stay warm and dry. Plaintiffs do not have enough money to obtain shelter, so they likely cannot pay these fines. When the fines remain unpaid, the additional collection fees are applied and the fines still remain unpaid, subjecting plaintiffs to collection efforts, the threat of driver license suspensions (Johnson Decl., Ex. 9 at 3-4 (Dkt. #63-9)), and damaged credit that makes it even more difficult for them to find housing, exacerbating the homeless problem in Grants Pass (Wessels Dec. ¶ 11 (Dkt #65)). As the Supreme Court recognized in the cruel and unusual punishment context, "even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California*, 370 U.S. 660, 667 (1962). So too here. Fining a homeless person in Grants Pass who must sleep outside beneath a blanket because they cannot find shelter $295 ($537.60 after collection fees are inevitably assessed) is grossly disproportionate to the "gravity of the offense." Any fine is excessive if it is imposed on the basis of status and not conduct. For Plaintiffs, the conduct for which they face punishment is inseparable from their status as homeless individuals, and therefore,

  

beyond what the City may constitutionally punish. The fines associated with violating the ordinances at issue, as applied to Plaintiffs, are unconstitutionally excessive.

Having found that the ordinances violate the Cruel and Unusual Punishment Clause as well as the Excessive Fines Clause of the Eight Amendment, the Court declines to decide whether the ordinances are also unconstitutionally vague.

**III. The appeal process for park exclusions in Grants Pass violates procedural due process rights.**

**a. Plaintiffs' claim that park exclusions violate procedural due process was adequately pled and standing has been established.**

***12** Grants Pass does not challenge the merits of plaintiffs' procedural due process claim regarding the City's park exclusion ordinance in its response to Plaintiffs' motion for summary judgment. Instead, Grants Pass argues that this claim was not properly pled in the operative complaint. The Court disagrees. This claim seems to be the sole reason for the Third Amended Complaint filed on November 13, 2019. (Dkt. #50). The only changes from the Second Amended Complaint were to add the allegation at paragraph 87 that, "Plaintiffs have been excluded from Grants Pass parks without due process of law" and to specifically add "GPMC 6.46.350 (the park exclusion ordinance)" to the injunctive and declaratory relief sought in this case. Third Amended Complaint ¶ 87, Prayer ¶¶ 3-4 (Dkt. #50). Although the City correctly points out that GPMC 6.46.355 (the ordinance that explains the appeal procedure) is missing from the operative complaint, Plaintiffs made clear that they were challenging park exclusions under the Procedural Due Process Clause. The City did not object to the amendment or ask that it be clarified or made more specific. Therefore, the claim was pled, and the City was on notice.

Second, Grants Pass argues that if the claim was pled, it should be dismissed because Plaintiffs have not alleged or sufficiently established standing. The City argues, "plaintiffs do not even attempt to produce a plaintiff or rely upon any individual's standing." Response at 51 (Dkt. #80). The Court disagrees. The record shows that of the 59 park exclusions produced to Plaintiffs by the City, all were issued to homeless individuals and 42 were issued for illegal camping. Pltf.s' Motion at 22 (Dkt. #62); Inessa Wurscher Decl. ¶ 7 (Dkt. #64). Class representative Debra Blake was issued an exclusion on September 11, 2019, after she was found sleeping in a City Park, and a copy of that exclusion order has been provided in the record. Johnson Decl., Ex. 9 at 7 (Dkt. #63-9). Debra Blake filed a written objection to her September 11, 2019 banishment from all parks. The ban was "lifted" without explanation on September 25, 2019, after half of the exclusion period had expired. Blake Decl. ¶ 8 (Dkt. #90). Additionally, class member Dolores Nevin was excluded from all parks after being found sleeping in Riverside Park on December 31, 2019. Wurscher Decl., Ex. 1 at 33-35 (Dkt. #64-1). Moreover, Plaintiffs provided evidence that a park exclusion goes into effect immediately and is not stayed when appealed. Johnson Decl., Ex. 5, McGinnis Depo p. 28 line 23 to p. 29 line 5 (Dkt. #63-5); Ex. 4, Hamilton Depo. at p.117 lines 11-14 (Dkt. #63-4). Therefore, Plaintiffs have standing to seek prospective declaratory and injunctive relief regarding the park exclusion appeal process.

Finally, Grants Pass argues in a footnote that if the claim was pled and plaintiffs do have standing, the claim is "moot" because the current practice of the Grants Pass Department of Public Safety is to not issue park exclusions until City Council "has made appropriate revisions." Response at 51, n.8 (Dkt. #80). Evidence presented by Grants Pass to show this policy change consists of a sworn declaration from Jim Hamilton, the Deputy Chief for the City of Grants Pass Department of Public Safety, in which he declares, "The current practice is that there are no park exclusions being issued by anyone in the Grants Pass Department of Public Safety by way of written Order from me. Unless and until a revised version of the park exclusion ordinance is adopted by the City council and the related forms revised, they will not be issued," Hamilton Decl. ¶ 3 (Dkt. #83). The written order issued to the department was not attached as an exhibit. However, even if it was, policy changes not reflected in a change to statutes or ordinances does not render a claim moot. *Rosebrock*, 745 F.3d at 971-72. The doctrine of voluntary cessation has been interpreted to apply generally in cases in which an injunction is sought. "Such cases do not become moot 'merely because the [defendant's] conduct immediately complained of has terminated, if there is a possibility of a recurrence which would be within the terms of a proper decree.' " *Armster v. U.S. District Court for the Central District of California*, 806 F.2d 1347, 1357 (9th Cir. 1986) (quoting P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 110 (2d ed. 1973)). This is particularly true, whereas here, the "new policy... could be easily abandoned or altered in the future." *Bell*, 709 F.3d at 901. If a municipal defendant could

  

moot out claims simply by announcing in its cross-motion for summary judgment that it has decided not to enforce the offending ordinance, the doctrine of voluntary cessation would be rendered meaningless. Plaintiffs pled this claim, have standing to assert it, and Grants Pass cannot moot this claim by asserting that it has temporarily stopped issuing park exclusions.

**b. Plaintiffs are entitled to summary judgment on this claim.**

***13** Under Grants Pass' enforcement scheme, police officers may issue a written exclusion order barring an individual "from all city park properties for a period of 30 days, if within a one-year period the individual is issued two or more citations for violating regulations related to city park properties, or is issued one or more citations for violating any state law(s) while on city park property." GPMC 6.46.350. A park exclusion goes into effect immediately upon being issued and is not stayed while a person appeals. Johnson Decl., Ex. 5, McGinnis Depo p. 28 line 23 to p. 29 line 5 (Dkt. #63-5); Ex. 4, Hamilton Depo. at p.117 lines 11-14 (Dkt. #63-4); GPMC 6.46.355. The appeal period is "within two business days" and the method of appeal is by "written objection" to the City Manager, at which point the objection will be placed on the City Council's agenda. GPMC 6.46.355.

Sixteen years ago, this Court found a substantially identical appeal process in Portland's park exclusion ordinance to violate procedural due process rights.

> The risk of erroneous deprivation is compounded by PCC 20.12:265's deficient appeal procedures and lack of a pre-deprivation hearing. An exclusion takes effect immediately upon issuance and is not stayed pending appeal. Thus, a person excluded from a park is subject to arrest for reentry as soon as she receives the exclusion notice. An appeal may be filed within five days, but the individual continues to be excluded from the parks. Thus, even if the exclusion is ultimately found to be invalid, the individual has been kept from the public park(s) for at least a significant portion of the thirty days.

*Yeakle v. City of Portland*, 322 F. Supp. 2d 1119, 1130 (D. Or. 2004). For the same reasons, Grants Pass' park exclusion ordinance is also unconstitutional and violates the procedural protections of the due process clause.

The *Yeakle* court applied the three-part balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) to Portland's functionally identical park exclusion appeal process. The court found that excluded individuals have a strong liberty interest in avoiding unjust exclusion because of the importance of public parks as a "treasured and unmatched resource" for members of the public. 322 F. Supp 2d at 1129. In this case, that interest is even greater for Plaintiffs because several parks in Grants Pass contain benches, tables and restrooms that homeless individuals may use for basic activities of daily life when they have no alternative place to dwell. The court also found that "the risk of erroneous deprivation under the present procedure is considerable" given the lack of pre-deprivation process and the lack of "any evidentiary standard." *Id.* at 1130. The same is true here. There is no requirement in the ordinance that the Grants Pass police officer have enough evidence or reasonable suspicion of the excludable conduct to issue an exclusion or make an arrest. The officer need not witness the violation or have any other reliable information that a violation occurred under the language of the ordinance. Further, just like in *Yeakle*, "a person is subject to arrest for reentry as soon as she receives the exclusion notice" and "even if the exclusion is ultimately found to be invalid, the individual has been kept from the public parks for at least a significant portion of the thirty days." *Id.* The *Yeakle* Court concluded that "a pre-deprivation hearing or other procedural safeguard would not unduly burden the government" and "there would be no additional burden on the City if the park exclusions were simply stayed in the event that an individual filed an appeal." *Id.* at 1131. For the same reasons, the procedures for appealing park exclusions in Grants Pass violate Plaintiffs' procedural due process rights.

**IV. Plaintiff's are denied summary judgment on their Equal Protection Claim.**

***14** The Equal Protection Clause guarantees that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Plaintiffs allege selective enforcement of the ordinances at issue. As such, they "must demonstrate that enforcement had a discriminatory effect and the police were motivated by a discriminatory purpose." *Rosenbaum* v. *City and County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007). Further, because the class seeks to enjoin enforcement, they must demonstrate that the selective enforcement "is part of a 'policy, plan, or a pervasive pattern.' " *Id.* at 1153 (quoting *Thomas v. County of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1993)).

  

Plaintiffs did not carry their burden of demonstrating that the City's ordinances were selectively enforced and that enforcement was motivated by a discriminatory purpose under the summary judgment standard. The evidence relied on by Plaintiffs to prove this claim are the minutes from the 2013 Roundtable Meeting and deposition testimony from two Grants Pass police officers. The City disputes this evidence as proof of selective enforcement. The City argues that deposition testimony from two knowledgeable police officers that they "could not remember" enforcing these ordinances against a non-homeless individual is not enough for the Court to conclude that these ordinances were selectively enforced as a matter of law. The Court agrees. Moreover, the City provided its Department of Public Safety Policy Manual, which specifically includes instructions to officers to not discriminate against homeless individuals. *See* Hamilton Decl., Ex. 1 (Dkt. #83-1). Therefore, facts surrounding the issues of whether the City's enforcement scheme had a discriminatory effect and whether the police were motivated by a discriminatory purpose are in dispute. As a result, Plaintiff's are denied summary judgment on their equal protection claim.

**V. Plaintiff's are denied summary judgment on their Substantive Due Process Claim.**

The substantive due process clause of the Fourteenth Amendment forbids the government from depriving a person of life, liberty, or property when the government acts with deliberate indifference or reckless disregard for that person's fundamental rights. *Tennison v. City & County of S.F.*, 570 F.3d 1078, 1089 (9th Cir. 2009); *Porter v. Osborn*, 546 F.3d 1131, 1137-39 (9th Cir. 2008). A plaintiff establishes a substantive due process violation by showing the defendant deprived him of his life, liberty, or property and engaged in "conscience shocking behavior." *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006). An official's conduct may shock the conscience where the official acts with deliberate indifference or reckless disregard for the plaintiff's rights in situations where the official had the opportunity to deliberate. *Tennison*, 570 F.3d at 1089; *Porter*, 546 F.3d at 1137-39.

Plaintiffs argue they have a protected liberty interest in being present in public spaces in Grants Pass. Plaintiffs cite *Morales*, which found "it is apparent that an 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,' or the right to move 'to whatsoever place one's own inclination may direct' identified in Blackstone's Commentaries." 27 U.S. at 53-54 (citing *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972); *Kent v. Dulles*, 357 U.S. 116, 126 (1958); 1 W. Blackstone, Commentaries on the Laws of England 130 (1765)). At least three Courts of Appeals have followed *Morales* and acknowledged a liberty interest to remain in a place open to the public. *See Vincent v. City of Sulphur*, 805 F.3d 543, 548 (5th Cir. 2015) ("Supreme Court decisions amply support the proposition that there is a general right to go to or remain on public property for lawful purposes ...."); *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) ("Plaintiffs have a constitutionally protected liberty interest to be in parks or on other city lands of their choosing that are open to the public generally."); *Kennedy v. City of Cincinnati*, 595 F.3d 327, 336 (6th Cir. 2010) ("[I]t is clear that Kennedy had a liberty interest 'to remain in a public place of his choice' and that defendants interfered with this interest.").

***15** However, even if this Court were to find that Plaintiffs have a liberty interest to remain in City parks or other City lands that are open to the public generally, Plaintiffs have not provided this Court with controlling authority to convince the Court that Plaintiffs have a liberty interest to sleep or camp in a public place. Moreover, Plaintiffs have not carried their burden of showing that the City engaged in "conscience shocking behavior" under the summary judgment standard. This Court's holding that the enforcement of Grants Pass' ordinances violate the Eight Amendment does not automatically translate to a finding that Grants Pass officials acted with deliberate indifference or reckless disregard for Plaintiffs' fundamental rights. Whether Grants Pass' conduct shocks the conscience is a question of material fact. Therefore, Plaintiffs are denied summary judgment on their substantive due process claim.

**VI. Conclusion**

The holding in this case does not say that Grants Pass must allow homeless camps to be set up at all times in public parks. Just like in *Martin*, this holding in no way dictates to a local government that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the street at any time and at any place. *See Martin*, 920 F.3d 584, 617. Nor does this holding "cover individuals who do have access to adequate temporary shelter, whether they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it" *Id.* at n. 8. The City may implement time and place restrictions for when homeless individuals may use their belongings to keep warm and dry and when they must have their belonging

  

packed up. The City may also implement an anti-camping ordinance that is more specific than the one in place now. For example, the City may ban the use of tents in public parks without going so far as to ban people from using any bedding type materials to keep warm and dry while they sleep. The City may also consider limiting the amount of bedding type materials allowed per individual in public places. Moreover, this holding does not limit Grants Pass' ability to enforce laws that actually further public health and safety, such as laws restricting littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence. Grants Pass would retain a large toolbox for regulating public space without violating the Eight Amendment.

There is no doubt that homelessness is a serious public health concern. Homeless individuals have higher rates of chronic physical and mental health conditions, increased rates of mortality, and related diseases and co-occurring disorders.[12] With the lack of access to the most basic of human needs, including running water, toilets, and trash disposal, infectious diseases—like COVID-19—can spread quickly. Uprooting homeless individuals, without providing them with basic sanitation and waste disposal needs, does nothing more than shift a public health crisis from one location to another, potentially endangering the health of the public in both locations. This concern is particularly acute during the current COVID-19 pandemic. As the U.S. Centers for Disease Control and Prevention (the "CDC") explained in its *Interim Guidance for Responding to Coronavirus Disease 2019 (COVID-19) among People Experiencing Unsheltered Homelessness:* Unless individual housing units are available, do not clear encampments during community spread of COVID-19.

The Court encourages Grants Pass to work with local homeless services experts and mental health professionals to develop training programs that cover techniques and tools for interacting with homeless individuals and for deescalating mental health crises. For example, the City of Eugene, Oregon has used the services from an organization called CAHOOTS ("Crisis Assistance Helping Out on the Streets") to provide free "immediate stabilization in cases of urgent medical need or psychological crisis, assessment, information referral, advocacy [and] (in some cases) transportation to the next step in treatment" to the people of Eugene, Oregon.[13] As *The Wall Street Journal noted*, Gary Marshall, a 64-year-old who previously lived on the streets of Eugene, said the police approach was "name, serial number and up against the van." In contrast, when he was having one of his frequent panic attacks, CAHOOTS counselors would bring the him inside and talk him down, he said.[14]

***16** Such trainings have also been, proven to be effective in Miami-Dade County, Florida. Specifically, "providing mental health de-escalation training to [its] police officers and 911 dispatchers enabled [the county] to divert more than 10,000 people to services or safely stabilizing situations without arrest."[15] The number of people in jail, in turn, fell by nearly 49%, which allowed the county to close an entire jail facility, thereby saving nearly $12 million a year.[16]

The City of Medford, Oregon, has also developed new strategies for addressing the homeless crisis in its community. The City of Medford worked with Rogue Retreat, a nonprofit group, to open Hope Village in November 2017.[17] Hope Village is the first tiny homes community in Southern Oregon that provides short term transitional shelter and case management for individuals and families to help move from homelessness into long term housing.[18] The idea of Hope Village was created in 2013, when Rogue Retreat, St. Vincent DePaul, and the Jackson County Homeless Taskforce began researching and visiting other villages in Oregon to find creative ways to serve the homeless in Jackson County.[19] Hope Village started with 14 units, each 8 feet by 10 feet, plus a communal kitchen, laundry and shower facilities. Hope Village began operating under a one-year agreement with the city, and in less than a year, the Medford City Council approved doubling the size of the village and signed a new, two-year agreement with Rogue Retreat.[20] Medford city officials didn't create the project, didn't build the units, and doesn't operate the village. However, city leaders supported the concept from the beginning, offering a city-owned property for the village.[21] When neighboring businesses and other property owners objected to that location, the City of Medford continued to offer support and encouragement, culminating in a new location.[22] Hope Village now sits on property owned by the City of Medford and another property leased by Rogue Retreat.[23] Residents of Hope Village are required to attend case management meetings, counseling sessions, and work on permanent ways to stay off of the streets. Rogue Retreat says the average stay at Hope Village is around four months, and the program has a 62 percent success rate. According to Rogue Retreat, this means 6 out of 10 people in the program successfully move away from homelessness.[24]

  

***17** As the League of Oregon Cities noted in its amicus brief, "Oregon's cities are obligated to provide safe and livable communities for all residents." Cities Br. at 2 (Dkt. #87). Laws that punish people because they are unhoused and have no other place to go undermine cities' ability to fulfill this obligation. Indeed, enforcement of such "quality of life laws" do nothing to cure the homeless crisis in this country. Arresting the homeless is almost never an adequate solution because, apart from the constitutional impediments, it is expensive, not rehabilitating, often a waste of limited public resources, and does nothing to serve those homeless individuals who suffer from mental illness and substance abuse addiction.

Quality of life laws erode the little trust that remains between homeless individuals and law enforcement officials. This erosion of trust not only increases the risk of confrontations between law enforcement and homeless individuals, but it also makes it less likely that homeless individuals will cooperate with law enforcement.[25] Moreover, quality of life laws, even civil citations, contribute to a cycle of incarceration and recidivism. Indeed, civil citations requiring appearance in court can lead to warrants for failure to appear when homeless people, who lack a physical address or phone number, do not receive notice of relevant hearings and wind up incarcerated as a result.[26] Moreover, unpaid civil citations can impact a person's credit history and be a direct bar to housing access in competitive rental markets where credit history is a factor in tenant selection. In this way, civil penalties can prevent homeless people from accessing the very housing that they need to move from outdoor public spaces to indoor private ones.

There are many options available to Grants Pass to prevent the erection of encampments that cause public health and safety concerns without violating the Eight Amendment. The Court reminds governing bodies of the importance of empathy and thinking outside the box. We must try harder to protect our most vulnerable citizens. Let us not forget that homeless individuals are citizens just as much as those fortunate enough to have a secure living space.

## ORDER

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment (Dkt. No. 62) is GRANTED in part and DENIED in part, and Defendant's Motion for Summary Judgment (Dkt. No. 80) is DENIED.

IT IS SO ORDERED and DATED this 22nd day of July, 2020.

### All Citations

Slip Copy, 2020 WL 4209227

Footnotes

1 The parties have consented to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c)(1).

2 National Law Center on Homelessness & Poverty, *Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities* 28 n. 15 (2019), http://nlchp.org/wpcontent/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [hereinafter *Housing Not Handcuffs*].

3 *Id.* at 28.

4 *Id.*

5 *See* Joshua Howard et al., *At What Cost: The Minimum Cost of Criminalizing Homelessness in Seattle and Spokane*, HOMELESS RIGHTS ADVOCACY PROJECT 10 (2015), https://digitalcommons.law.seattleu.edu/hrap/10.

6 Gale Holland, *L.A. Spends $100 Million a Year on Homelessness, City Report Finds*, LOS ANGELES TIMES, Apr. 16, 2015, https://www.latimes.com/local/lanow/la-me-lh-homeless-caoreport-20150416-story.html.

7 *Housing Not Handcuffs, supra* note 2, at 71.

8 *See* Joshua Howard et al., *At What Cost: The Minimum Cost of Criminalizing Homelessness in Seattle and Spokane*, HOMELESS RIGHTS ADVOCACY PROJECT iii (2015), https:// digitalcommons.law.seattleu.edu/hrap/10.

9 http://worldpopulationreview.com/us-cities/grants-passor-population/.

10 The Ninth Circuit in *Martin* also used PIT Counts to determine the number of homeless people in the area and commented that PIT Counts typically undercount the homeless population in a community because of difficulty in locating people, weather and volunteer issues. *Martin* at 604.

11 The Supreme Court has left open the question of whether the ability to pay the fine would be relevant to the excessiveness inquiry. *Bajakajian* at 340, n. 15; see also *Timbs* at 688 *quoting* 4 W. Blackstone, Commentaries on the Laws of England

  

372 (1769) “[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear ....”

12 *Housing Not Handcuffs, supra* note 2 at 68.

13 CAHOOTS, https://whitebirdclinic.org/cahoots/ (last visited Mar. 26, 2020); Mobile Crisis Services in Eugene and Springfield, *White Bird Clinic CAHOOTS*, https://whitebirdclinic.org/wp-content/uploads/2019/04/11x8.5_trifold_brochure_cahoots.pdf.

14 Zusha Elinson, *When Mental-Health Experts, Not Police, Are the First Responders*, THE WALL STREET JOURNAL (Nov. 24, 2018), https://www.wsj.com/articles/when-mental-healthexperts-not-police-are-the-first-responders-1543071600.

15 *Housing Not Handcuffs, supra* note 2 at 98.

16 *Id.*

17 Rogue Retreat, *Hope Village*, https://www.rogueretreat.com/housing-programs/hope-village/ (last visited Jul. 17, 2020).

18 *Id.*

19 *Id.*

20 Mail Tribune Editorial Board, *Medford can be proud of Hope Village*, THE MAIL TRIBUNE (Aug. 4, 2019), https://mailtribune.com/opinion/editorials/medford-can-be-proud-of-hope-village.

21 *Id.*

22 *Id.; see also* April Ehrlich, *Law Enforcement Officials Argue Rural Homeless Services Worsen Problem*, NPR (Jan. 21, 2020), https://www.npr.org/2020/01/21/797497926/law-enforcement-officials-argue-rural-homeless-services-worsen-problem (“Hope Village in Oregon faced some pushback in its early stages a few years ago. Some people feared that it would increase crime and generate litter. But resident Buckshot Cunningham says those fears proved to be wrong. ‘Look at this place,’ he says, motioning to the neat row of cottages. ‘It's clean; it's beautiful. And it stays that way seven days a week, all year round. It's pretty simple.’ ”).

23 Mail Tribune Editorial Board, *Medford can be proud of Hope Village*, THE MAIL TRIBUNE (Aug. 4, 2019), https://mailtribune.com/opinion/editorials/medford-can-be-proud-of-hope-village.

24 Madison LaBerge, *New tiny home village in Grants Pass for homeless population*, FOX 26 (June 10, 2020), https://fox26medford.com/new-tiny-home-village-in-grants-pass-for-homeless-population/

25 *Housing Not Handcuffs, supra* note 2 at 65.

26 *Id.* at 52.

End of Document

393 F.Supp.3d 1075
United States District Court, W.D. Washington, at Tacoma.

Elizabeth AITKEN, et al., Plaintiff,

v.

CITY OF ABERDEEN, a municipal government, Defendant.

CASE NO. 3:19-cv-05322-RBL
|
Signed 07/02/2019

**Synopsis**

**Background:** Homeless individuals brought action against city alleging city ordinances that would evict individuals and that prohibited camping on public property were unconstitutional because they made homelessness illegal in city. Individuals filed motion for temporary restraining order seeking to enjoin eviction of homeless camp and enforcement of ordinances.

**Holdings:** The District Court, Ronald B. Leighton, J., held that:

[1] individuals raised enough questions in Eighth Amendment claim to support temporary restraining order enjoining city from enacting camping ordinances;

[2] individuals raised enough questions in right to travel claim to support temporary restraining order enjoining city from enacting camping ordinances;

[3] individuals were unlikely to succeed on freedom of association claim;

[4] closure of homeless camp did not present possibility of irreparable constitutional violations;

[5] individuals faced sufficient likelihood of irreparable harm to justify temporarily enjoining enforcement of camping ordinances;

[6] balance of equities and public interest did not favor injunction barring enforcement of eviction ordinance; and

[7] balance of equities and public interest favored injunction barring enforcement of camping ordinances.

Motion granted in part and denied in part.

West Headnotes (21)

[1] **Injunction** Preservation of status quo
**Injunction** Scope and duration of relief
**Injunction** Irreparable harm

The purpose of a temporary restraining order is preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing on the preliminary injunction application, and no longer.

[2] **Injunction** Grounds in general; multiple factors

For a court to grant a preliminary injunction, the plaintiff must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

[3] **Injunction** Injunctions Sought by Government in General
**Injunction** Injunctions against government entities in general

When a court is determining whether to grant a preliminary injunction, balance of equities and public interest factors merge if the government is a party.

[4] **Injunction** Public interest considerations
**Injunction** Balancing or weighing hardship or injury

When considering whether to grant preliminary injunction, which is an extraordinary remedy, courts must balance the competing claims of injury and consider the effect of granting

  

or withholding the requested relief, paying particular regard to the public consequences.

[5] **Injunction** Balancing or weighing factors; sliding scale

A court considering whether to grant preliminary injunction applies a sliding scale approach in which a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits.

[6] **Injunction** Grounds in general; multiple factors

Serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support issuance of a preliminary injunction, assuming the balance of equities and public interest factors are met.

[7] **Injunction** Likelihood of success on merits

**Injunction** Unclear, unlikely, doubtful or speculative injury

A preliminary injunction cannot issue even when there is a strong likelihood of success on the merits if there is just a mere possibility of irreparable harm.

[8] **Sentencing and Punishment** Scope of Prohibition

**Sentencing and Punishment** Declaring Act Criminal

**Sentencing and Punishment** Proportionality

The Eighth Amendment circumscribes the criminal process in three ways: (1) it limits the kinds of punishment that can be imposed on those convicted of crimes, (2) it proscribes punishment grossly disproportionate to the severity of the crime, and (3) it imposes substantive limits on what can be made criminal and punished as such. U.S. Const. Amend. 8.

[9] **Sentencing and Punishment** Declaring Act Criminal

The Eighth Amendment's substantive limits on what can be made criminal and punished as such should be applied sparingly. U.S. Const. Amend. 8.

[10] **Civil Rights** Public accommodations or facilities

Homeless individuals were unlikely to succeed on Eighth Amendment claim with respect to city ordinance that would evict occupants of homeless camp and would prohibit public access to camp area once enacted, and thus individuals were not entitled to temporary restraining order enjoining city from enacting ordinance, where city was not limited in its ability to evict homeless individuals from particular public places. U.S. Const. Amend. 8.

5 Cases that cite this headnote

[11] **Civil Rights** Public accommodations or facilities

Homeless individuals raised enough questions in Eighth Amendment claim to support temporary restraining order enjoining city from enacting city ordinances prohibiting camping on public property; record was insufficient to determine whether cruel and unusual punishment clause extended to civil penalties imposed by ordinances, and record was insufficient to determine how ordinance would apply to individuals. U.S. Const. Amend. 8.

[12] **Constitutional Law** Compelling interest test

A classification which operates to penalize those persons who have exercised their constitutional right of interstate migration must be justified by a compelling state interest.

[13] **Civil Rights** Public accommodations or facilities

  

Homeless individuals were unlikely to succeed on right to travel claim with respect to city ordinance that would evict occupants of homeless camp and would prohibit public access to camp area once enacted, and thus individuals were not entitled to temporary restraining order enjoining city from enacting ordinance, where city was not limited in its ability to evict homeless individuals from particular public places.

4 Cases that cite this headnote

[14] **Civil Rights** Public accommodations or facilities

Homeless individuals raised enough questions in right to travel claim to support temporary restraining order enjoining city from enacting city ordinances prohibiting camping on public property; ordinances encompassed all public property, and it was unclear where individuals would relocate to.

[15] **Constitutional Law** Freedom of Association

**Constitutional Law** Intimate association; dating relationships in general

The right to associate freely breaks down into two separate forms of association: the right to enter into and maintain certain intimate human relationships and the right to associate for purposes of engaging in First Amendment activities. U.S. Const. Amend. 1.

[16] **Constitutional Law** Expressive association

The associational right to engage in First Amendment activities only applies if the group engages in expressive association. U.S. Const. Amend. 1.

[17] **Civil Rights** Public accommodations or facilities

Homeless individuals were unlikely to succeed on freedom of association claim with respect to city ordinances that would evict individuals and that prohibited camping on public property, and thus individuals were not entitled to temporary restraining order enjoining city from enacting ordinances; ordinances did not directly regulate how individuals congregated as family units, and ordinances did not prohibit individuals from cohabiting with relatives in city who wanted to live together.

[18] **Civil Rights** Public accommodations or facilities

Closure of homeless camp due to city ordinance that would evict occupants of homeless camp and would prohibit public access to camp area once enacted did not present possibility of irreparable constitutional violations to homeless individuals and thus did not justify temporary restraining order; individuals' sadness from their departure from place they had called home for years did not rise to the level of irreparable harm.

[19] **Civil Rights** Public accommodations or facilities

Homeless individuals faced sufficient likelihood of irreparable harm to justify temporarily enjoining enforcement of allegedly unconstitutional city ordinances prohibiting camping on public property; city's assurances that it would not enforce ordinances on certain areas clashed with ordinances' sweeping language making camping either civilly or criminally sanctionable on all public property, and harm from departure for individuals who had lived in city for years and had little money to relocate frequently was sufficiently irreparable.

[20] **Civil Rights** Public accommodations or facilities

Balance of equities and public interest did not favor injunction barring enforcement of allegedly unconstitutional city ordinance that would evict occupants of homeless camp and

  

would prohibit public access to camp area once enacted; camp's isolation made it particularly ripe for criminal activity and life-threatening accidents, and the camp's hazardous terrain made it difficult for city to access camp to stop dangerous conduct and protect lives.

**[21]** **Civil Rights** Public accommodations or facilities

Balance of equities and public interest favored injunction barring enforcement of allegedly unconstitutional city ordinances prohibiting camping on public property; city lacked sufficient shelter to house its homeless population, and ordinances would have likely saddled individuals with legal liabilities if they stayed in city or would have incited individuals to leave altogether.

1 Cases that cite this headnote

**Attorneys and Law Firms**

***1078** James E. Lobsenz, Carney Badley Spellman PS, Todd Maybrown, Allen Hansen Maybrown & Offenbecher, PS, Seattle, WA, for Plaintiff.

Jeffrey S. Myers, John E. Justice, Law Lyman Daniel Kamerrer & Bogdanovich, Olympia, WA, Mary Patrice Kent, City of Aberdeen, Aberdeen, WA, for Defendant.

ORDER ON PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

DKT. ## 11 & 43

Ronald B. Leighton, United States District Judge

**INTRODUCTION**

THIS MATTER is before the Court on Plaintiffs' Renewed Motion for Temporary Restraining Order. Dkt. ## 11 & 43. For the past several years, much of Aberdeen's homeless population has resided on a narrow strip of land between a train yard and the Chehalis River. That land, known as "River Camp," was recently purchased by the City of Aberdeen, which now wants to remove the homeless occupants. Around the same time, the City amended its municipal code to make camping either civilly or criminally prohibited on public property throughout Aberdeen. Plaintiffs, who are members of or associated with Aberdeen's homeless community, have sued to enjoin the River Camp eviction and enforcement of the City's camping-related ordinances. Plaintiffs argue that the ordinances are collectively unconstitutional because they make homelessness illegal in Aberdeen.

For the following reasons, Plaintiffs' Motion is DENIED in part and GRANTED in part.

**BACKGROUND**

**1. River Camp**

River Camp is a piece of undeveloped land in Aberdeen occupied by about 100 homeless individuals, several of whom are Plaintiffs in this case. The property is bordered to the south by the Chehalis river and to the north by a rail yard and is about 200 feet wide by 1200 feet long. Unless someone traverses the rail yard, ***1079** which is always occupied by train cars, there are only two entrances to River Camp accessible for pedestrians only. According to Plaintiffs, homeless encampments have existed in River Camp for the past several decades. Plaintiffs Hinkle and Vervalen have lived there for over eight years.

But while River Camp is home to some, it also poses health and safety problems for its occupants and the community. Police are often called to the property to address theft, assault, sexual assault, and controlled-substance use. River Camp's isolated location also makes it an ideal place for those wishing to take advantage of its vulnerable residents and for criminal suspects seeking refuge. With its thick vegetation, holes filled with human waste, discarded needles, and numerous tents, police officers face challenging obstacles when pursuing individuals into the camp. These aspects of River Camp also slow down emergency responders and otherwise make the property unsanitary and dangerous for its occupants. Indeed, it is important that first responders be able to access River Camp because its residents often have fires near their flammable shelters, which have been incinerated in the past. Finally, River Camp's location adjacent to the rail yard poses additional safety risks. The rail company has reported damage to its tracks from vehicles crossing to access the camp and

  

one homeless resident had her legs severed by a train while attempting to crawl under it.

Likely aiming to address these problems, the City purchased the River Camp property in August of 2018 for $295,000. In September, the City initiated a permitting process that required residents of River Camp to register in order to stay there. In April of 2019, the City announced a proposed ordinance that would prohibit access to the River Camp property altogether.

**2. The City's Ordinances**

Four ordinances are at issue in this case. The first is Ordinance No. 19-5, or the "Eviction Ordinance." Its effect will be to evict the occupants of River Camp and prohibit all public access to the property once enacted. Dkt. #1, Appendix D, at 2-3. The ordinance cites the dangerous adjacent rail yard, sanitation concerns, lack of police and medical access, and zoning violations as reasons for the eviction. *Id.* at 2. The Eviction Ordinance was scheduled for final approval on May 8 but has been delayed due to this lawsuit.

The second ordinance is Aberdeen Municipal Code § 12.46, or the "Anti-Camping Ordinance," which imposes civil liability for unlawful camping. Section 12.46.040 was expanded in February of 2019 to make "camp[ing] or us[ing] camp paraphernalia" illegal in basically all public places in Aberdeen, including public parks, streets, sidewalks, and "[a]ny other publicly owned parking lot or publicly owned property, improved or unimproved." The ordinance "shall be enforced at all times" except "when there is no available overnight shelter for individuals or family units experiencing homelessness on the date that camping occurs," in which case camping is allowed on "[p]ortions of any street right-of-way that are not expressly reserved for vehicular or pedestrian travel." AMC § 12.46.045. Violations of the Anti-Camping Ordinance are Class 4 civil infractions resulting in fines of up to $25.00. AMC § 12.46.050.

The third ordinance is Aberdeen Municipal Code § 12.41, or the "Sit-Lie Ordinance." Under § 12.41.010, "No person shall sit or lie down upon a public sidewalk, or upon a blanket, chair, stool or other object placed upon a public sidewalk within the city of Aberdeen Downtown Parking and Business Improvement District ***1080** as defined in Chapter 10.20 during the hours of 6:00 a.m. and 11:00 p.m." Violation is a Class 3 civil infraction that can lead to a fine of $50 plus statutory assessments. AMC § 12.41.020. Violators may be required to perform community service if they are unable to pay. *Id.* In addition, failure to appear in court or sign a notice of civil infraction amounts to a criminal misdemeanor. *Id.*

The fourth and final ordinance is Aberdeen Municipal Code § 12.44, or the "Sidewalk Law," which makes it a criminal misdemeanor to obstruct sidewalks. Under Section 12.44.040, "No person shall place or cause to be placed or keep or suffer to remain, any article in any street or on any sidewalk of the city, so as to obstruct the free use and passage thereof without first obtaining a permit from the city." The law is to be "strictly enforced to cause the arrest of any persons violating the same." § 12.44.060. Violators must pay a fine of up to $50.00 plus the costs of prosecution and defaulting on payment can result in up to 30 days in jail. § 12.44.050.

**3. The City's Attempt to Accommodate Evictees from River Camp**

On May 6, 2019, the Court held a hearing on Plaintiffs' original Motion for Temporary Restraining Order. *See* Dkt. #37. At the hearing, the Court stayed enforcement of the Eviction Ordinance so that the parties could determine suitable locations in Aberdeen for the former residents of River Camp to go. *See id.* Those negotiations did not yield an outcome that was acceptable to Plaintiffs, causing them to renew their Motion for Temporary Restraining Order. Dkt #43. However, the City asserts that the negotiation process caused them to re-examine their ordinances and identify places where camping would be permitted.

The City's proposal for re-locating the River Camp evictees largely amounts to a re-interpretation of its ordinances. First, the City asserts that the term "expressly reserved for pedestrian access" in § 12.46.045 of the Anti-Camping Ordinance refers to the four-foot public access route that the Americans with Disabilities Act (ADA) requires for all sidewalks. Dkt. #46 at 7. Consequently, "when there is no available overnight shelter" homeless individuals can camp on the portions of sidewalks outside the four-foot public access route without being cited under for violating the Anti-Camping Ordinance. *See* AMC § 12.46.045. The City further acknowledges that there is currently insufficient shelter for Aberdeen's homeless at all times, meaning the exception is constantly in effect. Dkt. #46 at 9. In somewhat indirect terms, the City also suggests that the Sidewalk Law and Sit-Lie Ordinance do not apply outside the ADA-required four-foot public access route or are not enforced as long as there is insufficient shelter. *Id.* at 8-9.

  

Under this interpretation of its ordinances, the City claims to have identified 174,500 square feet of space for camping on sidewalks inside the "enforcement zone" for the Sit-Lie Ordinance and 40,000 square feet outside it. *Id.* at 8. This area is all on relatively flat portions of sidewalk that are at least two feet in width. *Id.* Accounting for the roughly 120 square feet it takes to house a tent and the 108 individual tent sites needed, this area supposedly amounts to "between three and thirteen times" the area needed to establish alternative camping for Plaintiffs. *Id.* at 7-8. This area is also within downtown Aberdeen and close to social services such as the food bank, the department of social and health services, and other non-profits. Dkt. #46 at 6-7.

## *1081 DISCUSSION

**[1]** **[2]** **[3]** **[4]** The purpose of a TRO is "preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing [on the preliminary injunction application], and no longer." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974); *see also Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130–31 (9th Cir. 2006). For a court to grant a preliminary injunction, the plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). The last two factors merge if the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). When considering whether to grant this "extraordinary remedy, ... courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences." *Winter*, 555 U.S. at 24, 129 S.Ct. 365.

**[5]** **[6]** **[7]** The Ninth Circuit continues to apply one manifestation of the "sliding scale" approach to injunctions in which "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "In other words, 'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.* at 1131-32. However, an injunction cannot issue even when there is a strong likelihood of success on the merits if there is just a mere possibility of irreparable harm. *Id.* at 1131 (explaining the holding in *Winter*, 555 U.S. at 22, 129 S.Ct. 365).

### 1. Likelihood of Success on the Merits

*a. Cruel and Unusual Punishment*

**[8]** **[9]** The Eighth Amendment "circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). The last limitation should be "applied sparingly." *Id.* Nonetheless, in *Martin v. City of Boise*, the Ninth Circuit held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter" within a jurisdiction. 902 F.3d 1031, 1048 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019). The court accordingly ordered the district court to reconsider the constitutionality of two Boise ordinances criminalizing unauthorized camping and occupation at basically all public and private locations. *Id.* at 1035, 1049. However, the court also emphasized that its ruling was narrow and did not dictate that cities "must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place." *Id.* at 1048.

In keeping with *Martin*'s self-proclaimed restraint, courts have been reluctant to stretch the ruling beyond its context of total homelessness criminalization. *Miralle v. City of Oakland*, for example, held that Oakland could clear out a specific *1082 homeless encampment because "*Martin* does not establish a constitutional right to occupy public property indefinitely at Plaintiffs' option." 2018 WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018); *see also Le Van Hung v. Schaaf*, No. 19-CV-01436-CRB, 2019 WL 1779584, at *5 (N.D. Cal. Apr. 23, 2019) (reaching the same conclusion). *Quintero v. City of Santa Cruz* likewise distinguished *Martin* on the basis that the defendant city had suspended enforcement of its anti-camping ordinances and offered "adequate alternative shelter to every resident of the Encampment." No. 5:19-CV-01898-EJD, 2019 WL 1924990, at *2-3 (N.D. Cal. Apr. 30, 2019).

  

Courts have also limited *Martin* to situations involving criminal sanctions. In *Butcher v. City of Marysville*, in which the defendant city had evicted homeless occupants and destroyed their property, the court rejected the plaintiffs' Cruel and Unusual Punishment claim because the Eighth Amendment does not extend beyond the criminal process. No. 218CV02765JAMCKD, 2019 WL 918203, at *1-2, 7 (E.D. Cal. Feb. 25, 2019); *see also Shipp v. Schaaf*, 379 F. Supp. 3d 1033 (N.D. Cal. 2019) (holding that *Martin* did not apply because the city's temporary eviction of homeless residents from an encampment was not backed by criminal sanctions). These cases are consistent with Supreme Court precedent limiting the Cruel and Unusual Punishment Clause to "punishment imposed for the violation of criminal statutes." *See Ingraham*, 430 U.S. at 667-69, 97 S.Ct. 1401 (collecting cases and holding that paddling schoolchildren was beyond the scope of Eighth Amendment protections); *but see Austin v. United States*, 509 U.S. 602, 609-10, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) (holding that the Eighth Amendment is concerned with both civil and criminal "punishment").

**[10]** With respect to the Eviction Ordinance, Plaintiffs are unlikely to succeed in their Eighth Amendment claim. *Martin* does not limit the City's ability to evict homeless individuals from particular public places—including River Camp. Therefore, even if the remaining ordinances affecting the homeless violate the Eighth Amendment, this would not compel the conclusion that the Eviction Ordinance does as well.

**[11]** With respect to the City's other ordinances, Plaintiffs have raised enough questions to support a brief stay of enforcement until the Court can assess the City's regime more thoroughly. This is justified on several bases. First, additional argument and briefing is required to determine whether the *Martin*'s rationale concerning criminal sanctions extends to the civil penalties imposed by the Anti-Camping Ordinance. Although *Ingraham* held that the Cruel and Unusual Punishment Clause is limited to the criminal process, the Court held in *Austin* that the Eighth Amendment "cuts across the division between the civil and the criminal law." 509 U.S. 602, 609-10, 113 S.Ct. 2801 (1993); *but see John Corp. v. City of Houston*, 214 F.3d 573, 580 (5th Cir. 2000) (holding that *Austin* did not overrule *Ingraham*'s limitations on the Cruel and Unusual Punishment Clause). This broad conclusion sits uncomfortably with *Ingraham* and the City has provided little argument on this issue. The Court is therefore unwilling to hold definitively that *Martin*'s rationale cannot extend to the sweeping Anti-Camping Ordinance here.[1]

***1083** Second, the factual record is insufficient to determine how the ordinances restricting camping will actually apply to Plaintiffs. While the City has tried to explain that the ordinances provide ample space for Plaintiffs to camp on certain parts of the sidewalk, the Court is not yet convinced by the City's plan. The City's interpretation of its ordinances seems unmoored from their actual language in several respects. The map submitted by the City is also not very helpful for assessing whether River Camp's population can be accommodated by the spaces the City identified. These issues will be easier to resolve once Plaintiffs have actually left River Camp and relocated to other parts of Aberdeen.

*b. Right to Travel*

**[12]** "The right of interstate travel has repeatedly been recognized as a basic constitutional freedom." *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 253-54, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). Although the Supreme Court has been cagey about explaining the origins of the right, the line of cases that Plaintiffs rely on derive it largely from the Equal Protection Clause. *See id.* at 251, 94 S.Ct. 1076; *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *see also Zobel v. Williams*, 457 U.S. 55, 61 n. 6, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982) ("In reality, right to travel analysis refers to little more than a particular application of equal protection analysis ... [to] state distinctions between newcomers and longer term residents."). "Thus, ... a classification which 'operates to Penalize those persons ... who have exercised their constitutional right of interstate migration' must be justified by a compelling state interest." *Id.* at 258, 94 S.Ct. 1076 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 238, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970)). In *Shapiro*, for example, the Court held that a one-year waiting requirement to obtain welfare benefits penalized travel because it denied new residents the means to obtain "food, shelter, and other necessities of life." 394 U.S. at 627, 634, 89 S.Ct. 1322.

Although some circuits have held that intrastate travel is also protected by the Constitution, *see, e.g., King v. New Rochelle Municipal Housing Auth.*, 442 F.2d 646, 648 (2d Cir. 1971), the Supreme Court and the Ninth Circuit have declined to weigh in. *Mem'l Hosp.*, 415 U.S. at 255-56, 94 S.Ct. 1076; *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 n.

  

7 (9th Cir. 1997). However, the Washington Supreme Court has held that the right to intrastate travel is protected by both the U.S. and Washington State Constitutions. *Eggert v. City of Seattle*, 81 Wash. 2d 840, 845, 505 P.2d 801 (1973) (reasoning that the right to travel in the U.S. Constitutional applies within states); *Macias v. Dep't of Labor & Indus. of State of Wash.*, 100 Wash. 2d 263, 275, 668 P.2d 1278 (1983) (holding without further explanation that the Washington Constitution's privileges and immunities clause supports a right to travel based on equal protection of the law).

In *Pottinger v. City of Miami*, the Southern District of Florida applied the right to travel to enjoin city ordinances that criminalized conduct essential to life as a homeless person. 810 F.Supp. 1551, 1580 (S.D. Fla. 1992). The plaintiffs sued after Miami's homeless population was arrested and harassed over the course of several years for standing, sleeping, or sitting on sidewalks and in parks. ***1084** *Id.* at 1559-60. The court held that "[p]reventing homeless individuals from performing activities that are 'necessities of life,' such as sleeping, in any public place when they have nowhere else to go effectively penalizes migration." *Id.* at 1580; *see also City of Seattle v. McConahy*, 86 Wash. App. 557, 571, 937 P.2d 1133 (1997) (adopting *Pottinger*'s reasoning but declining to invalidate a Seattle ordinance prohibiting sitting and lying on sidewalks).

Some courts in this circuit have recognized *Pottinger*'s holding on the right to travel, *see, e.g., Veterans for Peace Greater Seattle, Chapter 92 v. City of Seattle*, No. C09-1032 RSM, 2009 WL 2243796, at *4 (W.D. Wash. July 24, 2009), but more have questioned or rejected its foundation. *See, e.g., Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1111 (E.D. Cal. 2012); *Joyce v. City & Cty. of San Francisco*, 846 F. Supp. 843, 861 (N.D. Cal. 1994). None, however, have followed *Pottinger*'s logic to enjoin an ordinance prohibiting camping or other conduct that homeless people often engage in. *See Nishi v. Cty. of Marin*, No. C11-0438 PJH, 2012 WL 566408, at *5 (N.D. Cal. Feb. 21, 2012) (ordinance prohibited overnight camping); *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1448 (W.D. Wash. 1994), *aff'd*, 78 F.3d 1425 (9th Cir. 1996) (ordinance restricted sitting and lying on sidewalks during daytime hours). Federal courts have also declined to apply *Pottinger* when a city seeks to evict homeless plaintiffs from a particular location. *See Veterans for Peace*, 2009 WL 2243796, at *5 (WSDOT sought to evict homeless plaintiffs from its property); *Davison v. City of Tucson*, 924 F. Supp. 989, 993 (D. Ariz. 1996) (city sought to evict homeless plaintiffs from long-standing encampment).

Finally, Plaintiffs also cite a line of Washington cases addressing banishment orders. In *State v. Schimelpfenig*, for example, the Washington Court of Appeals held that a criminal sentence banishing a defendant from Grays Harbor for life violated the right to intrastate travel and was therefore subject to strict scrutiny. 128 Wash. App. 224, 226, 115 P.3d 338 (2005). Applying a fact-intensive analysis, the court determined that the restriction was too broad and not justified by any imminent threat posed by the defendant. *Id.* at 229-30, 115 P.3d 338.

**[13]** With this legal backdrop, Plaintiffs' claim that the Eviction Ordinance violates their right to travel is unlikely to succeed. Courts in this circuit agree that the right to travel is not a right to remain indefinitely wherever one pleases. While it may be that the City could have pursued more lenient options that allowed Plaintiffs to remain at River Camp under different conditions, they were not constitutionally required to do so.

**[14]** However, similar to the Eighth Amendment claim, Plaintiffs have managed to raise enough questions to justify temporarily staying enforcement of the City's other ordinances. Although the Court is skeptical that the equal protection analysis applied in cases like *Shapiro* is applicable to ordinances that affect new and old residents equally, there is some inherent force to the argument that a City cannot effectively cast out its homeless population. The problem for Plaintiffs, however, is that the only ordinance affecting all public property, the Anti-Camping Ordinance, only imposes a small fine for violations and does not threaten criminal sanctions. This is a far cry from *Pottinger*'s systematic campaign against the homeless or *Schimelpfenig*'s banishment order backed up by criminal sanctions. Under Washington law, failure to pay a civil fine cannot result in criminal contempt if the defendant is homeless, so the Anti-Camping Ordinance does not appear to have much bite. *See* RCW 10.01.180(3)(c). ***1085** It is possible that enforcement will involve efforts to remove the homeless from places they are not allowed to camp, but that is not written into the law itself. Nonetheless, because the City's ordinances do encompass all public property and it remains unclear where River Camp's evictees will relocate, the Court is presently unwilling to hold that Plaintiffs' right to travel claim is destined to fail.

*c. Freedom of Association*

**[15]** **[16]** The right to associate freely breaks down into two separate forms of association. "In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). "In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618, 104 S.Ct. 3244. This associational right only applies if the group engages in "expressive association." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

**[17]** Here, Plaintiffs' freedom of association claim is unlikely to succeed. It is unclear what expressive activity Plaintiffs engage in that is contingent on being able to camp on public property without any legal repercussions. The City's ordinances also do not directly regulate how the homeless congregate as family units. Unlike *Moore v. City of East Cleveland, Ohio*, where the ordinance determined the types of relatives that could live together, the ordinances in this case have no such goal. 431 U.S. 494, 498-99, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). Indeed, even if the City's ordinances amounted to banishment, they still would not prohibit Plaintiffs from cohabiting with relatives in Aberdeen who wanted to live together. Plaintiffs identify no cases where freedom of association was applied to enjoin an ordinance affecting the homeless and the Court is unpersuaded by Plaintiffs' novel arguments.

**2. Irreparable Harm**

**[18]** Because Plaintiffs fail to establish either likelihood of success on the merits or serious questions regarding the Eviction Ordinance's constitutionality, the closure of River Camp does not present the possibility of irreparable constitutional violations. *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Furthermore, enjoining the Eviction Ordinance is not necessary to prevent Plaintiffs from being forced out of Aberdeen; temporarily enjoining enforcement of the City's other ordinances will ensure they are not immediately required to leave. Many of the Plaintiffs will certainly be sad to depart the place they have called home for years, but this effect of the City's decision does not rise to the level of irreparable harm.

**[19]** However, Plaintiffs face a sufficient likelihood of irreparable harm to justify temporarily enjoining enforcement of the remaining ordinances. On their face, these ordinances make camping either civilly or criminally sanctionable on all public property and are strictly enforced. Although the City has stated that it will not enforce the ordinances on certain areas of the sidewalk, these assurances clash with the laws' sweeping language. It therefore seems likely that at least some former residents of River Camp will simply leave Aberdeen to go someplace where public camping does not carry the inherent risk ***1086** of criminal or civil liability. For people who have lived in Aberdeen for years and have little money to relocate frequently, this harm is sufficiently irreparable.

**3. Balance of Equities and Public Interest**

**[20]** With respect to the Eviction Ordinance, the balance of equities and public interest do not favor an injunction. It is true that some Plaintiffs stand to lose the place they call home. However, the City has persuasively shown that River Camp poses dangers for those who live there and for the City's police and first responders. The camp's isolation makes it particularly ripe for criminal activity and life-threatening accidents. At the same time, the camp's hazardous terrain makes it difficult for the City to access the property to stop dangerous conduct and protect lives. It would therefore not be in the public interest to prevent the City from closing River Camp.

**[21]** The equities balance differently when it comes to the City's other ordinances. The City has already admitted that it lacks sufficient shelter to house its homeless population and will therefore refrain from arresting or citing homeless people who camp outside the 4-foot thoroughfare on public sidewalks. A temporary injunction therefore would not put a much larger burden on the City than that which it has already taken up willingly. On the other hand, the ordinances will likely saddle Plaintiffs with legal liability if they stay in Aberdeen or incite them to leave altogether. Strict enforcement of the ordinances restricting camping is therefore not in the public interest and the equities favor Plaintiffs.

**CONCLUSION**

For the above reasons, Plaintiffs' Motion is DENIED with respect to the Eviction Ordinance, or Ordinance No. 19-5. Plaintiffs' Motion is GRANTED with respect to the Anti-Camping Ordinance, AMA § 12.46. The Motion is also partly

  

GRANTED with respect to the Sidewalk Law, AMA § 12.44, and Sit-Lie Ordinance, AMA § 12.41, which are enjoined only regarding those portions sidewalk space outside of the four-foot public access route and other areas identified by the City as necessary for ADA compliance.

Although the Court remains skeptical of Plaintiffs' arguments, they at least warrant a full hearing that would be better held on a later date after Plaintiffs have relocated from River Camp. The Court will tentatively schedule that hearing for September 4, 2019, at 9:30 A.M.

IT IS SO ORDERED.

**All Citations**

393 F.Supp.3d 1075

Footnotes

1 Plaintiffs also suggest that imposing civil penalties for camping on public property violates due process by imposing a punitive sanction outside the criminal system. They rely on *Kennedy v. Mendoza-Martinez*, which held that a civil statute that stripped citizenship from those who leave the country to avoid military service was unconstitutional. 372 U.S. 144, 166, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). However, Plaintiffs do not identify any cases applying this theory to ordinances affecting the homeless or explain how the small fines imposed by the Anti-Camping Ordinance are comparable to revoking citizenship.

302 Or.App. 23
Court of Appeals of Oregon,
En Banc.

STATE of Oregon and City of Portland, Plaintiffs-Respondents,
v.
Alexandra Chanel BARRETT, aka Alexandra Barrett, aka Alexandra C. Barrett, Defendant-Appellant.

A159139 (Control), A159140, A159141, A159142, A159143, A159144, A159145
|
Argued and submitted May 2, 2017, Chiloquin High School, Chiloquin.
|
January 29, 2020

**Synopsis**

**Background:** Defendant was convicted in the Circuit Court, Multnomah County, Nos. 14CR10631, 14CR14443, 14CR16019, 14CR17841, 14CR20088, 14CR32814, 15CR00103, Stephen K. Bushong, P.J., of unlawful camping on public property, criminal trespass, and interference with peace officer (IPO). Defendant appealed.

**Holdings:** The Court of Appeals, en banc, DeVore, J., held that:

[1] record was inadequate for trial court and Court of Appeals to address defendant's challenge to public camping charges on ground that city ordinance violated Eighth Amendment as-applied to her;

[2] city ordinance providing that it is unlawful for any person to camp in or upon any public property or public right of way does not violate the right to travel of those who are unsheltered; and

[3] city ordinance did not conflict with notice provisions of state laws requiring a city to develop and implement a "policy" as to "removal" of homeless persons and belongings that make a camping site.

Affirmed.

Ortega, J., filed concurring opinion in which Powers, J., joined.

James, J., filed concurring opinion in which Egan, C.J., joined.

West Headnotes (10)

[1] **Criminal Law** Grounds of review in general

**Indictments and Charging Instruments** Grounds

Record was inadequate for trial court and, on appeal, Court of Appeals to address and resolve defendant's challenge to public camping charges on ground that city ordinance violated Eighth Amendment as-applied to her; in pretrial motion to dismiss public camping charges, defendant did not develop factual record sufficient to permit trial court to determine whether defendant's conviction under the ordinance violated Eighth Amendment as applied to her, record was devoid of any personal information about defendant's attempts to find shelter, and record did not indicate whether defendant's acts of camping were involuntary acts. U.S. Const. Amend. 8.

[2] **Courts** Highest appellate court

**Courts** Decisions of United States Courts as Authority in State Courts

**Courts** Construction of federal Constitution, statutes, and treaties

Court of Appeals is not compelled to follow the analysis of the Ninth Circuit or any other federal circuit court; rather, in understanding the Eighth Amendment, Court of Appeals is bound only by the United States Constitution and the decisions of the United States Supreme Court and Oregon Supreme Court. U.S. Const. Amend. 8.

  

[3] **Constitutional Law** Freedom of Travel and Movement

City ordinance, which addresses all persons alike, providing that it is unlawful for any person to camp in or upon any public property or public right of way does not violate the right to travel of those who are unsheltered.

[4] **Municipal Corporations** Local legislation
**Vagrancy** Nature and elements of offenses

City ordinance providing that it is unlawful for any person to camp in or upon any public property or public right of way did not conflict with notice provisions of state laws requiring a city to develop and implement a "policy" as to "removal" of homeless persons and belongings that make a camping site, and therefore, under its home rule authority, city could issue public camping citations independently of policy enacted under the state laws; the state laws did not prescribe or limit criminal offenses, state laws did not address what elements must comprise unlawful camping, nor did they address effect of a city's violation of a policy once adopted. Or. Const. art. 4, § 1(5); Or. Const. art. 11, § 2; Or. Rev. Stat. §§ 203.077, 203.079(1), 203.079(3).

[5] **Municipal Corporations** Local legislation

Under a municipality's home rule authority, a local law is valid and not preempted if it is authorized by the local charter or by a statute, and if it does not contravene state or federal law. Or. Const. art. 4, § 1(5); Or. Const. art. 11, § 2.

[6] **Municipal Corporations** Local legislation

Under a municipality's home rule authority, the first of two ways a state law can preempt a municipal law is that the state might pass a law or laws expressly precluding all municipal regulation in an area, such that the state occupies the field in that area. Or. Const. art. 4, § 1(5); Or. Const. art. 11, § 2.

[7] **Municipal Corporations** Local legislation

A state statute will displace the local rule where the text, context, and legislative history of the statute unambiguously expresses an intention to preclude local governments from regulating in the same area as that governed by the statute.

[8] **Municipal Corporations** Local legislation

Under a municipality's home rule authority, the second of two ways a state law can preempt a municipal law is if the laws conflict, such that they cannot operate concurrently. Or. Const. art. 4, § 1(5); Or. Const. art. 11, § 2.

[9] **Municipal Corporations** Local legislation

When conducting a conflict analysis to determine if a state law can preempt a municipal law under the municipality's home rule authority, Court of Appeals must construe the local law if possible, to be intended to function consistently with state laws. Or. Const. art. 4, § 1(5); Or. Const. art. 11, § 2.

[10] **Municipal Corporations** Local legislation

It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent.

****94** Multnomah County Circuit Court, 14CR10631, 14CR14443, 14CR16019, 14CR17841, 14CR20088, 14CR32814, 15CR00103; Stephen K. Bushong, Judge.

**Attorneys and Law Firms**

Lindsey Burrows, Deputy Public Defender, argued the cause for appellant. Also on the briefs was Ernest G. Lannet,

  

Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Denis M. Vannier argued the cause and filed the brief for respondent City of Portland.

Paul L. Smith, Salem, argued the cause for respondent State of Oregon. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Shauna M. Curphey filed the brief amicus curiae for Oregon Justice Resource Center, Portland Chapter of the National Lawyers Guild, Homeless Youth Law Clinic, Common Cup Family Shelter, Operation Nightwatch, Right to Dream Too, Sisters of the Road, First Unitarian Church of Portland, Augustana Lutheran Church, and Albina Ministerial Alliance. Also on the joint brief were Mathew W. Dos Santos and Kelly K. Simon for ACLU of Oregon.

Before Egan, Chief Judge, and Armstrong, Ortega, DeVore, Tookey, DeHoog, James, Aoyagi, Powers, and Mooney, Judges, and Hadlock, Judge pro tempore.

**Opinion**

DeVORE, J.

***25** Defendant appeals from judgments convicting her of unlawful camping on public property, criminal trespass, and interference with a peace officer (IPO). Defendant first contends that the trial court erred by denying her pretrial motion to dismiss the charges of unlawful camping under Portland ****95** City Code (PCC) 14A.50.020.[1] She argues that the camping law, as applied to her in this case, violates the Eighth Amendment to the United States Constitution.[2] Defendant also contends that the camping law violates her constitutional right to travel. In addition, she contends that the court erred during trial by denying her motion for judgment of acquittal (MJOA) because convictions on the charges of unlawful camping and IPO were invalid. Finally, she contends that the city's camping law was preempted by ORS 203.077 and ORS 203.079, which require local governments to enact policies on removal of homeless campsites.[3]

As explained in the opinions of the court, we affirm the judgments of conviction on the several charges. We agree that the trial court did not err in denying defendant's pretrial motion and her MJOA. A majority of this court refrains ***26** from addressing whether enforcement of PCC 14A.50.020 could violate the Eighth Amendment on an as-applied basis in the absence of a factual record needed to properly present that question. By refraining from addressing that question, we do not imply an answer.[4] Defendant's right-to-travel argument fails as either a facial or as-applied challenge. Finally, ORS 203.077 and ORS 203.079 do not preempt the camping law, as they only require cities and counties to develop and implement policies regarding the removal of homeless persons and their belongings, and they do not prescribe or limit the enactment or enforcement of criminal offenses.

## I. PROCEEDINGS

The procedural facts are undisputed. In May, June, July, August, September, and October 2014, defendant was arrested and charged with a variety of offenses, including unlawful camping, PCC 14A.50.020; IPO, ORS 162.247; resisting arrest, ORS 162.315; second-degree criminal trespass, ORS 164.245; third-degree criminal mischief, ORS 164.345; and offensive littering, ORS 164.805.[5]

In December 2014, defendant filed a "Motion to Dismiss," asserting that convictions under Portland's camping ordinance would be cruel and unusual punishment as applied to her. She argued that camping in a public place was an involuntary act that was an ****96** unavoidable consequence of her status of being homeless. For purposes of the motion, the parties agreed to a number of factual statements. They agreed that, at the time of her first arrest on May 24, 2014, defendant was "a member of the homeless community ***27** residing in downtown Portland." Defendant's ensuing argument assumed that she remained homeless; the city did not contest that assumption.

Defendant advised the court "that the original motion, captioned as a motion to dismiss, was incorrectly captioned." She wrote, "It should have been labeled a *demurrer* under ORS 135.630(4)." (Emphasis added.) At the hearing on the motion, defendant elaborated:

> "As we know [*sic*] in the motion that this is an as applied challenge. And under [ORS] 135.630, we were really focusing on (4), which is *the facts do not constitute an offense*. However, *demurrer only really applies to a facial challenge just on the face of the complaint itself*. And so we really think that this motion should just be brought as a motion to find the city—the Portland city camping ordinance unconstitutional and just leave it at that."

  

(Emphases added.) Defendant explained, "On its face, the Portland City Code ordinance does not facially violate the constitution. That's why we just brought this as an 'as applied' challenge."

Treating the matter as an as-applied challenge, the trial court asked defendant if she contended that the ordinance was unconstitutional "no matter what the city did in terms of providing places for homeless people to sleep at night." Defendant replied that the answer depended on the number of beds and the restrictions on using them, such as a person's gender, a person's status with or without children, and a person's illicit drug use. The court responded, "Don't I need to know all those facts before I can decide whether this ordinance is constitutional or not?" Defendant referenced a past survey, which was not among the agreed statements, concerning homelessness and shelter beds in prior years. The court asked:

> "Is that the relevant question? Or does it have to be on the night that [defendant] was—since we're an as applied challenge, on the particular night on the particular date that she was cited, if there's a bed available and she chose not to use it, wouldn't that make a difference?"

Defendant replied, "I don't think it's necessarily whether there's a bed available on that specific night." Defendant ***28** explained that a person might have been turned away repeatedly or felt safer camping on a sidewalk or in a park. The court asked whether it should consider the "bigger picture" and the efforts of the city to address homelessness. Defense counsel responded that one reason to have brought the case as an as-applied challenge was instead to focus on defendant's personal circumstances because counsel's office "didn't necessarily have the resources to go out and conduct this, which I agree with the Court is required and needed."

The trial court denied defendant's motion without deciding whether the anticamping ordinance necessarily violated the Eighth Amendment. The court observed that more facts would be helpful to decide the issue. Nevertheless, assuming without deciding that the Eighth Amendment prevented the city from enforcing its camping ordinance against defendant, the court concluded that the affirmative defense of "necessity" or "choice of evils," when raised at trial, could avoid a constitutional problem.[6]

At trial, defendant asserted an affirmative defense of "choice of evils." *See* ORS 161.200 (providing justification when necessity or choice of evils is provided). Defendant and the city presented conflicting evidence on that defense.[7] Defendant did not raise her as-applied challenge under the Eighth Amendment. The jury returned its verdicts against ****97** defendant for unlawful camping and a variety of other charges.

## II. AS-APPLIED CHALLENGE

**[1]** On appeal, defendant's first assignments of error assert that the trial court erred in rejecting her pretrial motion against the public camping charges on the ground that Portland's ordinance violates the Eighth Amendment as applied to her. Citing *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962), defendant notes that, ***29** although the criminal law may penalize a person's conduct, such as possession or use of illicit drugs, it may not criminalize mere status, such as being addicted to drugs. By extension, she argues that her camping on public property was an involuntary act that was an unavoidable consequence of her status of being homeless. In this court, she supports her argument with evidence that was not in the record at the time of the pretrial motion.

The city responds that the trial court did not err, arguing a pretrial demurrer or motion to dismiss is an improper means by which to present defendant's challenge because those pretrial motions do not consider the facts necessary for an as-applied challenge under the Eighth Amendment. Relatedly, the city notes that, at trial, defendant did not renew the Eighth Amendment defense, and, as a result, the issue was not preserved. On the merits, the city argues that the camping ordinance does not violate the Eighth Amendment because it addresses the act of camping in public spaces, not the mere status of being homeless.

**[2]** After we heard oral argument in this case, the Ninth Circuit Court of Appeals held, in a civil action under 42 USC section 1983, that a Boise ordinance that prohibited camping on public property as applied to homeless plaintiffs violated the Eighth Amendment, because camping could be considered an involuntary act that was an unavoidable consequence of the status of being homeless when the number of homeless persons exceeded the number of shelter beds. *Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir.), *cert. den.*, —— U.S. —— (2019).[8] To indicate that its decision was "narrow," ***30** the court stated that an as-applied challenge would include consideration of additional facts, including a defendant's specific efforts at finding shelter and, even if

  

shelters were unavailable, consideration of a city's concern for particular locations or obstructions of public ways. *Id.* at 617 n. 8.

We begin and end with the recognition that, with her pretrial motion, defendant did not develop a factual record that was sufficient to permit the court to determine whether conviction of defendant under PCC 14A.50.020 would violate the Eighth Amendment as applied to her.[9] That is, assuming, without deciding, that she could present such an as-applied challenge, she fails to provide the facts needed, in the first place, for us to begin to consider the sort of challenge that she presents. Although defendant argued at the hearing about homeless persons, shelter beds, and restrictions on shelter beds, there ****98** was no evidence received, stipulated to, or judicially noticed to support that argument. The record was devoid of general information about the availability of shelter and devoid of any personal information about defendant's attempts to be among those sheltered. In short, the record did not indicate whether defendant's acts of camping were involuntary acts.

By referring to the absence of facts needed for an as-applied challenge, we do not imply our acceptance or rejection of defendant's constitutional theory—a theory that is centered on an "involuntary act" as a matter of constitutionally protected status. We need not, and we do not, address the Eighth Amendment—either directly or implicitly. It is simply enough to recognize that the record was inadequate in the trial court to present the as-applied challenge that defendant urged, just as it is now inadequate for this court to consider, address, and resolve that question, in whole or in part, on appeal. We conclude that, lacking the record necessary for this as-applied challenge, the trial court did not err in denying the pretrial motion.

***31** Our task as an appellate court is to determine whether the trial court erred in denying defendant's pretrial motion. We recognize that defendant asked the trial court to "find * * * the Portland city camping ordinance unconstitutional and just leave it at that." But, this is a criminal case, not a declaratory judgment action. Accordingly, we do not decide whether the Portland ordinance would or would not violate the Eighth Amendment based on hypothetical facts. In similar cases, we have declined to address constitutional questions where the record was "too inconclusive to justify the adoption of the constitutional rule urged by defendant." *City of Portland v. Juntunen*, 6 Or. App. 632, 635, 488 P.2d 806 (1971) (declining to conclude that punishing an alcoholic for his appearance in public while drunk constitutes cruel and unusual punishment absent evidence that the defendant was unable to avoid appearing in public while drunk). We have cautioned that the development of judge-made constitutional law should proceed incrementally despite recognition "that the bench and Bar might be well served by a decision resolving [a] central constitutional issue." *State v. Herrera-Lopez*, 204 Or. App. 188, 193, 129 P.3d 238, *rev. den.*, 341 Or. 140, 139 P.3d 258 (2006) (declining to determine whether Sixth Amendment rules announced in "*Apprendi* and *Blakely* apply to imposition of consecutive sentences" because "any decision" on that point "would be *dictum* and would not have any effect" on defendant, who would lose on appeal in any event). And, in a different context, the Oregon Supreme Court recently reminded us that, "[a]s a general matter, [the] court will 'avoid reaching constitutional questions in advance of the necessity of deciding them.' " *Vasquez v. Double Press Mfg., Inc.*, 364 Or. 609, 614, 437 P.3d 1107 (2019) (quoting *State v. Barrett*, 350 Or. 390, 397-98, 255 P.3d 472 (2011)) (preferring decision on a statutory basis). We adhere to those principles here.

## III. RIGHT TO TRAVEL

**[3]** In her pretrial motion, defendant also argued that the camping law imposed an unconstitutional restriction on her fundamental right to travel. *See City of Chicago v. Morales*, 527 U.S. 41, 53, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (recognizing "the freedom to loiter for innocent purposes"); *see also* ***32** *State v. Berringer*, 234 Or. App. 665, 671-75, 229 P.3d 615, *rev. den.*, 348 Or. 669, 237 P.3d 824 (2010) (discussing the right to interstate travel). In her view, a "homeless person residing or passing through Portland has no choice but to sleep outside" and, by criminalizing public camping, the ordinance "wholly prevents homeless persons from residing in or visiting Portland."

If intended to be a facial challenge, defendant's argument has not persuaded us that Portland's camping law, which addresses all persons alike, violates the right to travel of those who are unsheltered. *See Berringer*, 234 Or. App. at 671-75, 229 P.3d 615 (rejecting argument that enforcement of Oregon's law against possession of marijuana, addressing all persons alike, violated the right to travel). If intended to be an as-applied challenge, the argument fails for lack of a factual record for the reasons discussed.

  

**99 IV. PREEMPTION

**[4]** At trial, defendant twice moved for a judgment of acquittal on the charges of unlawful camping and IPO.[10] Defendant argued that state law, ORS 203.077 and ORS 203.079, preempted the city's camping restriction. In her view, because the camping restriction was preempted, the police officer's order not to camp on public property was not lawful, and a required element of the offense of IPO is refusal "to obey a lawful order by the peace officer." ORS 162.247(1)(b). The first of the two provisions, ORS 203.077, states that all

> "municipalities and counties shall:
>
> "(1) Develop a policy that recognizes the social nature of the problem of homeless individuals camping on public property.
>
> ***33** "(2) Implement the policy as developed, to ensure the most humane treatment for removal of homeless individuals from camping sites on public property."

The second of the provisions, ORS 203.079 describes "what those policies must include":

> "(1) A policy developed pursuant to ORS 203.077 shall include, but is not limited to, the following:
>
> "(a) Prior to removing homeless individuals from an established camping site, law enforcement officials shall post a notice, written in English and Spanish, 24 hours in advance.
>
> "* * * * *
>
> "(3) A person authorized to issue a citation for unlawful camping under state law, administrative rule or city or county ordinance may not issue the citation if the citation would be issued within 200 feet of the notice described in this section and within two hours before or after the notice was posted."

Defendant argued that the state had failed to present evidence that officers had posted a notice before ordering defendant to leave the park and had notified social services of the need to arrange housing and other assistance.

The trial court denied the motion. The court noted that ORS 203.077 and ORS 203.079 were not part of the state's criminal code and did not present an obvious conflict with local ordinances. The court also noted that ORS 203.077 and ORS 203.079 do not provide a remedy for a city's failure to comply with those policy statutes; more particularly, the statutes do not provide that they "invalidate any criminal charges that follow from violations of the city ordinance that are observed by the—by local law enforcement." Defendant had not offered the court legislative history that would suggest legislative intention to preempt local ordinances. Therefore, the court was not persuaded that the legislature intended ORS 203.077 and ORS 203.079 to preempt the criminal ordinances on camping, such as PCC 14A.50.020.

On appeal, defendant relies on ORS 203.079(1) and (3) to assert that state law permits a person to camp on public property until the city posts a notice. She argues that ***34** the statute conflicts with PCC 14A.50.020, which proscribes public camping without requiring such notice as an element of the offense. Defendant concludes that, because the state and local enactments conflict, the statute preempts PCC 14A.50.020. We disagree.

**[5]** **[6]** **[7]** **[8]** **[9]** Under a municipality's home rule authority, a "local law is valid and not preempted if it is authorized by the local charter or by a statute, and if it does not contravene state or federal law."[11] ****100** *Qwest Corp. v. City of Portland*, 275 Or. App. 874, 882, 365 P.3d 1157 (2015), *rev. den.*, 360 Or. 465, 384 P.3d 152 (2016) (quoting *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or. 437, 450, 353 P.3d 581 (2015)) (internal quotation marks and brackets omitted). A state law can preempt a municipal law in two ways. First, "the state might pass a law or laws expressly precluding all municipal regulation in an area, such that the state 'occup[ies] the field' in that area." *Id.* at 883, 365 P.3d 1157 (quoting *Rogue Valley Sewer Services*, 357 Or. at 454, 353 P.3d 581). "A state statute will displace the local rule where the text, context, and legislative history of the statute '*unambiguously* expresses an intention to preclude local governments from regulating' in the same area as that governed by the statute." *Rogue Valley Sewer Services*, 357 Or. at 450-51, 353 P.3d 581 (quoting *Gunderson, LLC v. City of Portland*, 352 Or. 648, 663, 290 P.3d 803 (2012) (emphasis in *Rogue Valley Sewer Services*)). Second, "state law will preempt a municipal law if the laws conflict, such that they 'cannot operate concurrently.' " *Qwest Corp.*, 275 Or. App. at 883, 365 P.3d 1157 (quoting *LaGrande/Astoria v. PERB*, 281 Or. 137, 148, 576 P.2d 1204, *adh'd to on recons*, 284 Or. 173, 586 P.2d 765 (1978)). When "conducting that conflict analysis, we must construe the local law 'if possible, to be intended to function consistently with state laws.' " *Id.* (quoting *LaGrande/ Astoria*, 281 Or. at 148, 576 P.2d 1204).

  

In this case, ORS 203.077 instructs cities and counties to develop and implement policies to "ensure the most humane treatment for removal of homeless individuals from camping sites on public property." To that end, ORS 203.079(1) provides that a policy should include requirements ***35** for law enforcement when removing individuals and their belongings from campsites, including posting a notice before removing persons or property. In addition, ORS 203.079(3) provides that a policy should require that a citation for unlawful camping may not be issued "within 200 feet" of the posted notice *and* "within two hours before or after the notice was posted." In order to determine that those statutes preempt a local ordinance, it would be necessary to find that the legislature intended that compliance with those policy provisions was an element of proof of a camping offense in the criminal enforcement of a local camping ordinance.

**[10]** Defendant does not assert that the text and context unambiguously express a legislative intention to preempt the field so as to preclude local governments from providing criminal sanctions for public camping. Therefore, the question becomes whether PCC 14A.50.020 conflicts with the notice provisions set out in ORS 203.079(1) or (3). In considering that question, we interpret the statute and the ordinance to determine "if they can function concurrently or if they necessarily conflict." *Qwest Corp.*, 275 Or. App. at 883, 365 P.3d 1157. "It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law *unless that intention is apparent*." *LaGrande/Astoria*, 281 Or. at 148-49, 576 P.2d 1204 (emphasis added; footnote omitted).

An intention to displace local regulation is not apparent from the text of ORS 203.077 or ORS 203.079. The purpose of those two statutes is to require a city or county to develop and implement a "policy" as to the "removal" of homeless persons and the belongings that make a camping site. Examined more closely, the statutes concern development of a "policy," which would be understood to mean "a definite course or method of action selected (as by a government ***)" or "a projected program consisting of desired objectives and the means to achieve them." *Webster's Third New Int'l Dictionary* 1754 (unabridged ed. 2002). That policy would concern the "removal" of persons and the belongings that comprise the camp site. ***36** ORS 203.079(1)(d).[12] Because ORS 203.077 and ORS 203.079 ****101** speak in terms of "policies," the statutes do not prescribe or limit criminal offenses themselves. The policy statutes do not address what elements must comprise unlawful camping, nor do the statutes address the effect of a city's violation of a policy once adopted.

Given that, if possible, we construe the ordinance and statutes in a manner that permits each to operate without conflicting with the other, *LaGrande/Astoria*, 281 Or. at 148, 576 P.2d 1204, we conclude that a city can issue public camping citations independently of a policy enacted under ORS 203.079. As a result, a city could be noncompliant with such a policy and might be subject to a remedy for compliance.[13] But noncompliance would not mean that ORS 203.077 and ORS 203.079 conflict with a local ordinance in prescribing the terms of the offense of unlawful camping. Those statutes do not preempt so as to foreclose prosecution of a camping offense under PCC 14A.50.020. The prosecution need not prove that the city complied with a policy developed in accordance with ORS 203.079 in order to prosecute a citation for unlawful camping.

## V. CONCLUSION

For all of those reasons, we conclude that the trial court did not err in denying defendant's pretrial motion or her motion for judgment of acquittal.

Affirmed.

Ortega, J., concurring.

James, J., concurring.

ORTEGA, J., concurring.

The trial court reached defendant's Eighth Amendment challenge to the city's public camping ordinance, concluding that "applying [it] to defendant does not violate the ***37** prohibitions on cruel and unusual punishment in the Eighth Amendment." The court was unpersuaded that *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962), and *Powell v. Texas*, 392 U.S. 514, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968), applied and concluded that the "choice-of-evils" defense was the appropriate means for defendant to challenge the public camping charges against her. Nevertheless, a majority of this court declines to address whether those conclusions by the trial court were correct,

on the basis that doing so would require the assumption of hypothetical facts.

Although I agree with the majority that the trial court did not err in denying defendant's pretrial motion—I reject defendant's contention that the fact that she is homeless is alone sufficient to decide her Eighth Amendment challenge—and thus agree that we must affirm defendant's convictions, I write separately because the importance of the issue deserves a fuller engagement with the merits. As I see it, it is not hypothetical that the homeless in Portland are subject to criminal punishment for a circumstance that is, in many cases, beyond their control, and those in circumstances similar to those faced by defendant would benefit from guidance by this court. Having examined *Robinson*, *Powell*, and the two well-developed contemporary decisions from federal appellate courts on this issue, I disagree with the trial court's bases for rejecting defendant's Eighth Amendment argument. The city's blanket prohibition of public camping violates the Eighth Amendment when the camping is an unavoidable consequence of being homeless.

To explain why, I begin with the relevant constitutional law. A state has the authority to punish individuals for criminal conduct, but the "constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish be exercised within the limits of civilized standards." *Kennedy v. Louisiana*, 554 U.S. 407, 436, 128 S. Ct. 2641, 171 L. Ed. 2d 525, *modified on denial of reh'g*, 554 U.S. 945, 129 S. Ct. 1, 171 L. Ed. 2d 932 (2008) (internal quotation marks omitted). In addition to the Eighth Amendment limitation on the *kind* of punishment that may be imposed, and its mandate that punishment may not be *grossly* ****102** *disproportionate* to the severity of the crime, the Eighth Amendment "imposes substantive ***38** limits on *what* can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977) (emphasis added). That last limitation, the Court has said, is "one to be applied sparingly." *Id.*

*Robinson* provides the foundation for defendant's argument that the city's public camping prohibition fell within that third limitation articulated by the Court in *Ingraham*. The *Robinson* court invalidated, under the Eighth Amendment, a California law making it a criminal offense to "be addicted to the use of narcotics." 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758. The Court reasoned that the California law was "not one which punishe[d] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration." *Id.* at 666, 82 S. Ct. 1417. That is, it did not punish any conduct but the mere fact of being addicted to narcotics, *i.e.*, it made "the 'status' of narcotic addiction a criminal offense." *Id.* Further, the Court recognized that, because narcotics addiction is an illness or disease and, as such, can be "contracted innocently or involuntarily," "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment." *Id.* at 667, 82 S. Ct. 1417.

In *Powell*, six years later and in a 4-1-4 divided decision, the Court revisited *Robinson* when it assessed an Eighth Amendment challenge to a Texas law that imposed a $100 fine for being "found in a state of intoxication in any public place." 392 U.S. at 517, 88 S.Ct. 2145. The trial court found that the defendant was an alcoholic who had no control over his drinking or appearing in public while drunk, but rejected the defendant's argument that, under the Eighth Amendment, he could not be punished for involuntarily appearing in public while drunk. *Id.* The plurality opinion, which affirmed the defendant's conviction, interpreted *Robinson* as precluding only the criminalization of "status" and not the criminalization of conduct associated with status. *Id.* at 533, 88 S. Ct. 2145. It reasoned that the

> "entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties ***39** may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' * * *."

*Id.* Thus, because, "[o]n its face the present case does not fall within that holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion," the plurality opinion upheld the public intoxication law. *Id.* at 532, 88 S. Ct. 2145.

The four-Justice dissent concluded that *Robinson* was broader in its reach: "Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 567, 88 S. Ct. 2145 (Fortas, J., dissenting). The dissent acknowledged that, unlike the statute in *Robinson*, the public intoxication statute covers more than just status. *Id.* The dissent reasoned, however, that "the essential constitutional defect here is the same as in *Robinson*, for in both cases

  

the particular defendant was accused of being in a condition which he had no capacity to change or avoid." *Id.* at 568, 88 S. Ct. 2145. That is, the state cannot punish a person for actions that are intertwined with "the syndrome or disease of alcoholism." *Id.* at 559 n. 2, 88 S. Ct. 2145 (distinguishing public intoxication from crimes such as driving while intoxicated, which "require independent acts or conduct [that] do not typically flow from and are not part of the syndrome of the disease of chronic alcoholism").

In a concurring opinion, Justice White considered the voluntariness or volitional nature of the conduct in question. *Id.* at 548-51, 88 S. Ct. 2145 (White, J., concurring in the judgment). He reasoned that, if sufficient evidence is presented to show that the conduct at issue was involuntary due to one's condition, the Eighth Amendment prohibits criminalization ****103** of that conduct. However, he concurred with the plurality's affirmance of the conviction because, although the record supported a finding that the defendant involuntarily drank, nothing in the record suggested that the defendant—who had a home and a wife—was compelled to be drunk *in public*. *Id.* at 553, 88 S. Ct. 2145. The defendant's circumstances, Justice White ***40** noted, were different from those of many chronic alcoholics who are also homeless:

> "For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible."

*Id.* at 551, 88 S.Ct. 2145.

The Ninth Circuit was persuaded by Justice White's approach in *Powell* when it addressed a 42 USC section 1983 challenge by homeless individuals who had been cited or arrested for violating a City of Los Angeles ordinance that made it illegal to sit, lie, or sleep on the city's sidewalks and streets at all times. *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vac'd*, 505 F.3d 1006 (2007). There, in reviewing the district court's grant of summary judgment to the city on grounds that the ordinance in question penalized conduct, not status, the Ninth Circuit considered the undisputed factual record that indicated, among other things, the pervasive homelessness problem in Skid Row (where the city's homeless population was concentrated), and that for "the approximately 11,000 - 12,000 homeless individuals in Skid Row, space is available in [single-room occupancy] hotels, shelters, and other temporary or transitional housing for only 9000 or 10,000, leaving more than 1000 people unable to find shelter each night." *Id.* at 1122.

Persuaded by the reasoning supplied by the Court in *Robinson*, and by the dissent and Justice White's concurrence in *Powell*, the Ninth Circuit held that "the involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable status, and incidental conduct which is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment." *Id.* at 1132. That is, the court explained that "five Justices in *Powell* understood *Robinson* to stand for ***41** the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Id.* at 1135. Accordingly, because the plaintiffs "made a substantial showing that they were unable to stay off the streets on the night[s] in question," the enforcement of the city's ordinance "at all times and in all places against homeless individuals who are sitting, lying, or sleeping in Los Angeles's Skid Row because they cannot obtain shelter violates the Cruel and Unusual Punishment Clause." *Id.* at 1136.

Although the *Jones* decision was vacated when the parties settled, the Ninth Circuit returned to the same conclusions in *Martin v. City of Boise*, 920 F.3d 584 (2019), *cert. den. sub nom. Boise, ID v. Martin*, 19-247, 2019 WL 6833408, —— U.S. ——, 140 S.Ct. 674, 205 L.Ed.2d 438 (U.S. Dec. 16, 2019). In *Martin*, the plaintiffs were homeless residents of the City of Boise who had been cited by the police for violating the city's ordinance that made it a misdemeanor offense to camp in public at all times. 920 F.3d at 603-04. The Ninth Circuit, reaffirming its holding in *Jones*, held that "an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them." *Id.* at 604.[1]

****104** It is important to emphasize that the *Martin* court's holding is limited; it applies "only that 'so long as there is a ***42** greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.' " *Id.*

  

at 617 (quoting *Jones*, 444 F.3d at 1138). Put differently, under *Martin*, the Eighth Amendment prohibits a local government from enforcing a public camping ordinance that is unrestricted to particular places or times against a homeless person who does not have access to adequate temporary shelter. The *Martin* holding " 'in no way dictate[s]' " to a local government " 'that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets * * * at any time and at any place.' " *Id.* (quoting *Jones*, 444 F.3d at 1138). Nor does the holding "cover individuals who do have access to adequate temporary shelter, whether they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it." *Id.* at 617 n. 8.

With that said, Justice White's concurrence in *Powell* comes the closest to providing a guiding United States Supreme Court opinion for resolving the constitutionality of a public camping ordinance enforced against the homeless. To begin with, Justice White and the plurality did not achieve consensus in *Powell* on the reach of *Robinson* and the Eighth Amendment. When "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgmen[t] on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (internal quotation mark omitted). Consequently, under the *Marks* rule, the precedential effect of the *Powell* plurality opinion is constrained by its particular facts, and neither the plurality opinion nor Justice Black's concurrence compels the view advanced by Judge James's opinion in this case. 302 Or. App. at 49-53, 460 P.3d at 107–10 (James, J., concurring). Although I do not necessarily agree with the Fourth Circuit's conclusion that Justice White's concurrence "offers the narrowest basis for the Court's fractured decision, and so is controlling under the *Marks* rule," *Manning v. Caldwell*, 930 F.3d 264, 281 (2019), I find ***43** that Justice White's concurrence, when combined with the reasoning of the four justices in the *Powell* dissent, is the appropriate basis to approach the Eighth Amendment issue presented to us by defendant. That is, with those two opinions, five justices agreed that a law that criminalizes an act that is an unavoidable byproduct of a person's status—as opposed to one that criminalizes status itself—still runs afoul of the Eighth Amendment's stricture against cruel and unusual punishment.

Turning to the issue at hand, I start by concluding that homelessness is a status for the purpose of deciding the Eighth Amendment challenge here. Under *Robinson*, it is cruel and unusual under the Eighth Amendment to punish the status of narcotic addiction. 370 U.S. at 666, 82 S.Ct. 1417 (characterizing the law in question as a "statute which makes the 'status' of narcotic addiction a criminal offense"). Likewise, the Court in *Powell* recognized that a law that sought to punish the status of alcohol addiction would similarly violate the Eighth Amendment. 392 U.S. at 532, 88 S.Ct. 2145 ("On its face the present case does not fall within [*Robinson*'s] ****105** holding, since appellant was convicted not for being a chronic alcoholic, but for being in public while drunk on a particular occasion."). I would extend those holdings to criminalizing the status of being homeless. As the *Jones* court put it:

> "Homelessness is not an innate or immutable characteristic, nor is it a disease, such as drug addiction or alcoholism. But generally one cannot become a drug addict or alcoholic, as those terms are commonly used, without engaging in at least some voluntary acts (taking drugs, drinking alcohol). Similarly, an individual may become homeless based on factors both within and beyond his immediate control, especially in consideration of the composition of the homeless as a group: the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable."

444 F.3d at 1137. In addition to the involuntary and voluntary causes of homelessness, it is unlikely that a person chooses to remain homeless. That is, the causes of homelessness—mental illness, addiction, economic conditions—similarly remain to pose substantial, if not in some cases, insurmountable, obstacles to obtaining a "decent, safe, stable and permanent place to live that is fit for human ***44** habitation" while a person is in the throes of homelessness. ORS 458.528 (so defining homelessness).

Further, the act at issue here—sleeping or resting—is fundamental to the human condition, as it involves a human act or condition that is life sustaining and biologically unavoidable. *See Martin*, 920 F.3d at 617-18 (explaining that the conduct at issue is a " 'universal and unavoidable consequence[ ] of being human' " (quoting *Jones*, 444 F.3d at 1136)). Sleeping or resting is inescapable, and, if the only means to satisfy that human necessity is by violating the city's public camping ordinance, any distinction drawn between status and conduct violating the ordinance is illusory. *See Jones*, 444 F.3d at 1136 (reasoning that any "conduct at issue here is involuntary and inseparable from status—they are

one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping").

Consequently, if a person is homeless, and the city does not have temporary shelter available, then complying with PCC 14A.50.020 is impossible. PCC 14A.50.020 prohibits setting up or remaining in or at a campsite as a temporary place to live on all of the city's public property at all times of day. Camping on private property without permission is not an option. Homeless persons do not, or should not, have to leave the city to comply with PCC 14A.50.020. *See* Harry Simon, *Towns without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 Tul. L. Rev. 631, 634-35 (1992) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), and *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), for the proposition that those decisions invalidating vagrancy and loitering laws as impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment effectively caused local governments to shift from using those laws as a way to drive homeless persons from cities to enacting laws like sleeping or camping in public); *Dunn v. Blumstein*, 405 U.S. 330, 338, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972) (recognizing that "freedom to travel through the United States has long been recognized as a basic right under the Constitution"). Hence, it is my view that the Eighth Amendment does not ***45** permit punishing a homeless a person for public camping when the camping is an unavoidable consequence of being homeless.

I do not come to that conclusion lightly, as I recognize that the category of limitations under the Eighth Amendment implicated here, namely, "what can be made criminal and punished as such," is to "be applied sparingly." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401. However, when the derivative conduct is a human necessity, punishing a homeless person for violating PCC 14A.50.020 is one of those rare circumstances in which what can be punished runs afoul of the Eighth Amendment. The core premise of the Eighth Amendment is that "punishment be exercised within the limits of civilized standards." *Kennedy*, 554 U.S. at 436, 128 S.Ct. 2641. Because it is impossible for a homeless person to comply with PCC ****106** 14A.50.020 when no temporary shelter is available, that conduct is missing the moral culpability required to justify criminal punishment, and, thus, criminalizing public camping when it is an unavoidable consequence of homelessness does not fit within those standards, particularly when it affects the most vulnerable among us—the mentally ill, the drug addicted, marginalized communities, casualties of economic crises, and victims of domestic violence.

It is worth mentioning that the Ninth Circuit's *Martin* holding is the law of the land in Oregon. Local governments and their officials are examining the viability of ordinances prohibiting camping on public property given the exposure to lawsuits and the threat of litigation. Because local governments are already contending with the legality of enforcing public camping ordinances against the homeless if temporary shelter is unavailable, or the ordinance to be enforced covers all public property at all times of day, any conclusions or comments on this court's part as to the constitutionality of the city's public camping ordinance is not as impactful as it would be otherwise. Further, given that backdrop of civil liability for the enforcement of public camping ordinances,[2] it is, in my view, appropriate for litigants, trial courts, and appellate courts to explore a procedural ***46** pathway for resolving the Eighth Amendment challenge raised here in criminal proceedings.

I am also skeptical that the availability of a choice-of-evils defense, under ORS 161.200, cures the constitutional defect of criminalizing public camping when the camping is an unavoidable consequence of being homeless. This court has explained that entitlement to an instruction on the defense requires a showing of "evidence that *** criminal conduct was necessary as an emergency measure to avoid imminent injury" and, when "the defense is properly raised, the trier of fact may balance the desirability of avoiding the injury against the desirability of avoiding what the law seeks to prevent by making that conduct criminal." *State v. Neubauer*, 68 Or. App. 885, 888, 683 P.2d 136 (1984). In this instance, PCC 14A.50.020 is violated when a person sets up a campsite on public property, and a defendant would have to offer evidence that the proscribed conduct was required as an *emergency* measure to avoid an *imminent* injury. Although public camping is inescapable when there are no other options, public camping in that circumstance is not necessarily an *emergency* measure to avoid *imminent* injury. That is, the risk of injury from not going to sleep with one's belongings essential for that act, depending on the circumstances, may be uncertain or speculative, or the risk of injury may be one that accrues over time. *See State v. Freih*, 270 Or. App. 555, 557, 348 P.3d 324 (2015) ("To show that the injury that the defendant sought to avoid was 'imminent' within the meaning of the statute, defendant was required to

  

show that the threat of injury existed *at the time* that defendant committed his offense." (Emphasis in original.)).

I emphasize that, like the Ninth Circuit's holding, my conclusion regarding PCC 14A.50.020 is limited. The city's public camping ordinance applies to all public property within the city at all times of day, and, as defendant acknowledges, the city can enact an ordinance proscribing camping in public at certain times (for example, by requiring persons to remove campsites by a certain time in the morning) or in certain areas (like Chapman Park, where defendant was cited) or excluding campsites placed in public walkways without violating the Eighth Amendment. Moreover, the Eighth Amendment does not prohibit a local ***47** government from enacting ordinances regarding a campsite's sanitary conditions. Further, there may be circumstances when shelter beds are available, but a homeless person charged with public camping has nevertheless decided that he or she simply does not like the available shelter or shelters and chooses to camp on public property.[3] It also needs to be said that ****107** the limited conclusion I make here is *not* an attempt to address the homeless crisis. My conclusions here are confined to the constitutionality of the city's public camping law when it is applied to the homeless and cannot be obeyed.

Powers, J., joins in this concurrence.

JAMES, J., concurring.

Every member of this court agrees that the trial court judgment in this case should be affirmed. We differ, however, in the rationale for that affirmance. Unfortunately, I must add to this fracture. The majority and the concurrence by Judge Ortega each forge separate pathways to affirmance. Regrettably, I cannot join either, but for different reasons, as I will explain.

Judge Ortega, drawing upon the rationale articulated by the Ninth Circuit in *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019), concludes that "it is my view that the Eighth Amendment does not permit punishing a homeless person for public camping when the camping is an unavoidable consequence of being homeless." ***48** 302 Or. App. at 44-45, 460 P.3d at 105–06 (Ortega, J., concurring). However, she reasons, in this case the factual record is insufficient under *Martin* to hold that the enforcement of the Portland City Code (PCC) ordinance at issue against defendant constituted an Eighth Amendment violation. As I will discuss, I am unpersuaded by *Martin* and would not adopt its reasoning, and accordingly, I do not join in that construction of the Eighth Amendment.

The majority does not reach the merits of the Eighth Amendment challenge, instead affirming based on judicial discretion. The majority accepts the parties' characterization of this case as presenting an "as-applied" constitutional challenge, and subsequently concludes that the factual record is insufficient to reach the merits of the as-applied challenge:

> "We begin and end with the recognition that, with her pretrial motion, defendant did not develop a factual record that was sufficient to permit the court to determine whether conviction of defendant under PCC 14A.050.020 would violate the Eighth Amendment as applied to her."

302 Or. App. at 30, 460 P.3d at 97.

I agree that the lack of a developed factual record should prudentially preclude a court from reaching the merits of an as-applied constitutional challenge. Unfortunately, and for reasons I will discuss, we cannot treat this case as an as-applied challenge. This case is a classic example of the grey area that exists between facial and as-applied challenges, having characteristics of both. In such instances, the United States Supreme Court has held that, when faced with a federal constitutional challenge, a court must look to the nature of the relief, and if the holding sought would extend beyond the individual litigant, then a court must treat the issue under the standards for a facial challenge. I conclude that is the case here. Accordingly, I do not join the majority opinion, which holds that deficiencies in the factual record preclude us reaching the merits. As a facial challenge, any deficiency in the factual record is not an impediment to the analysis we must conduct, which simply involves comparing the statute against the Eighth Amendment. Therefore, I would affirm on the merits.

***49** THE EIGHTH AMENDMENT

To help explain why I do not join with Judge Ortega, I must briefly discuss my understanding of what limits the Eighth Amendment places on states. In our federalist ****108** system, it is the state that is the primary sovereign, possessed of plenary power, as opposed to the limited enumerated power of the federal government. This plenary power is most commonly described as the "police power."

  

> "The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.' "

*National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 535-36, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012) (internal citation omitted). The states traditionally have had great latitude under their police powers to legislate as " 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.' " *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985) (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall). 36, 62, 21 L. Ed. 394 (1872), in turn quoting *Thorpe v. Rutland & Burlington R. Co.*, 27 Vt. 140, 149 (1854)).

The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The amendment uses past participles—fines *imposed* and punishments *inflicted*. Accordingly, the amendment limits the *effect* of a state's use of its police power after it has been used and is not generally interpreted to impose a prohibition on the use of that police power in the first instance. The "primary purpose" of the Eighth Amendment's Cruel and Unusual Punishment Clause "has always been considered, and properly so, to be directed at the method ***50** or kind of punishment imposed for the violation of criminal statutes." *Powell v. Texas*, 392 U.S. 514, 531-32, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968). Accordingly, the overwhelming number of cases construing the limits imposed on the state by the Eighth and Fourteenth Amendments concern the penalty imposed, assessing whether it was cruel and unusual or disproportionate. There is one very narrow exception.

The United States Supreme Court has recognized that the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such," however, those limits are "to be applied sparingly." *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977) (internal citation omitted). So sparingly, in fact, that only one case has ever found the Eighth Amendment to prohibit a state from using its plenary powers to regulate its citizens, and, in that lone instance, the regulation was not of conduct, but one that "ma[de] the 'status' of narcotic addiction a criminal offense." *Robinson v. California*, 370 U.S. 660, 666, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

The statute in *Robinson* criminalized the status of being a drug addict, regardless whether an individual actually used or possessed drugs. *Id*. at 662-63, 82 S. Ct. 1417. In essence, the state sought to penalize its citizens not based on their *acts*, but their *existence*. In that unique factual scenario, the Court determined that, because "narcotic addiction is an illness * * * which may be contracted innocently or involuntarily, * * * a state law which imprisons a person thus afflicted as criminal, even though he has never touched any narcotic drug" violates the Eighth Amendment. *Id*. at 667, 82 S. Ct. 1417.

The Court revisited *Robinson* in *Powell*, 392 U.S. at 532, 88 S.Ct. 2145, this time considering a Texas law that banned public drunkenness. A four-justice plurality interpreted *Robinson* to stand for the narrow proposition that a state could not criminalize one's status. *Id*. at 534, 88 S. Ct. 2145. The plurality held that, because the Texas statute criminalized conduct—being drunk in public—rather than the status of alcoholism, the Eighth Amendment did not prohibit the state from exercising its police powers in enacting ****109** and enforcing the law. *Id.* at 532, 88 S. Ct. 2145.

***51** Four dissenting justices interpreted *Robinson* to stand for a broader principle, namely, that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 567, 88 S. Ct. 2145 (Fortas, J., dissenting). For the dissent, the statute's focus on an act was a veil for status:

> "But the essential constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid. The trial judge sitting as trier of fact found upon the medical and other relevant testimony, that Powell is a 'chronic alcoholic.' He defined appellant's 'chronic alcoholism' as 'a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.' He also found that 'a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.' I read these findings to mean that appellant was powerless to avoid drinking; that having taken his first drink, he had 'an uncontrollable compulsion to drink' to the

> point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places."

*Id*. at 567-68, 88 S.Ct. 2145 (Fortas, J., dissenting).

Justice White concurred in the judgment affirming the conviction based on a defect in the factual record, specifically, that the defendant had not shown that he was unable to stay off the streets on the night he was arrested. *Id*. at 552-53, 88 S. Ct. 2145 (White, J., concurring). But, in so doing, White offered language that, while *dicta*, indicated at least some support for the reasoning of the dissent:

> "It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that he loses the power to control his movements and for that reason appears in public. The Eighth Amendment might also forbid conviction in such circumstances, but only on a record satisfactorily showing that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue."

*Id*. at 551-52, 88 S.Ct. 2145 (White, J., concurring).

***52** Nevertheless, White's opinion in *Powell* stands alone. As far as United States Supreme Court jurisprudence is concerned, *Robinson* remains a solitary holding. The only successful facial challenge to the upfront use of a state's police power—*Robinson*—is limited to when that legislation targets status, not acts. Subsequently, the Court has never declared that the Eighth Amendment prohibits a state from exercising its police power to regulate acts, even purportedly "involuntary" acts.

The 4-1-4 nature of *Powell* resulted in uncertainty. Advocates and commentators have attempted to build upon *Robinson*, the *Powell* dissent, and White's concurrence, arguing that certain involuntary acts are indistinguishable from status. However, all of that discussion has occurred at the lower court level, such as before the Ninth Circuit in *Martin*. In *Martin*, 902 F.3d at 1035, the Ninth Circuit construed the Eighth Amendment's applicability to a specific city code provision. There, the Boise city code at issue, *former* section 9-10-02 (2009), *amended and renumbered as* section 7-3A-2A (2014), made it a misdemeanor "for any person to use any of the streets, sidewalks, parks or public places as a camping place at any time." "Camping," for purposes of that statute, was defined to include "the *use* of public property as a temporary or permanent place of dwelling, lodging or residence, or as a living accommodation at any time between sunset and sunrise, or as a sojourn." *Id*. (emphasis added).

*Martin* held that enforcement of the ordinance "violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them." *Martin*, 920 F.3d at 604. In reaching that result, the Ninth Circuit ****110** relied upon its earlier, though vacated, opinion in *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vac'd*, 505 F.3d 1006 (9th Cir. 2007). There, the court held that "so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]" Los Angeles could not enforce an ordinance against homeless individuals "for involuntarily sitting, lying, and sleeping in public." *Id*.

***53** I am unpersuaded by *Martin*, for many of the reasons discussed by Justice Marshall in *Powell*, that "[t]raditional common-law concepts of personal accountability and essential considerations of federalism" preclude such an interpretation of the Eighth Amendment. *Powell*, 392 U.S. at 535, 88 S.Ct. 2145. Otherwise, there would be no "limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country." *Id*. at 533, 88 S. Ct. 2145.

Similarly, I find the words of Justice Black, in his concurring opinion in *Powell*, compelling. He agreed with the plurality that *Robinson* was "explicitly limited *** to the situation where no conduct of any kind is involved." *Id*. at 542, 88 S. Ct. 2145 (Black, J., concurring). He cautioned that the "revolutionary doctrine of constitutional law" advocated by the *Powell* dissent would "significantly limit the States in their efforts to deal with a widespread and important social problem" and would take the Court "far beyond the realm of problems for which we are in a position to know what we are talking about." *Id*. at 537-38, 88 S. Ct. 2145. Black thus declined to "depart[ ] from *** the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow." *Id*. at 548, 88 S. Ct. 2145.

I find the federalism concerns referenced by Marshall and Black especially present under the *Martin* rationale, in that *Martin* does not bar a state's police power entirely; rather, it preconditions it. Under *Martin*, whether a state has

  

an inherent police power to regulate conduct and enforce that regulation against certain persons is a function of expenditures. If a local municipality spends sufficient monies, it has the police power to regulate, if it does not, the police power does not exist. That construction of the Eighth Amendment is unprecedented and represents a profound alteration to the federalist model of our nation.

## FACIAL VERSUS AS-APPLIED CONSTITUTIONAL CHALLENGES

Having discussed the Eighth Amendment, and why I do not join Judge Ortega, I must now explain why I am ***54** equally unable to join the majority. To do so, I must briefly discuss the nature of constitutional challenges.

Constitutional challenges are routinely, though somewhat imprecisely, conceived of as fitting neatly within one of two boxes: facial challenges and as-applied challenges. Typically, a court considering a facial constitutional challenge compares the text of a statute against a constitutional provision asking if " 'no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (internal citation omitted). Facial challenges present questions of law. They are largely not fact dependent, and a reviewing court typically does not need to defer ruling on the merits due to a deficiency in the factual record.

On the other hand, "[a]n as-applied challenge consists of a challenge to the statute's application only as-applied to the party before the court." *Minnesota Majority v. Mansky*, 708 F.3d 1051, 1059 (8th Cir. 2013) (internal quotation marks omitted). "If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable." *Id.* (internal quotation marks omitted). Consequently, an as-applied challenge is a fact-dependent inquiry. *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 173 (4th Cir. 2009) (quoting ****111** Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1331 (2000)). A court may properly defer ruling on an as-applied challenge when the factual record is incomplete, because as-applied ruling must be "based on a developed factual record [showing the] application of a statute to a specific person." *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 298 n. 5 (4th Cir. 2013) (internal citation omitted).

However, as alluded to, facial versus as-applied classifications are not necessarily discrete boxes. As the United States Supreme Court has cautioned, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings or disposition in every case ***55** involving a constitutional challenge." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 331, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). The important inquiry—and the truest indicator of whether a case presents a facial or as-applied challenge—is whether the claim and the relief that would follow is beyond the particular circumstances of the plaintiff.

In *John Doe No. 1 v. Reed*, 561 U.S. 186, 190-91, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010), the United States Supreme Court took up the constitutionality of the disclosure, via the State of Washington's Public Records Act, of the names and addresses of initiative petition signers. The parties disagreed about whether the issue before the Court was a facial or an as-applied challenge. As the Court explained:

> "It obviously has characteristics of both: The claim is 'as applied' in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim is 'facial' in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.
>
> "The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow *** reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach."

*Id.* at 194, 130 S.Ct. 2811 (internal citation omitted).

Since *Citizens United* and *John Doe No. 1*, federal courts have been increasingly sensitive to the nebulous distinction between facial versus as-applied claims. *See, e.g.*, *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012) ("It is true that facial challenges and as-applied challenges can overlap conceptually."); *Am. Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 865 (11th Cir. 2013) ("[T]he line between facial and as-applied relief is a fluid one, and many constitutional challenges may occupy an intermediate position on the

spectrum between purely as-applied relief and complete facial invalidation."); *Showtime Entm't, LLC v. Town of Mendon*, 769 F.3d 61, 70 (1st Cir. 2014) ("[T]his case highlights the sometimes nebulous nature of the distinction between facial and as-applied challenges, for Showtime's challenge does not fit neatly ***56** within our traditional concept of either type of claim."); *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 426 (5th Cir. 2014) (noting that "the precise boundaries of facial and as-applied challenges are somewhat elusive—certain challenges can have characteristics of both").

Applying *Citizens United* and *John Doe No. 1* here, I conclude that this case presents elements of both a facial as well as an as-applied challenge. Though this issue was raised in an individual criminal case, and defendant sought the dismissal of particular discrete charges, and though the parties call it an as-applied challenge, the relief sought goes far beyond this one defendant. At trial, defendant did not challenge a specific fine or punishment imposed upon her. Her challenge was raised pretrial, before any punishments had been imposed. Her argument was that the state's inherent police power was limited, by operation of the Eighth Amendment, because of her membership in a class of persons: the homeless. That type of pretrial challenge, inviting a court to limit that state's police power proscriptively due to class membership, obviously carries with it legal effects beyond the individual litigant.

****112** We need look no further than defendant's own pleading, which asked the trial court to conclude that "Portland's camping ordinance is unconstitutional as applied to *the homeless* under the Eighth Amendment as cruel and unusual punishment." (Emphasis added.) Defendant did not argue that the ordinance was unconstitutional as applied to *her*, based upon her unique traits, but rather that it was unconstitutional as applied to a broader class of persons to which she identified.

Further, at oral argument on the motion, counsel specifically asked the trial court to broadly declare the ordinance unconstitutional:

> "[DEFENSE COUNSEL]: Thank you, Your Honor. Before we get to the actual argument about why the Portland camping ordinance is unconstitutional, I just sort of want to address quickly the procedural posture. When we initially filed this motion, we filed it as a motion to dismiss. And then when we filed our reply, we included in our footnote how, uhm, it perhaps should have been filed as a ***57** demurrer under [ORS] 135.630 (4). Now that we're here this morning, we have had a chance to sort of re-evaluate that, and re-evaluate the posture that this motion is being brought in.
>
> "As we know in the motion that this is an as applied challenge. And under [ORS] 135.630, we were really focusing on (4), which is the facts do not constitute an offense. Uhm, however, demurrer only really applies to a facial challenge just on the face of the complaint itself. And so we really think that this motion should just be brought as a motion to find the city—the Portland city camping ordinance unconstitutional and just leave it at that."

Later, again, counsel argued that the ordinance was broadly unconstitutional:

> "[DEFENSE COUNSEL]: *** And so as we set out in both our initial motion and in our reply, there are really four arguments that we're bringing. And that is that the Portland City Code 14A.020.050 is unconstitutional. It is unconstitutional on four grounds.
>
> "And that is that it constitutes cruel and unusual punishment as applied to Ms. Barrett who is a—because it punishes her for her status of being a homeless citizen in the city of Portland. Second is that the camping ordinance violates the equal protection clause of the United States Constitution. And then third, the ordinance is overbroad. And then, fourth, the ordinance is vague."

In concluding arguments, defense counsel asked the trial court to adopt the reasoning of *Jones*, and to similarly invalidate the ordinance as applied to the greater homeless population of the city:

> "[DEFENSE COUNSEL]: I think that going to—that in its application, it is a Portland City ordinance in its application, although on its face, it applies to everybody equally. It goes to the famous quote by (inaudible), or—you know, the law in its equal majesty prohibits sleeping—prohibits the rich and the poor alike from sleeping under a bridge.
>
> "And, here in the Portland just like in the Los Angeles ordinance where it prevents somebody from sleeping on the city streets, from sitting down on the sidewalk, so too does the Portland ordinance, with the exception that so long as that person does not place any bedding down on the ***58** sidewalk or on the street, if it's just down by themselves, then, okay, the ordinance does not apply.

  

> "But with the Portland homeless population, that seems to be, I guess that the phrase I used in my (inaudible) was that—is the difference by distinction, where if somebody is just trying to survive out in the city, then they are going to use something to protect themselves from the elements. So I think that's why in application it's applied just the same as the Los Angeles ordinance in preventing homeless individuals from engaging again in those basic necessities of life."

In determining whether this case presents a facial or an as-applied federal constitutional challenge, it matters not that the parties have labeled this an as-applied constitutional challenge. "The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow *** reach **113 beyond the particular circumstances of these plaintiffs." *John Doe No. 1*, 561 U.S. at 194, 130 S.Ct. 2811. In many respects, the caution expressed by the Supreme Court in *Bucklew v. Precythe*, —— U.S. ——, 139 S. Ct. 1112, 1127-28, 203 L. Ed. 2d 521 (2019), concerning an as-applied challenge under the Eighth Amendment to an execution protocol is instructive:

> "Here's yet another problem with Mr. Bucklew's argument: It invites pleading games. The line between facial and as-applied challenges can sometimes prove 'amorphous,' *Elgin v. Department of Treasury*, 567 U.S. 1, 15, 132 S. Ct. 2126, 183 L. Ed. 2d 1 (2012), and 'not so well defined,' *Citizens United*, 558 U.S. at 331, 130 S. Ct. 876. Consider an example. Suppose an inmate claims that the State's lethal injection protocol violates the Eighth Amendment when used to execute anyone with a very common but not quite universal health condition. Should such a claim be regarded as facial or as-applied? In another context, we sidestepped a debate over how to categorize a comparable claim—one that neither sought 'to strike [the challenged law] in all its applications' nor was 'limited to plaintiff's particular case'—by concluding that '[t]he label is not what matters.' *Doe v. Reed*, 561 U.S. 186, 194, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). To hold now, for the first time, that choosing a label changes the meaning of the Constitution would only guarantee a good deal of litigation over labels, with lawyers on each side seeking to classify cases to maximize their *59 tactical advantage. Unless increasing the delay and cost involved in carrying out executions is the point of the exercise, it's hard to see the benefit in placing so much weight on what can be an abstruse exercise."

This case presents that same trap of "pleading games" prophesized in *Bucklew*. While the case has been pleaded as an as-applied challenge, and while the specific remedy sought in this case was the dismissal of charges, no one involved in this litigation sought a ruling applicable only to defendant. Here, defendant was the face of a constitutional challenge that was intended to prevent enforcement of the PCC ordinance against the homeless as a community. When a party makes the decision to frame the litigation in this manner, they cannot avoid the consequences of those choices by labeling their challenge "as applied." Rather, when a case exists in the grey area of both a facial and an as-applied challenge, the litigant must "satisfy our standards for a facial challenge to the extent of that reach." *John Doe No. 1*, 561 U.S. at 194, 130 S.Ct. 2811.

When we apply the standards of a facial challenge, resolution of this case becomes straightforward. Defendant can only succeed in a facial challenge by showing that " 'no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Washington State Grange*, 552 U.S. at 449, 128 S.Ct. 1184 (internal citation omitted). Pursuant to *Robinson*, a state's prospective exercise of police power only violates the Eighth Amendment "in all of its applications" when the statute on its face penalizes *status*. Defendant conceded at trial that she could not satisfy the burdens of such a facial challenge.

> "THE COURT: You concede that this ordinance on its face doesn't violate any constitutional provision?
>
> "[DEFENSE COUNSEL]: On its face, the Portland City Code ordinance does not facially violate the constitution. That's the way we just brought this as an as applied challenge."

That concession is well taken. Here, the PCC ordinance at issue defines public camping as "to set up, or to remain in or at a campsite" which is, in turn, defined as a place "where any bedding, sleeping bag, or other sleeping *60 matter, or any stove or fire is placed, established, or maintained." PCC 14A.50.020.[1] The statute on its face plainly **114 targets acts, not status. The facial challenge must fail under *Robinson*. I am, therefore, compelled to affirm on the merits.

In reaching my decision to affirm on the merits of the Eighth Amendment claim, however, it bears emphasis that the question before us is narrow. We are asked only to assess the enforcement of Portland's anticamping ordinance against the homeless using the yardstick of the Eighth Amendment.

Axiomatically, the federalism concerns that exist when interpreting the Eighth Amendment's constraints on plenary state power are not present when considering limits on that power that may exist pursuant to the state constitution. Similarly, *John Doe No. I*'s distinction between facial and as-applied challenges applies to federal constitutional claims, not state constitutional claims. However, defendant does not develop a distinct argument under Article I, section 16, of the Oregon Constitution. Likewise, defendant here offers no federal constitutional basis for a limitation on state plenary power apart from the Eighth Amendment.[2]

My judgment on that singular question before us—whether one specific provision to the United States ***61** Constitution prohibits local enforcement of a specific provision of a city code—is not the same as passing judgment on the propriety, or the humanity, of that enforcement. At the Hubert Humphrey Building dedication in Washington, D. C., on November 1, 1977, former Vice President Humphrey said that "the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life; the sick, the needy and the handicapped." That there exist among us those who, through happenstance or ill-fortune, have nowhere to lay their head—no shelter, no safety, no sanctuary—is a profound indictment of our society. There can be no doubt that there is a moral and ethical imperative to address homelessness in our state. And, as homeless encampments throughout Oregon bear witness, our collective response has yet to meet the challenge. The frustration by all—the homeless, land owners, merchants, and the citizenry at large—is real. But impetus for action must find its roots in different soil than the Eighth Amendment.

Egan, C. J., joins in this concurrence.

**All Citations**

302 Or.App. 23, 460 P.3d 93

Footnotes

1 PCC 14A.50.020 provides:

"A. As used in this Section:

"1. 'To camp' means to set up, or to remain in or at a campsite, for the purpose of establishing or maintaining a temporary place to live.

"2. 'Campsite' means any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire is placed, established, or maintained, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.

"B. It is unlawful for any person to camp in or upon any public property or public right of way, unless otherwise specifically authorized by this Code or by declaration by the Mayor in emergency circumstances.

"C. The violation of this Section is punishable, upon conviction, by a fine of not more than $100 or by imprisonment for a period not to exceed 30 days or both."

2 The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Defendant also cites Article I, section 16, of the Oregon Constitution but presents no developed argument involving state constitutional grounds. Consequently, we approach the question as a matter of federal constitutional law.

3 Defendant also argues that the trespass and interference charges were invalid because the camping ordinance was unconstitutional under the Eighth Amendment, but she did not preserve that issue on those charges in her MJOA.

4 In separately concurring opinions, some judges go further to address the merits of the question. Some conclude that, with proof that camping was involuntary, enforcement of the ordinance would violate the Eighth Amendment. 302 Or. App. at 45, 460 P.3d at 105 (Ortega, J., concurring) ("[I]t is my view that the Eighth Amendment does not permit punishing a homeless person for public camping when the camping is an unavoidable consequence of being homeless."). Another judge concludes, regardless of such facts, that the camping ordinance does not violate the Eighth Amendment as a matter of law. 302 Or. App. at 52-53 (James, J., concurring) (enforcement of the camping ordinance does not punish status in violation of the Eighth Amendment).

5 Seven cases have been consolidated for appeal. A charge of unlawful possession of methamphetamine, ORS 475.894, was dismissed before trial. Defendant does not appeal from the judgment of conviction for offensive littering, ORS 164.805.

  

6 The trial court followed *In re Eichorn*, 69 Cal. App. 4th 382, 81 Cal. Rptr. 2d 535 (1998) (concluding that there was no constitutional violation because a defendant may assert a necessity or "choice of evils" defense).

7 At trial, defendant presented a witness who referred to a survey in prior years finding the number of homeless persons to exceed the number of shelter beds. The city presented the testimony of police officers that defendant rebuffed their attempts to interest her in engaging in social or housing services.

8 In other circumstances, other courts have expressed other views. *See, e.g., Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000), *cert. den.*, 532 U.S. 978, 121 S.Ct. 1616, 149 L.Ed.2d 480 (2001) (court rejected complaint of homeless plaintiffs alleging, among other things, a violation of Eighth Amendment, but where shelter has never exceeded its capacity); *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1104-05, 892 P.2d 1145, 40 Cal.Rptr.2d 402 (1995) (given failure of evidence, rejecting the plaintiff's Eighth Amendment challenge to a city ordinance that banned public camping and determining that ordinance was facially constitutional). Generally, we may consider *Martin* and other opinions in reaching our own decision, but it is well established that we are not compelled to follow the analysis of the Ninth Circuit or any other federal circuit court. Rather, in understanding the Eighth Amendment, we are bound only by the United States Constitution and the decisions of the United States Supreme Court and Oregon Supreme Court. *State v. Febuary*, 361 Or. 544, 548 n. 1, 396 P.3d 894 (2017); *State v. Moyle*, 299 Or. 691, 707, 705 P.2d 740 (1985).

9 We need not address the procedural limitations of a demurrer or pretrial motion to dismiss. *See* ORS 135.630 (demurrer standards); *see also State v. Nistler*, 268 Or. App. 470, 477-79, 342 P.3d 1035, *rev. den.*, 357 Or. 551, 357 P.3d 504 (2015) (demurrer standards); *State v. Cervantes*, 232 Or. App. 567, 576, 223 P.3d 425 (2009) (same); *State v. Weber*, 172 Or. App. 704, 713-14, 19 P.3d 378 (2001) (demurrer and alternative motion to dismiss).

10 In her MJOA, defendant did not make preemption or posted notice under ORS 203.077 and ORS 203.079 a basis to dismiss the charges of criminal trespass. Although she includes preemption and posted notice in her arguments about trespass charges on appeal, that issue was not preserved in the trial court. To the extent that she challenges the evidentiary basis of the charges of criminal trespass, we reject the arguments without discussion.

Defendant also argues about preemption and posted notice in her challenge on appeal to denial of the pretrial motion on the camping charges, but she failed to preserve those arguments by making them with her pretrial motion. Accordingly, the arguments about preemption and posted notice on appeal relate only to denial of her motion for judgment of acquittal on unlawful camping and IPO.

11 Home rule authority derives from Article XI, section 2, and Article IV, section 1(5), of the Oregon Constitution.

12 In part, ORS 203.079(1)(d) provides:

> "All unclaimed personal property shall be given to law enforcement officials whether 24-hour notice is required or not. The property shall be stored for a minimum of 30 days during which it will be reasonably available to any individual claiming ownership."

13 For example, the trial court suggested that "there's a lot of different ways to enforce that mandate from the state legislature, including they can cut off any sort of state funding if the city of Portland is not in compliance with the statute or the city's policy is not in compliance with the statute."

1 The Fourth Circuit recently came to a similar view of the Eighth Amendment, *Robinson*, and *Powell*. *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264 (4th Cir. 2019). In *Manning*, the en banc court considered a Virginia law that prohibited the possession, purchase, or consumption of alcohol by a person who is subject to a civil order—an interdiction—when the person has been convicted of driving while intoxicated or designated as a "habitual drunkard." *Id*. at 268-70. Among other constitutional challenges in that case, homeless persons who were alcoholics and had been prosecuted for violating their interdiction orders argued that the interdiction law criminalized their status as homeless alcoholics and was thus, under the Eighth Amendment, cruel and unusual punishment. *Id*. The court reversed the district court's dismissal of the suit for failure to state a claim, concluding that, under the Eighth Amendment, the habitual drunkard statute punished "conduct that is an *involuntary manifestation* of an illness." *Id*. at 284 (emphasis in original). Notable is the court's view of federal circuit opinions on the issue. Responding to the principal dissent's suggestion that the majority's conclusion " 'runs headlong into a large chorus of circuit court opinions' holding to the contrary," the court pointed to the Ninth Circuit's *Martin* decision and characterized the two opinions from the Eleventh Circuit as "cursory and unpersuasive." *Manning*, 930 F.3d at 282 n. 17 (quoting *id*. at 289 (Wilkinson, J., dissenting)).

2 Because the United States Supreme Court denied *certiorari* in *Martin*, it is likely that that will be the case in Oregon for the foreseeable future.

3 The court in *Martin* noted that its

> "holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do

  

> we suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible. *See Jones*, 444 F.3d at 1123. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the 'universal and unavoidable consequences of being human' in the way the ordinance prescribes. *Id*. at 1136."

920 F.3d at 617 n. 8.

1 The ordinance at issue in this case is PCC 14A.50.020, which reads, in pertinent part:

> "(A) As used in this Section:
>
> "(1) 'To camp' means to set up, or to remain in or at a campsite, for the purpose of establishing or maintaining a temporary place to live.
>
> "(2) 'Campsite' means any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire is placed, established, or maintained, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.
>
> "(B) It is unlawful for any person to camp in or upon any public property or public right of way, unless otherwise specifically authorized by this Code or by declaration by the Mayor in emergency circumstances.
>
> "(C) The violation of this Section is publishable, upon conviction, by a fine of not more than $100 or imprisonment for a period not to exceed 30 days or both."

2 Some scholars have considered whether plenary state power might be independently limited by the Ninth and Fourteenth Amendments. *See, e g.*, Randy E. Barnett, *The Proper Scope of the Police Power*, 79 Notre Dame L Rev 429, 429-95 (2004).

Medford Municipal Code 5.257: Prohibited Camping, Lying, and Sleeping

(1) As used in this section:

(a) "To camp" means to set up or to remain in or at a campsite.

(b) "Campsite" means any place where any stove or fire is placed, established or maintained for the purpose of maintaining a temporary place to live, or where the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof is placed, established or maintained for the purpose of maintaining a temporary place to live.

(c) "Bedding materials" means a sleeping bag, bedroll, or other material used for bedding purposes, including materials used to keep warm and dry while sleeping.

(d) "The Greenways" refers to the Bear Creek Greenway, the Larson Creek Greenway, the Lazy Creek Greenway, and the Navigator's Landing Greenway.

(e) "Vehicle camping in a lawful parking space" refers to a person experiencing homelessness parking utilizing a motor vehicle in a lawful parking space as a temporary place to live. The vehicle must be operational and must be moved at least every 24 hours. To fall within this definition, the parking space at issue cannot be adjacent to residences.

(2) It is found and declared that:

(a) From time to time persons establish campsites on sidewalks, public rights-of-way, under bridges, and so forth;

(b) Such persons, by such actions create unsafe and unsanitary living conditions which pose a threat to the peace, health, and safety of themselves and the community; and,

(c) During high and extreme fire conditions, the Greenways and Prescott Park pose a unique fire danger due to dry brush and abundant fuel sources;

(d) Enforcing existing arson laws and burning prohibitions on an incident-by-incident basis alone on the Greenways and Prescott Park during high and extreme fire conditions does not provide sufficient protection to public peace, health, and safety under such conditions, because of increased fire ignition potential and the rapid rate at which fire spreads under such circumstances;

(e) It is difficult for emergency personnel to evacuate individuals camping on the Greenways or Prescott Park during a fire event;

(f) Wildfires on the Greenways and Prescott Park pose a severe threat to persons and property, including residents and property owners near those areas and persons experiencing homelessness within those areas;

(g) Camping, lying, or sleeping on a playground or sports field fundamentally undermines the public's ability to use that public property for its intended purpose;

(h) Camping, lying, or sleeping on or near railroad tracks, or in a manner that obstructs sidewalks prevents the public's ability to use that public property for its intended purpose and can in some situations result in imminent threats to life;

(i) This section's regulations are meant strictly to regulate the use of publicly-owned property, and are not intended to regulate activities on private property; and

(j) The enactment of this provision is necessary to protect the peace, health, and safety of the city and its inhabitants.

(3) No person shall place or utilize bedding materials upon any sidewalk, street, alley, lane, public right-of-way, park, greenway, or any other publicly-owned property or under any bridge or viaduct for more than 24 hours consecutively in a particular location, unless otherwise specifically authorized by this code, or by declaration of the Mayor in emergency circumstances, or by executive order of the City Manager pursuant to such declaration, or by declaration of the City Manager in the case of a severe event.

(4) (a) Except as set forth in subsection (b), no person shall camp in or upon any sidewalk, street, alley, lane, public right-of-way, park, greenway, or any other publicly-owned property or under any bridge or viaduct.

(b) The prohibition in subsection (a) does not apply to tent camping or vehicle camping in the following circumstances:

(i) if otherwise specifically authorized by any provision of the Medford Municipal Code;

(ii) by declaration of the Mayor in emergency circumstances, if so authorized by the declaration;

(iii) by executive order of the City Manager pursuant to such declaration, if so authorized by the executive order;

(iv) by declaration of the City Manager in the case of a severe event, if so authorized by the declaration; or

(v) if the City publishes on its website a written policy authorizing tent camping or vehicle camping on specific publicly-owned properties, then tent camping or vehicle camping on such properties is lawful and permissible consistent with the time, place, and manner constraints contained within any such written-and-published City policy.

(5) No person shall camp, lie, sleep, or use bedding materials in any of the following circumstances, unless otherwise specifically authorized by this code, by declaration of the Mayor in emergency circumstances, by executive order of the City Manager pursuant to such emergency declaration, or by executive order of the City Manager pursuant to such declaration, or by declaration of the City Manager in the case of a severe event:

(a) On the Greenways or Prescott Park, during the period May 1 to September 30 in any calendar year, or at any other time if the Fire Chief or the Fire Chief's designee determines that a fire hazard exists;

(b) On a playground or sports field during hours of closure. Notwithstanding Section 5.255, lying or sleeping in a City-owned park during hours of closure is not prohibited so long as the individual is experiencing homelessness, is not on a playground or sports field, is not on a "school park" associated with a school, and is not violating any other subsection of this section;

(c) On areas underneath roadways or bridges that are not open to the public;

(d) On railroad tracks or within fifteen feet of railroad tracks;

(e) On publicly-owned property not open to the public, including but not limited to the Public Works Service Center and park areas temporarily closed for construction, repairs, maintenance, cleaning and similar activities;

(f) On streets, including planter strips, medians and parking spaces;

(g) On sidewalks, if by doing so, the person obstructs pedestrian traffic along the sidewalk or into private property and businesses adjacent to the sidewalk. For purposes of this provision, an individual obstructs pedestrian traffic if that individual, by camping, lying, sleeping, or using bedding materials, reduces the path of travel to less than 36 inches.

(6) Prior to removing homeless individuals from an established camping site, law enforcement officials shall post a notice, written in English and Spanish, 24 hours in advance.

(a) At the time the notice is posted, law enforcement officials shall inform local agencies that deliver social services to homeless individuals that the notice has been posted. Any local agency, providing service within the City limits of Medford, desiring to be on this notification list must provide its name, address, telephone number, and name of contact person to the Medford Police Department, in writing, requesting notification.

(b) The local agencies may arrange for outreach workers to visit the camping site where a notice has been posted to assess the need for social service assistance in arranging shelter and other assistance.

(7) All unclaimed personal property shall be given to law enforcement officials whether 24-hour notice is required or not. The property shall be stored for 30 days during which it will be reasonably available to any individual claiming ownership. Any personal property that remains unclaimed for 30 days may be disposed of. For purposes of this paragraph, "personal property" means any item that is reasonably recognizable as belonging to a person and that has apparent utility. Items that have no apparent utility or are in an unsanitary condition may be immediately discarded upon removal of the homeless individuals from the camping site. Weapons, drug paraphernalia, and items that appear to be either stolen or evidence of a crime shall be given to law enforcement officials.

(8) The 24-hour notice required under subsection (4) of this section shall not apply:

(a) When there are grounds for law enforcement officials to believe that illegal activities other than camping are occurring.

(b) In the event of an exceptional emergency such as possible site contamination by hazardous materials or when there is immediate danger to human life or safety.

(c) When the campsite is located in the areas specified in subsection 5(a) above, and the notice is placed during the time frame described in subsection 5(a) above, or when in the discretion of the Fire Chief or the Fire Chief's designee, the Greenways or Prescott Park should be immediately closed for fire danger as described in subsection 5(a) above or per Administrative Regulation 907.

(9) A person authorized to issue a citation for unlawful camping may not issue the citation if the citation would be issued within 200 feet of the notice described in this section and within two hours before or after the notice was posted.

(10) Violation of subsection (3) constitutes a violation. Violation of subsection (4) consisting of vehicle camping in a lawful parking space constitutes a violation. Every day in which such violations occur constitutes a separate violation. A violation of subsection (4) or subsection (5) constitutes a crime, except for vehicle camping in a lawful parking space.

[Added Sec. 1, Ord. No. 6226, Nov. 3, 1988; Amd. Sec. 3, Ord. No. 2000-46, March 16, 2000; Amd. Sec. 1, Ord. No. 2018-115, Sept. 20, 2018; Ord. No. 2021-93, Apr. 1, 2021.]

ORDINANCE NO. 2021-23

AN ORDINANCE amending Sections 5.257 and 5.990 of the Medford Municipal Code relating to prohibited camping, lying and sleeping on publicly-owned and publicly-controlled property.

WHEREAS, the City Council is acutely aware that homelessness is a complex, challenging issue and the City has prioritized addressing homelessness by actively working with community partners to reduce hardships that lead to the homelessness of our residents and families with children and to increase access to affordable housing for those at-risk of becoming homeless;

WHEREAS, City Council in April of 2019 approved a Homeless System Action Plan which contains five recommended goals and 32 actions to address homelessness in Medford. The City revised the Homeless System Action Plan in June of 2020 and has been working diligently to implement the Plan, which specifically addresses a variety of focus areas, including the support of new affordable housing options, a variety of shelter and transitional housing options, coordination of efforts with local non-profits and social service providers, as well as identification and implementation of prevention programs;

WHEREAS, despite these efforts to address homelessness in the community, there are many people in the community who still face homelessness;

WHEREAS, the City's greenways have become a *de facto* location for camping and sleeping outside. The greenway areas are not well-suited to this sort of human habitation for a number of reasons, just one of which is the extreme fire danger during summer months. Medford Fire Department reports that approximately 220 fire-related incidents (from all causes) occurred along the greenway and related areas during 2020. In addition, human habitation along the greenways results in tons of garbage and detritus being deposited, which causes inestimable environmental and ecological degradation to the City's Greenways, including protected riparian areas, and this human habitation deters public use of the greenways and undermines the public's ability to use that public property for its intended recreational purposes;

WHEREAS, other circumstances also exist beyond the greenways where time, place, and manner restrictions are warranted to further public safety and the usability of public property for its intended use, including but not limited to prohibitions on sleeping or camping on playgrounds and ballfields, and prohibitions on sleeping or camping adjacent to railroad tracks;

WHEREAS, Medford Municipal Code (MMC) Section 5.257, in its current form, allows officers to cite individuals sleeping or camping in a prohibited area, but even if an individual declines social services and refuses to relocate to a safer area, the current ordinance does not allow officers to physically remove the individual from that situation unless there is an independent basis to make an arrest (such as an outstanding warrant or ongoing criminal activity);

WHEREAS, evolving federal case law has held 1) that criminalizing sitting, lying, or sleeping on public property could constitute an Eighth Amendment violation (prohibiting

imposing excessive fines or cruel and unusual punishments) if the prohibition was jurisdiction-wide and adequate shelter beds for all individuals experiencing homelessness did not exist in the jurisdiction (*Martin v. Boise*); and 2) that non-criminal violations for sitting, lying, sleeping, or keeping warm and dry could constitute Eighth Amendment violations under certain circumstances, regardless of whether or not criminal penalties attached (*Blake v. Grants Pass*). However, the Court in *Blake* also noted that municipalities may implement reasonable time, place and manner restrictions, stating:

> "[T]his holding in no way dictates to a local government that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the street at any time and at any place…The City may implement time and place restrictions for when homeless individuals may use their belongings to keep warm and dry and when they must have their belongings packed up [and] … the City may ban the use of tents in public parks without going so far as to ban people from using any bedding type materials to keep warm and dry while they sleep."

WHEREAS, to align the provisions of MMC 5.257 with federal case law and to address numerous other public health and safety concerns and other important public interests, City staff drafted proposed revisions to MMC 5.257 and presented the revisions to the City Council at a study session on February 11, 2021. Consistent with direction from City Council at the study session, City staff sought public input and feedback through various channels, including direct contacts with several local advocates and activists, presentation to the City's Housing Advisory Commission and the City's Community Development and Services Commission, and presentation at a meeting of the Homeless Task Force. Substantial feedback has been received, both in favor of the proposal and in opposition to it, and both from individuals within and outside of the City of Medford; and

WHEREAS, the City Council finds and declares as follows:

(a) From time to time persons establish campsites on properties that are publicly-owned or publicly-controlled, such as sidewalks, parks, public rights-of-way, under bridges, along various Greenways in the City and similar areas;

(b) These persons, by their actions create unsafe and unsanitary living conditions which pose a threat to the peace, health, and safety of themselves and the community; and cause inestimable environmental and ecological damage to areas along the City Greenways;

(c) During high and extreme fire conditions, the Greenways and Prescott Park pose a unique fire danger due to dry brush and abundant fuel sources;

(d) Enforcing existing arson laws and burning prohibitions on an incident-by-incident basis alone on the Greenways and in Prescott Park during high and extreme fire conditions does not provide sufficient protection to public peace, health, and safety under such conditions, because of increased fire ignition potential and the rapid rate at which fire spreads under such circumstances;

(e) It is difficult for emergency personnel to evacuate individuals camping on the Greenways or Prescott Park during a fire event;

(f) Wildfires on the Greenways and in Prescott Park pose a severe threat to persons and property, including residents and property owners near those areas and persons experiencing homelessness within those areas;

(g) Camping, lying, or sleeping on a playground or sports field fundamentally undermines the public's ability to use that public property for its intended purpose; and

(h) Camping, lying, or sleeping on or near railroad tracks, or in a manner that obstructs sidewalks prevents the public's ability to use that public property for its intended purpose and can in some situations result in imminent threats to life; now, therefore,

THE CITY OF MEDFORD ORDAINS AS FOLLOWS:

Section 1. Sections 5.257 and 5.990(4) of the Medford Municipal Code are hereby amended to read as set forth in Exhibit A, attached hereto and incorporated herein by reference [language in **bold font** is new; language in ~~strikethrough~~ font is existing law to be repealed; and three asterisks (* * *) indicate existing law which remains unchanged by this ordinance but was omitted for the sake of brevity].

PASSED by the Council and signed by me in authentication of its passage this 2nd day of April, 2021.

ATTEST: _____
Acting City Recorder

_____
Mayor

APPROVED: April 2nd, 2021

_____
Mayor

# EXHIBIT A

[NOTE: language in **bold** font is new; language in ~~strikethrough~~ font is existing law to be repealed; and three asterisks (* * *) indicate existing law which remains unchanged by this ordinance but was omitted for the sake of brevity.]

5.257 Prohibited Camping**, Lying, and Sleeping**

(1) As used in this section:

(a) "To camp" means to set up or to remain in or at a campsite.

(b) "Campsite" means any place ~~where any bedding, sleeping bag, or other material used for bedding purposes, or~~ **where** any stove or fire is placed, established or maintained for the purpose of maintaining a temporary place to live, ~~whether or not such place incorporates~~**or where** the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof **is placed, established or maintained for the purpose of maintaining a temporary place to live**.

**(c) "Bedding materials" means a sleeping bag, bedroll, or other material used for bedding purposes, including materials used to keep warm and dry while sleeping.**

**(d) "The Greenways" refers to the Bear Creek Greenway, the Larson Creek Greenway, the Lazy Creek Greenway, and the Navigator's Landing Greenway.**

**(e) "Vehicle camping in a lawful parking space" refers to a person experiencing homelessness parking utilizing a motor vehicle in a lawful parking space as a temporary place to live. The vehicle must be operational and must be moved at least every 24 hours. To fall within this definition, the parking space at issue cannot be adjacent to residences.**

(2) It is found and declared that:

(a) From time to time persons establish campsites on sidewalks, public rights-of-way, under bridges, and so forth;

(b) Such persons, by such actions create unsafe and unsanitary living conditions which pose a threat to the peace, health, and safety of themselves and the community; ~~and,~~

**(c) During high and extreme fire conditions, the Greenways and Prescott Park pose a unique fire danger due to dry brush and abundant fuel sources;**

**(d) Enforcing existing arson laws and burning prohibitions on an incident-by-incident basis alone on the Greenways and Prescott Park during high and extreme fire conditions does not provide sufficient protection to public peace, health, and safety under such conditions, because of increased fire ignition potential and the rapid rate at which fire spreads under such circumstances;**

**(e) It is difficult for emergency personnel to evacuate individuals camping on the Greenways or Prescott Park during a fire event;**

**(f) Wildfires on the Greenways and Prescott Park pose a severe threat to persons and property, including residents and property owners near those areas and persons experiencing homelessness within those areas;**

**(g) Camping, lying, or sleeping on a playground or sports field fundamentally undermines the public's ability to use that public property for its intended purpose;**

**(h) Camping, lying, or sleeping on or near railroad tracks, or in a manner that obstructs sidewalks prevents the public's ability to use that public property for its intended purpose and can in some situations result in imminent threats to life;**

**(i) This section's regulations are meant strictly to regulate the use of publicly-owned property, and are not intended to regulate activities on private property; and**

(e**j**) The enactment of this provision is necessary to protect the peace, health, and safety of the city and its inhabitants.

**(3) No person shall place or utilize bedding materials upon any sidewalk, street, alley, lane, public right-of-way, park, greenway, or any other publicly-owned property or under any bridge or viaduct for more than 24 hours consecutively in a particular location, unless otherwise specifically authorized by this code, or by declaration of the Mayor in emergency circumstances, or by executive order of the City Manager pursuant to such declaration, or by declaration of the City Manager in the case of a severe event.**

(~~3~~4)**(a) Except as set forth in subsection (b),** ~~No~~ **no** person shall camp in or upon any sidewalk, street, alley, lane, public right-of-way, park, **greenway,** or any other publicly-owned property or under any bridge or viaduct~~;~~**.**

**(b) The prohibition in subsection (a) does not apply to tent camping or vehicle camping in the following circumstances:**
**(i)** ~~unless~~ **if** otherwise specifically authorized by **any provision of the Medford Municipal Code;**~~this code or~~
**(ii)** by declaration of the Mayor in emergency circumstances**, if so authorized by the declaration;**
**(iii) by executive order of the City Manager pursuant to such declaration, if so authorized by the executive order;**
**(iv) by declaration of the City Manager in the case of a severe event, if so authorized by the declaration; or**
**(v) if the City publishes on its website a written policy authorizing tent camping or vehicle camping on specific publicly-owned properties, then tent camping or vehicle camping on such properties is lawful and permissible consistent with the time, place, and manner constraints contained within any such written-and-published City policy.**

**(5) No person shall camp, lie, sleep, or use bedding materials in any of the following circumstances, unless otherwise specifically authorized by this code, by declaration of the Mayor in emergency circumstances, by executive order of the City Manager pursuant to such emergency declaration, or by executive order of the City Manager pursuant to such declaration, or by declaration of the City Manager in the case of a severe event:**

**(a) On the Greenways or Prescott Park, during the period May 1 to September 30 in any calendar year, or at any other time if the Fire Chief or the Fire Chief's designee determines that a fire hazard exists;**

**(b) On a playground or sports field during hours of closure. Notwithstanding Section 5.255, lying or sleeping in a City-owned park during hours of closure is not prohibited so long as the individual is experiencing homelessness, is not on a playground or sports field, is not on a "school park" associated with a school, and is not violating any other subsection of this section;**

**(c) On areas underneath roadways or bridges that are not open to the public;**

**(d) On railroad tracks or within fifteen feet of railroad tracks;**

**(e) On publicly-owned property not open to the public, including but not limited to the Public Works Service Center and park areas temporarily closed for construction, repairs, maintenance, cleaning and similar activities;**

**(f) On streets, including planter strips, medians and parking spaces;**

**(g) On sidewalks, if by doing so, the person obstructs pedestrian traffic along the sidewalk or into private property and businesses adjacent to the sidewalk. For purposes of this provision, an individual obstructs pedestrian traffic if that individual, by camping, lying, sleeping, or using bedding materials, reduces the path of travel to less than 36 inches.**

(~~4~~**6**) Prior to removing homeless individuals from an established camping site, law enforcement officials shall post a notice, written in English and Spanish, 24 hours in advance.

(a) At the time the notice is posted, law enforcement officials shall inform local agencies that deliver social services to homeless individuals that the notice has been posted. Any local agency, providing service within the City limits of Medford, desiring to be on this notification list must provide its name, address, telephone number, and name of contact person to the Medford Police Department, in writing, requesting notification.

(b) The local agencies may arrange for outreach workers to visit the camping site where a notice has been posted to assess the need for social service assistance in arranging shelter and other assistance.

(~~5~~7) All unclaimed personal property shall be given to law enforcement officials whether 24-hour notice is required or not. The property shall be stored for 30 days during which it will be reasonably available to any individual claiming ownership. Any personal property that remains unclaimed for 30 days may be disposed of. For purposes of this paragraph, "personal property" means any item that is reasonably recognizable as belonging to a person and that has apparent utility. Items that have no apparent utility or are in an unsanitary condition may be immediately discarded upon removal of the homeless individuals from the camping site. Weapons, drug paraphernalia, and items that appear to be either stolen or evidence of a crime shall be given to law enforcement officials.

(~~6~~8) The 24-hour notice required under subsection (~~4~~6) of this section shall not apply:

(a) When there are grounds for law enforcement officials to believe that illegal activities other than camping are occurring~~.~~

(b) In the event of an exceptional emergency such as possible site contamination by hazardous materials or when there is immediate danger to human life or safety; **or**~~.~~

**(c) When the campsite is located in the areas specified in subsection 5(a) above, and the notice is placed during the time frame described in subsection 5(a) above, or when in the discretion of the Fire Chief or the Fire Chief's designee, the Greenways or Prescott Park should be immediately closed for fire danger as described in subsection 5(a) above or per Administrative Regulation 907.**

(~~7~~9) A person authorized to issue a citation for unlawful camping may not issue the citation if the citation would be issued within 200 feet of the notice described in this section and within two hours before or after the notice was posted.

(~~8~~10) Violation of ~~this section~~ **subsection (3)** constitutes a violation. **Violation of subsection (4) consisting of vehicle camping in a lawful parking space constitutes a violation.** Every day in which ~~prohibited camping as defined in this section~~ **such violations** occurs constitutes a separate violation. **A violation of subsection (4) or subsection (5) constitutes a crime, except for vehicle camping in a lawful parking space.**

[Added Sec. 1, Ord. No. 6226, Nov. 3, 1988; Amd. Sec. 3, Ord. No. 2000-46, March 16, 2000; Amd. Sec. 1, Ord. No. 2018-115, Sept. 20, 2018.]

5.990 Penalties.

* * *

(4) A violation of sections 5.185, 5.247, 5.250, **5.257(4) (except vehicle camping in a lawful parking space), 5.257(5),** 5.292, 5.296(4)(a) and 5.603(1)(c) is a crime and is punishable by a fine not exceeding $500 and imprisonment not exceeding 30 days.

* * *

## HB 3115 STAFF MEASURE SUMMARY

**Carrier:** Rep. Power

**House Committee On Judiciary**

| | |
|---|---|
| **Action Date:** | 03/25/21 |
| **Action:** | Do Pass. |
| **Vote:** | 6-3-1-0 |
| **Yeas:** | 6 - Bynum, Dexter, Helm, Kropf, Power, Wilde |
| **Nays:** | 3 - Lewis, Morgan, Wallan |
| **Exc:** | 1 - Noble |
| **Fiscal:** | Has minimal fiscal impact |
| **Revenue:** | No revenue impact |
| **Prepared By:** | Amie Fender-Sosa, Counsel |
| **Meeting Dates:** | 3/9, 3/23, 3/25 |

**WHAT THE MEASURE DOES:**

Requires that by July 1, 2023, local laws regulating the acts of sitting, lying, sleeping, or keeping warm and dry in outdoor public spaces be objectively reasonable as to time, place, and manner with regards to persons experiencing homelessness**.** Creates affirmative defense that law is not objectively reasonable for persons charged with violating local law. Allows persons experiencing homelessness to file suit for relief to challenge the objective reasonableness of local laws. Does not create a right of action for monetary damages. Authorizes the court, under certain circumstances, to award attorney fees to prevailing plaintiff. Declares emergency, effective on passage.

**ISSUES DISCUSSED:**

- State law not included in measure
- Definition of public property
- Use of state property for housing needs

**EFFECT OF AMENDMENT:**

No amendment.

**BACKGROUND:**

In 2019, the Circuit Court of Appeals in *Martin v. Boise* (920 F. 3d 584) held that the government cannot criminalize certain conduct, such as lying, sitting, or sleeping on the streets, that is unavoidable as a result of homelessness. The Court further concluded that to punish such conduct would be comparable to punishing a person's homeless status and to do so would be unconstitutional under the 8th Amendment of the U.S. Constitution, which prohibits imposing excessive fines, bail, or cruel and unusual punishments.

Some localities in Oregon have regulations for managing use of public spaces. House Bill 3115 would require local laws on outdoor public spaces be objectively reasonable with regards to persons experiencing homelessness**.**

# House Bill 3115

Sponsored by Representative KOTEK


## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Provides that local law regulating sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to public must be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness. Creates affirmative defense to charge of violating such local law that law is not objectively reasonable. Creates cause of action for person experiencing homelessness to challenge objective reasonableness of such local law. Authorizes court to award attorney fees to prevailing plaintiff in such suit in certain circumstances.

Declares emergency, effective on passage.


## A BILL FOR AN ACT

Relating to the regulation of public property with respect to persons experiencing homelessness; and declaring an emergency.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1. (1) As used in this section:**

**(a) "City or county law" does not include policies developed pursuant to ORS 203.077 or 203.079.**

**(b)(A) "Keeping warm and dry" means using measures necessary for an individual to survive outdoors given the environmental conditions.**

**(B) "Keeping warm and dry" does not include using any measure that involves fire or flame.**

**(c) "Public property" has the meaning given that term in ORS 131.705.**

**(2) Any city or county law that regulates the acts of sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to the public must be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness.**

**(3) It is an affirmative defense to a charge of violating a city or county law described in subsection (2) of this section that the law is not objectively reasonable.**

**(4) A person experiencing homelessness may bring suit for injunctive or declaratory relief to challenge the objective reasonableness of a city or county law described in subsection (2) of this section. The action must be brought in the circuit court of the county that enacted the law or of the county in which the city that enacted the law is located.**

**(5) For purposes of subsections (2) and (3) of this section, reasonableness shall be determined based on the totality of the circumstances, including, but not limited to, the impact of the law on persons experiencing homelessness.**

**(6) In any suit brought pursuant to subsection (4) of this section, the court, in its discretion, may award reasonable attorney fees to a prevailing plaintiff if the plaintiff:**

**(a) Was not seeking to vindicate an interest unique to the plaintiff; and**

**(b) At least 90 days before the action was filed, provided written notice to the governing**

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

**body of the city or county that enacted the law being challenged of an intent to bring the action and the notice provided the governing body with actual notice of the basis upon which the plaintiff intends to challenge the law.**

**(7) Nothing in this section creates a private right of action for monetary damages for any person.**

**SECTION 2. Section 1 of this 2021 Act becomes operative on July 1, 2023.**

**SECTION 3. This 2021 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2021 Act takes effect on its passage.**